Subtitle B—Regulations of the Offices of the Department of Education

CHAPTER I—OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

PART 100—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF EDUCATION EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d–1, unless otherwise noted.

SOURCE: 45 FR 30918, May 9, 1980, unless otherwise noted.

§ 100.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the ''Act'') to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education.

(Authority: Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

§ 100.2 Application of this regulation.

This regulation applies to any program to which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal financial assistance listed in appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary, or (d) any employment practice, or any employer, employment agency, or labor organization, except to the extent described in § 100.3. The fact that a type of Federal assistance is not listed in appendix A shall not mean, if title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Authority: Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d–1, 2000d–3)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of

such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(A) Projects under the Public Works Acceleration Act, Pub. L. 87–658, 42 U.S.C. 2641–2643.

(B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371–1374.

(C) Programs assisted under laws listed in appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32–34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian health and Cuban refugee services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

(Authority: Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d–1, 2000d–3)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, except an application to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other

participants. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing Federal financial assistance.* Every application by a State or a State agency for continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in part 2 of appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans

or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1. Sec. 182; 80 Stat. 1209; 42 U.S.C. 2000d–5)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.5 Illustrative application.

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In federally-affected area assistance (Pub. L. 815 and Pub. L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(b) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university.

(c) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(d) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students.

(e) Upon transfers of real or personal surplus property for educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(f) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(g) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which

have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(h) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under §100.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in paragraph (i) of §100.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68053, Nov. 13, 2000]

§ 100.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Approved by the Office of Management and Budget under control number 1870–0500)

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 53 FR 49143, Dec. 6, 1988; 65 FR 68053, Nov. 13, 2000]

§ 100.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 100.8.

(2) If an investigation does not warrant action pursuant to paragraph (1) of this paragraph (d) the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1)

§ 100.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking,

and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with §100.4.* If an applicant fails or refuses to furnish an assurance required under §100.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d–1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d–5)

§100.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by §100.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and §100.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, DC, at a time fixed by the responsible Department official unless he determines that

the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5–8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more Federal assistance statutes to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 100.10.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 100.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions

the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to §100.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with §100.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of §100.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered

pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

§ 100.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Authority: Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d–2)

§ 100.12 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or

(2) Requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 34 CFR part 280.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this regulation (other than responsibility for review as provided in § 100.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this section shall have the same effect as though such action had been taken by the responsible official of this Department.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

§ 100.13 Definitions.

As used in this part:

(a) The term *Department* means the Department of Education.

(b) The term *Secretary* means the Secretary of Education.

(c) The term *responsible Department official* means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term *reviewing authority* means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 100.10(a)–(d).

(e) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term ''State'' means any one of the foregoing.

(f) The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term *program or activity* and the term *program* mean all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (g)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 42 U.S.C. 2000d–4)

(h) The term *facility* includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary.

(j) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient.

(k) The term *applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term *application* means such an application, request, or plan.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d–1)

[45 FR 30918, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

APPENDIX A TO PART 100—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

Part 1—Assistance Other Than Continuing Assistance to States

1. Loans for acquisition of equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).

2. Construction of facilities for institutions of higher education (20 U.S.C. 701–758).

3. School Construction in federally-affected and in major disaster areas (20 U.S.C. 631–647).

4. Construction of educational broadcast facilities (47 U.S.C. 390–399).

5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).

6. Demonstration residential vocational education schools (20 U.S.C. 1321).

7. Research and related activities in education of handicapped children (20 U.S.C. 1441).

8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperation Research Act (20 U.S.C. 331–332(b)).

9. Research in teaching modern foreign languages (20 U.S.C. 512).

10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a–2610c).

11. Research and training projects in Vocational Education (20 U.S.C. 1281(a), 1282–1284).

12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461–465).

13. Grants for training in librarianship (20 U.S.C. 1031–1033).

14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).

15. Allowances for institutions training teachers and related educational personnel in elementary and secondary education, or post-secondary vocational education (20 U.S.C. 1111–1118).

16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101–1107a).

17. Operation and maintenance of schools in Federally-affected and in major disaster areas (20 U.S.C. 236–241; 241–1; 242–244).

18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special educational problems occasioned by desegregation (42 U.S.C. 2000c–3).

19. Grants for in-service training of teachers and other schools personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c–4).

20. Higher education students loan program (Title II, National Defense Education Act, 20 U.S.C. 421–429).

21. Educational Opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (Title IV, Higher Education Act of 1965, 20 U.S.C. 1061–1087).

22. Grants and contracts for the conduct of Talent Search, Upward Bound, and Special Services Programs (20 U.S.C. 1068).

23. Land-grant college aid (7 U.S.C. 301–308; 321–326; 328–331).

24. Language and area centers (Title VI, National Defense Education Act, 20 U.S.C. 511).

25. American Printing House for the Blind (20 U.S.C. 101–105).

26. Future Farmers of America (36 U.S.C. 271–391) and similar programs.

27. Science clubs (Pub. L. 85–875, 20 U.S.C. 2, note).

28. Howard University (20 U.S.C. 121–129).

29. Gallaudet College (31 D.C. Code, Chapter 10).

30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 D.C. Code 1051–1053; 80 Stat. 1027–1028).

31. Faculty development programs, workshops and institutes (20 U.S.C. 1131–1132).

32. National Technical Institute for the Deaf (20 U.S.C. 681–685).

33. Institutes and other programs for training educational personnel (parts D, E, and F, Title V, Higher Education Act of 1965) (20 U.S.C. 1119–1119c–4).

34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).

35. Acquisition of college library resources (20 U.S.C. 1021–1028).

36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051–1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751–2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121–1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171–1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Secretary to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (20 U.S.C. 841–844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1434).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b–880b–6).

49. Grants to agencies and organizations for Cuban refugees (22 U.S.C. 2601(b)(4)).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment, including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental preschool and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private non-profit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809 (a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a–1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133–1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134–1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135–1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136–1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Surplus real and related personal property disposal for educational purposes (40 U.S.C. 484(k)).

Part 2—Continuing Assistance to States

1. Grants to States for public library service and construction, interlibrary cooperation and specialized State library services for certain State institutions and the physically handicapped (20 U.S.C. 351–355).

2. Grants to States for strengthening instruction in academic subjects (20 U.S.C. 441–444).

3. Grants to States for vocational education (20 U.S.C. 1241–1264).

4. Arrangements with State education agencies for training under the Manpower Development and Training Act (42 U.S.C. 2601–2602, 2610a).

5. Grants to States to assist in the elementary and secondary education of children of low-income families (20 U.S.C. 241a–242m).

6. Grants to States to provide for school library resources, textbooks and other instructional materials for pupils and teachers in elementary and secondary schools (20 U.S.C. 821–827).

7. Grants to States to strengthen State departments of education (20 U.S.C. 861–870).

8. Grants to States for community service programs (20 U.S.C. 1001–1011).

9. Grants to States for adult basic education and related research, teacher training and special projects (20 U.S.C. 1201–1211).

10. Grants to States educational agencies for supplementary educational centers and services, and guidance, counseling and testing (20 U.S.C. 841–847).

11. Grants to States for research and training in vocational education (20 U.S.C. 1281(b)).

12. Grants to States for exemplary programs and projects in vocational education (20 U.S.C. 1301–1305).

13. Grants to States for residential vocational education schools (20 U.S.C. 1321).

14. Grants to States for consumer and homemaking education (20 U.S.C. 1341).

15. Grants to States for cooperative vocational educational program (20 U.S.C. 1351–1355).

16. Grants to States for vocational work-study programs (20 U.S.C. 1371–1374).

17. Grants to States to attract and qualify teachers to meet critical teaching shortages (20 U.S.C. 1108–1110c).

18. Grants to States for education of handicapped children (20 U.S.C. 1411–1414).

19. Grants for administration of State plans and for comprehensive planning to determine construction needs of institutions of higher education (20 U.S.C. 715(b)).

[45 FR 30918, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

APPENDIX B TO PART 100—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

I. SCOPE AND COVERAGE

A. APPLICATION OF GUIDELINES

These Guidelines apply to recipients of any Federal financial assistance from the Department of Education that offer or administer programs of vocational education or training. This includes State agency recipients.

B. DEFINITION OF RECIPIENT

The definition of *recipient* of Federal financial assistance is established by Department regulations implementing Title VI, Title IX, and Section 504 (34 CFR 100.13(i), 106.2(h), 104.3(f).

For the purposes of Title VI:

The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such terms does not include any ultimate beneficiary [e.g., students] under any such program. (34 CFR 100.13(i)).

For the purposes of Title IX:

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended, directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof. (34 CFR 106.2(h)).

For the purposes of Section 504:

Recipient means any State or its political subdivision any instrumentality of a State or its political subdivision, any public or private agency, institution, or organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. (34 CFR 104.3(f)).

C. EXAMPLES OF RECIPIENTS COVERED BY THESE GUIDELINES

The following education agencies, when they provide vocational education, are examples of recipients covered by these Guidelines:

1. The board of education of a public school district and its administrative agency.

2. The administrative board of a specialized vocational high school serving students from more than one school district.

3. The administrative board of a technical or vocational school that is used exclusively or principally for the provision of vocational education to persons who have completed or left high school (including persons seeking a certificate or an associate degree through a vocational program offered by the school) and who are available for study in preparation for entering the labor market.

4. The administrative board of a postsecondary institution, such as a technical institute, skill center, junior college, community college, or four year college that has a department or division that provides vocational education to students seeking immediate employment, a certificate or an associate degree.

5. The administrative board of a proprietary (private) vocational education school.

6. A State agency recipient itself operating a vocational education facility.

D. EXAMPLES OF SCHOOLS TO WHICH THESE GUIDELINES APPLY

The following are examples of the types of schools to which these Guidelines apply.

1. A junior high school, middle school, or those grades of a comprehensive high school that offers instruction to inform, orient, or prepare students for vocational education at the secondary level.

2. A vocational education facility operated by a State agency.

3. A comprehensive high school that has a department exclusively or principally used for providing vocational education; or that offers at least one vocational program to secondary level students who are available for study in preparation for entering the labor market; or that offers adult vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market.

4. A comprehensive high school, offering the activities described above, that receives students on a contract basis from other school districts for the purpose of providing vocational education.

5. A specialized high school used exclusively or principally for the provision of vocational education, that enrolls students form one or more school districts for the purpose of providing vocational education.

6. A technical or vocational school that primarily provides vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, including students seeking an associate degree or certificate through a course of vocational instruction offered by the school.

7. A junior college, a community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, an associate degree or a certificate through a course of vocational instruction offered by the school.

8. A proprietary school, licensed by the State that offers vocational education.

NOTE: Subsequent sections of these Guidelines may use the term *secondary vocational education center* in referring to the institutions described in paragraphs 3, 4 and 5 above or the term *postsecondary vocational education center* in referring to institutions described in paragraphs 6 and 7 above or the term *vocational education center* in referring to any or all institutions described above.

II. Responsibilities Assigned Only to State Agency Recipients

A. Responsibilities of All State Agency Recipients

State agency recipients, in addition to complying with all other provisions of the Guidelines relevant to them, may not require, approve of, or engage in any discrimination or denial of services on the basis of race, color, national origin, sex, or handicap in performing any of the following activities:

1. Establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State;

2. Establishment of requirements for admission to or requirements for the administration of vocational education programs;

3. Approval of action by local entities providing vocational education. (For example, a State agency must ensure compliance with Section IV of these Guidelines if and when it reviews a vocational education agency decision to create or change a geographic service area.);

4. Conducting its own programs. (For example, in employing its staff it may not discriminate on the basis of sex or handicap.)

B. State Agencies Performing Oversight Responsibilities

The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (A ''subrecipient,'' in this context, is a local agency or vocational education center that receives financial assistance through a State agency.) This compliance program must include:

1. Collecting and analyzing civil rights related data and information that subrecipients compile for their own purposes or that are submitted to State and Federal officials under existing authorities;

2. Conducting periodic compliance reviews of selected subrecipients (i.e., an investigation of a subrecipient to determine whether it engages in unlawful discrimination in any aspect of its program); upon finding unlawful discrimination, notifying the subrecipient of steps it must take to attain compliance and attempting to obtain voluntary compliance;

3. Providing technical assistance upon request to subrecipients. This will include assisting subrecipients to identify unlawful discrimination and instructing them in remedies for and prevention of such discrimination;

4. Periodically reporting its activities and findings under the foregoing paragraphs, including findings of unlawful discrimination under paragraph 2, immediately above, to the Office for Civil Rights.

State agencies are not required to terminate or defer assistance to any subrecipient. Nor are they required to conduct hearings. The responsibilities of the Office for Civil Rights to collect and analyze data, to conduct compliance reviews, to investigate complaints and to provide technical assistance are not diminished or attenuated by the requirements of Section II of the Guidelines.

C. Statement of Procedures and Practices

Within one year from the publication of these Guidelines in final form, each State agency recipient performing oversight responsibilities must submit to the Office for Civil Rights the methods of administration and related procedures it will follow to comply with the requirements described in paragraphs A and B immediately above. The Department will review each submission and will promptly either approve it, or return it to State officials for revision.

III. Distribution of Federal Financial Assistance and Other Funds for Vocational Education

A. Agency Responsibilities

Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

B. Distribution of Funds

Recipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap. However, a recipient may adopt a formula or other method of allocation that uses as a factor race, color, national origin, sex, or handicap [or an index or proxy for race, color, national origin, sex, or handicap e.g., number of persons receiving Aid to Families with Dependent Children or with limited English speaking ability] if the factor is included to compensate for past discrimination or to comply with those provisions of the Vocational Education Amendments of 1976 designed to assist specified protected groups.

C. Example of a Pattern Suggesting Unlawful Discrimination

In each State it is likely that some local recipients will enroll greater proportions of minority students in vocational education than the State-wide proportion of minority students in vocational education. A funding formula or other method of allocation that results in such local recipients receiving per-pupil allocations of Federal or State vocational education funds lower than the State-wide average per-pupil allocation will be presumed unlawfully discriminatory.

D. Distribution Through Competitive Grants or Contracts

Each State agency that establishes criteria for awarding competitive vocational education grants or contracts must establish and apply the criteria without regard to the race, color, national origin, sex, or handicap of any or all of a recipient's students, except to compensate for past discrimination.

E. Application Processes for Competitive or Discretionary Grants

State agencies must disseminate information needed to satisfy the requirements of any application process for competitive or discretionary grants so that all recipients, including those having a high percentage of minority or handicapped students, are informed of and able to seek funds. State agencies that provide technical assistance for the completion of the application process must provide such assistance without discrimination against any one recipient or class of recipients.

F. Alteration of Fund Distribution to Provide Equal Opportunity

If the Office for Civil Rights finds that a recipient's system for distributing vocational education funds unlawfully discriminates on the basis of race, color, national origin, sex, or handicap, it will require the recipient to adopt an alternative nondiscriminatory method of distribution. The Office for Civil Rights may also require the recipient to compensate for the effects of its past unlawful discrimination in the distribution of funds.

IV. Access and Admission of Students to Vocational Education Programs

A. Recipient Responsibilities

Criteria controlling student eligibility for admission to vocational education schools, facilities and programs may not unlawfully discriminate on the basis of race, color, national origin, sex, or handicap. A recipient may not develop, impose, maintain, approve, or implement such discriminatory admissions criteria.

B. Site Selection for Vocational Schools

State and local recipients may not select or approve a site for a vocational education facility for the purpose or with the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin. Recipients must locate vocational education facilities at sites that are readily accessible to both nonminority and minority communities, and that do not tend to identify the facility or program as intended for nonminority or minority students.

C. Eligibility for Admission to Vocational Education Centers Based on Residence

Recipients may not establish, approve or maintain geographic boundaries for a vocational education center service area or attendance zone, (hereinafter ''service area''), that unlawfully exclude students on the basis of race, color, or national origin. The Office for Civil Rights will presume, subject to rebuttal, that any one or combination of the following circumstances indicates that the boundaries of a given service area are unlawfully constituted:

1. A school system or service area contiguous to the given service area, contains minority or nonminority students in substantially greater proportion than the given service area;

2. A substantial number of minority students who reside outside the given vocational education center service area, and who are not eligible for the center reside, nonetheless, as close to the center as a substantial number of non-minority students who are eligible for the center;

3. The over-all vocational education program of the given service area in comparison to the over-all vocational education program of a contiguous school system or service area enrolling a substantially greater proportion of minority students:

(a) Provides its students with a broader range of curricular offerings, facilities and equipment; or (b) provides its graduates greater opportunity for employment in jobs:

(i) For which there is a demonstrated need in the community or region; (ii) that pay higher entry level salaries or wages; or (iii) that are generally acknowledged to offer greater prestige or status.

D. ADDITIONS AND RENOVATIONS TO EXISTING VOCATIONAL EDUCATION FACILITIES

A recipient may not add to, modify, or renovate the physical plant of a vocational education facility in a manner that creates, maintains, or increases student segregation on the basis of race, color, national origin, sex, or handicap.

E. REMEDIES FOR VIOLATIONS OF SITE SELECTION AND GEOGRAPHIC SERVICE AREA REQUIREMENTS

If the conditions specified in paragraphs IV, A, B, C, or D, immediately above, are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the discrimination. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) Redrawing of the boundaries of the vocational education center's service area to include areas unlawfully excluded and/or to exclude areas unlawfully included; (2) provision of transportation to students residing in areas unlawfully excluded; (3) provision of additional programs and services to students who would have been eligible for attendance at the vocational education center but for the discriminatory service area or site selection; (4) reassignment of students; and (5) construction of new facilities or expansion of existing facilities.

F. ELIGIBILITY FOR ADMISSION TO SECONDARY VOCATIONAL EDUCATION CENTERS BASED ON NUMERICAL LIMITS IMPOSED ON SENDING SCHOOLS

A recipient may not adopt or maintain a system for admission to a secondary vocational education center or program that limits admission to a fixed number of students from each sending school included in the center's service area if such a system disproportionately excludes students from the center on the basis of race, sex, national origin or handicap. (Example: Assume 25 percent of a school district's high school students are black and that most of those black students are enrolled in one high school; the white students, 75 percent of the district's total enrollment, are generally enrolled in the five remaining high schools. This paragraph prohibits a system of admission to the secondary vocational education center that limits eligibility to a fixed and equal number of students from each of the district's six high schools.)

G. REMEDIES FOR VIOLATION OF ELIGIBILITY BASED ON NUMERICAL LIMITS REQUIREMENTS

If the Office for Civil Rights finds a violation of paragraph F, above, the recipient must implement an alternative system of admissions that does not disproportionately exclude students on the basis of race, color, national origin, sex, or handicap.

H. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS, BRANCHES OR ANNEXES BASED UPON STUDENT OPTION

A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if:

(1) It was established by a recipient for members of one race, national origin or sex; or (2) it has since its construction been attended primarily by members of one race, national origin or sex; or (3) most of its program offerings have traditionally been selected predominantly by members of one race, national origin or sex.

I. REMEDIES FOR FACILITY SEGREGATION UNDER STUDENT OPTION PLANS

If the conditions specified in paragraph IV-H are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the segregation. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) Elimination of program duplication in the segregated facility and other proximate vocational facilities; (2) relocation or ''clustering'' of programs or courses; (3) adding programs and courses that traditionally have been identified as intended for members of a particular race, national origin or sex to schools that have traditionally served members of the other sex or traditionally served persons of a different race or national origin; (4) merger of programs into one facility through school closings or new construction;

(5) intensive outreach recruitment and counseling; (6) providing free transportation to students whose enrollment would promote desegregation.

J. [RESERVED]

K. ELIGIBILITY BASED ON EVALUATION OF EACH APPLICANT UNDER ADMISSIONS CRITERIA

Recipients may not judge candidates for admission to vocational education programs on the basis of criteria that have the effect of disproportionately excluding persons of a particular race, color, national origin, sex, or handicap. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admissions criteria that must meet this test are past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diplomas and standardized tests, such as the Test of Adult Basic Education (TABE).

An introductory, preliminary, or exploratory course may not be established as a prerequisite for admission to a program unless the course has been and is available without regard to race, color, national origin, sex, and handicap. However, a course that was formerly only available on a discriminatory basis may be made a prerequisite for admission to a program if the recipient can demonstrate that:

(a) The course is essential to participation in the program; *and* (b) the course is presently available to those seeking enrollment for the first time and to those formerly excluded.

L. ELIGIBILITY OF NATIONAL ORIGIN MINORITY PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

Recipients may not restrict an applicant's admission to vocational education programs because the applicant, as a member of a national origin minority with limited English language skills, cannot participate in and benefit from vocational instruction to the same extent as a student whose primary language is English. It is the responsibility of the recipient to identify such applicants and assess their ability to participate in vocational instruction.

Acceptable methods of identification include: (1) Identification by administrative staff, teachers, or parents of secondary level students; (2) identification by the student in postsecondary or adult programs; and (3) appropriate diagnostic procedures, if necessary.

Recipients must take steps to open all vocational programs to these national origin minority students. A recipient must demonstrate that a concentration of students with limited English language skills in one or a few programs is not the result of discriminatory limitations upon the opportunities available to such students.

M. REMEDIAL ACTION IN BEHALF OF PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

If the Office for Civil Rights finds that a recipient has denied national origin minority persons admission to a vocational school or program because of their limited English language skills or has assigned students to vocational programs solely on the basis of their limited English language skills, the recipient will be required to submit a remedial plan that insures national origin minority students equal access to vocational education programs.

N. EQUAL ACCESS FOR HANDICAPPED STUDENTS

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must:

(1) Modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more limited for handicapped persons than for non-handicapped persons.

O. PUBLIC NOTIFICATION

Prior to the beginning of each school year, recipients must advise students, parents, employees and the general public that all vocational opportunities will be offered without regard to race, color, national origin, sex, or handicap. Announcement of this policy of

non-discrimination may be made, for example, in local newspapers, recipient publications and/or other media that reach the general public, program beneficiaries, minorities (including national origin minorities with limited English language skills), women, and handicapped persons. A brief summary of program offerings and admission criteria should be included in the announcement; also the name, address and telephone number of the person designated to coordinate Title IX and Section 504 compliance activity.

If a recipient's service area contains a community of national origin minority persons with limited English language skills, public notification materials must be disseminated to that community in its language and must state that recipients will take steps to assure that the lack of English language skills will not be a barrier to admission and participation in vocational education programs.

V. Counseling and Prevocational Programs

A. Recipient Responsibilities

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. Counseling and Prospects for Success

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. Student Recruitment Activities

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. Counseling of Students With Limited English-Speaking Ability or Hearing Impairments

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. Promotional Activities

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the extent possible they should portray males or females, minorities or handicapped persons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. Equal Opportunity in the Vocational Education Instructional Setting

A. Accommodations For Handicapped Students

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 34 CFR, part 104, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin minority persons with limited English language skills, such information must be disseminated to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDARY VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opportunities without discrimination based on race, color, national origin, sex, or handicap. This obligation extends to recipients that provide on-campus housing and/or that have agreements with providers of off-campus housing. In particular, a recipient postsecondary vocational education program that provides on-campus or off-campus housing to its nonhandicapped students must provide, at the same cost and under the same conditions, comparable convenient and accessible housing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing rooms, showers, and other facilities for students of one sex that are comparable to those provided to students of the other sex. This may be accomplished by alternating use of the same facilities or by providing separate, comparable facilities.

Such facilities must be adapted or modified to the extent necessary to make the vocational education program readily accessible to handicapped persons.

VII. WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

A. RESPONSIBILITIES IN COOPERATIVE VOCATIONAL EDUCATION PROGRAMS, WORK-STUDY PROGRAMS, AND JOB PLACEMENT PROGRAMS

A recipient must insure that: (a) It does not discriminate against its students on the basis of race, color, national origin, sex, or handicap in making available opportunities in cooperative education, work study and job placement programs; and (b) students participating in cooperative education, work study and job placement programs are not discriminated against by employers or prospective employers on the basis of race, color, national origin, sex, or handicap in recruitment, hiring, placement, assignment to work tasks, hours of employment, levels of responsibility, and in pay.

If a recipient enters into a written agreement for the referral or assignment of students to an employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated without regard to race, color, national origin, sex, or handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. APPRENTICE TRAINING PROGRAMS

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor:

(1) That it does not engage in such discrimination against its membership or applicants for membership; and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. EMPLOYMENT OF FACULTY AND STAFF

A. EMPLOYMENT GENERALLY

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

B. RECRUITMENT

Recipients may not limit their recruitment for employees to schools, communities, or companies disproportionately composed of

persons of a particular race, color, national origin, sex, or handicap except for the purpose of overcoming the effects of past discrimination. Every source of faculty must be notified that the recipient does not discriminate in employment on the basis of race, color, national origin, sex, or handicap.

C. PATTERNS OF DISCRIMINATION

Whenever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin, or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.

D. SALARY POLICIES

Recipients must establish and maintain faculty salary scales and policy based upon the conditions and responsibilities of employment, without regard to race, color, national origin, sex or handicap.

E. EMPLOYMENT OPPORTUNITIES FOR HANDICAPPED APPLICANTS

Recipients must provide equal employment opportunities for teaching and administrative positions to handicapped applicants who can perform the essential functions of the position in question. Recipients must make reasonable accommodation for the physical or mental limitations of handicapped applicants who are otherwise qualified unless recipients can demonstrate that the accommodation would impose an undue hardship.

F. THE EFFECTS OF PAST DISCRIMINATION

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty. Such steps may include the recruitment or reassignment of qualified persons of a particular race, national origin, or sex, or who are handicapped.

G. STAFF OF STATE ADVISORY COUNCILS OF VOCATIONAL EDUCATION

State Advisory Councils of Vocational Education are recipients of Federal financial assistance and therefore must comply with Section VIII of the Guidelines.

H. EMPLOYMENT AT STATE OPERATED VOCATIONAL EDUCATION CENTERS THROUGH STATE CIVIL-SERVICE AUTHORITIES

Where recruitment and hiring of staff for State operated vocational education centers is conducted by a State civil service employment authority, the State education agency operating the program must insure that recruitment and hiring of staff for the vocational education center is conducted in accordance with the requirements of these Guidelines.

IX. PROPRIETARY VOCATIONAL EDUCATION SCHOOLS

A. RECIPIENT RESPONSIBILITIES

Proprietary vocational education schools that are recipients of Federal financial assistance through Federal student assistance programs or otherwise are subject to all of the requirements of the Department's regulations and these Guidelines.

B. ENFORCEMENT AUTHORITY

Enforcement of the provisions of Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973 is the responsibility of the Department of Education. However, authority to enforce Title VI of the Civil rights Act of 1964 for proprietary vocational education schools has been delegated to the Veterans Administration.

When the Office for Civil Rights receives a Title VI complaint alleging discrimination by a proprietary vocational education school it will forward the complaint to the Veterans Administration and cite the applicable requirements of the Department's regulations and these Guidelines. The complainant will be notified of such action.

[45 FR 30918, May 9, 1980; 45 FR 37426, June 3, 1980]

PART 101—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 100 OF THIS TITLE

Subpart A—General Information

Sec.

Subpart B—Appearance and Practice

Subpart C—Parties

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 30931, May 9, 1980, unless otherwise noted.

Subpart A—General Information

§ 101.1 Scope of rules.

The rules of procedure in this part supplement §§100.9 and 100.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Education, pursuant to Title VI of the Civil Rights Act of 1964 (section 602, 78 Stat. 252) and part 100 of this subtitle.

§ 101.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts, of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Department of Education, 400 Maryland Avenue SW., Washington, DC 20202.

§ 101.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 101.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 101.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 101.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 101.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 101.21 Parties.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent.

(b) The Assistant Secretary for Civil Rights of the Department of Education, shall be deemed a party to all proceedings.

§ 101.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 101.23 Complainants not parties.

A person submitting a complaint pursuant to § 100.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 101.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 101.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 101.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only on exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 101.107.

§ 101.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 101.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 101.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 101.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 101.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 101.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in part 100 of this chapter.

[45 FR 30931, May 9, 1980, as amended at 79 FR 76095, Dec. 19, 2014]

Subpart F—Proceedings Prior to Hearing

§ 101.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to §100.9 of this title.

§ 101.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 101.53 Amendment of notice or answer.

The Assistant Secretary for Civil Rights may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 101.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 101.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 101.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and

served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 101.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 101.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however*, That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held or written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 101.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly section 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 101.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 101.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551–559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 101.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 101.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of part 100 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 101.101. Thereafter the proceedings shall go to conclusion in accordance with subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 101.86.

§ 101.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 101.75 and 101.76, witnesses shall be available at the hearing for cross-examination.

§ 101.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 101.75 Affidavits.

An affidavit is; not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 101.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 101.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon

an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute and admission by him for any other purpose or be used against him in any other proceeding or action.

§ 101.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 101.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 101.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 101.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 101.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 101.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 101.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 101.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall

accompany the record as the offer of proof.

§ 101.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decisions, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 101.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 101.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 101.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 101.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 101.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 101.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in §101.103, such decision shall become the final decision of the Department, and shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of §101.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's

initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute ''final agency action'' within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of §101.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§101.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§101.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to §101.104(a) or within 20 days of the mailing of a final decision referred to in §101.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§101.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under §101.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§101.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§101.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgement of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding,

or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgement of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 101.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 101.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 101.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by §101.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of part 100 of this title are not prohibited.

§ 101.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 101.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it

believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to paragraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 101.131 Definitions.

The definitions contained in §100.13 of this subtitle apply to this part, unless the context otherwise requires, and the term ''reviewing authority'' as used herein includes the Secretary of Education, with respect to action by that official under §101.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which part 100 of this title applies. In the case of any proceeding or part thereof governed by the provisions of 34 CFR, part 100 (Title VI regulations of the Department of Education) as that part existed prior to the amendments published in the FEDERAL REGISTER on Oct. 19, 1967 (effective on that date), the rules in this part 101 shall apply as if those amendments were not in effect.

PART 104—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

Subpart B—Employment Practices

Subpart C—Accessibility

Subpart D—Preschool, Elementary, and Secondary Education

Subpart E—Postsecondary Education

Subpart F—Health, Welfare, and Social Services

Subpart G—Procedures

COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

AUTHORITY: 20 U.S.C. 1405; 29 U.S.C. 794; Pub. L. 111–256, 124 Stat. 2643.

SOURCE: 45 FR 30936, May 9, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 104.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to the program or activity that receives such assistance.

[65 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.3 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 29 U.S.C. 794.

(b) *Section 504* means section 504 of the Act.

(c) *Education of the Handicapped Act* means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94–142, 20 U.S.C. 1401 *et seq*.

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

(e) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department of Education.

(f) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person*—(1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Program or activity* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 29 U.S.C. 794(b))

(l) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(m) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000; 82 FR 31912, July 11, 2017]

§ 104.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits, or services limited by Federal law.* The exclusion of nonhandicapped persons from aid, benefits, or services limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Assistant

Secretary, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and any problems identified, and

(iii) A description of any modifications made and of any remedial steps taken.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to §104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§104.7 and 104.8, in whole or in part, when the Assistant

Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs or activities assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons, and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

[45 FR 30936, May 9, 2000, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 104.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §104.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That:

(1) All entering employees are subjected to such an examination regardless of handicap, and

(2) The results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

Subpart C—Accessibility

§ 104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 104.22 Existing facilities.

(a) *Accessibility.* A recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of §104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility in order to comply with paagraph (a) of this section and, if the time period of the transition plan is

longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usuable by handicapped persons.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with phusical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

Subpart D—Preschool, Elementary, and Secondary Education

§ 104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.32 Location and notification.

A recipient that operates a public elementary or secondary education program or activity shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

[45 FR 30936, May 9, 2000, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision

of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.

(3) *Residential placement.* If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 104.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated

by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in §104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§104.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is belived to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with §104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons

who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68054, Nov. 13, 2000]

§ 104.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.38 Preschool and adult education.

A recipient to which this subpart applies that provides preschool education or day care or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits or services to be provided.

[65 FR 68055, Nov. 13, 2000]

§ 104.39 Private education.

(a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in §104.33(b)(1), within that recipient's program or activity.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of §§104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§104.34, 104.37, and 104.38.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart E—Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to §104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training,

housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations

is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not,

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 104.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart F—Health, Welfare, and Social Services

§ 104.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

§ 104.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 104.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 104.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 104.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity that provides aid, benefits or services for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 104.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D.

[45 FR 30936, May 9, 1980, as amended at 65 FR 68055, Nov. 13, 2000]

Subpart G—Procedures

§ 104.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6–100.10 and part 101 of this title.

APPENDIX A TO PART 104—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *Recipient.* Section 104.23 contains definitions used throughout the regulation.

One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of §104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *Federal financial assistance.* In §104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

3. *Handicapped person.* Section 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93–516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase ''substantially limits.'' The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only ''traditional'' handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended.

Paragraph (15) of section 602 uses the term ''specific learning disabilities'' to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of ''record'' in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as having an intellectual disability.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are ''physical or mental impairments'' within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce

rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *Qualified handicapped person*. Paragraph (k) of §104.3 defines the term ''qualified handicapped person.'' Throughout the regulation, this term is used instead of the statutory term ''otherwise qualified handicapped person.'' The Department believes that the omission of the word ''otherwise'' is necessary in order to comport with the intent of the statute because, read literally, ''otherwise'' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be ''otherwise qualified'' for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms ''qualified'' and ''otherwise qualified'' are intended to be interchangeable.

Section 104.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term ''essential functions'' does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of §104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 104.3(k)(2) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of §104.6(a)(3), however, persons beyond the age limits prescribed in §104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 104.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3–18 as of September 1978, and 3–21 as of September 1980 are incorporated by reference in this paragraph.

Section 104.3(k)(3) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term *technical standards* refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination*. Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1(i) prohibits the exclusion of qualified handicapped persons from aids,

benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term *equally effective*, defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase ''in the most integrated setting appropriated to the person's needs'' is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to §104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§104.38 and 104.47 in connection with physical education and athletics programs.

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret §104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of §104.23.

7. *Assurances of compliance.* Section 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick*, Civil No. 75–0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols*, *supra*.

9. *Remedial action.* Where there has been a finding of discrimination, §104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have

been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In §104.6(b), the term ''voluntary action'' has been substituted for the term ''affirmative action'' because the use of the latter term led to some confusion. We believe the term ''voluntary action'' more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 104.7 requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of §104.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 104.8 (formerly §84.9) sets forth requirements for dissemination of statements of nondicrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In §104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of §104.8(a) has been revised to list possible, rather than required, means of notification. Section 104.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §104.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested

that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Section 104 which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new §104.9 the Assistant Secretary may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind laywers may find it more difficult to find jobs than do nonhandicapped lawyers.

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (34 CFR, part 106) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requries certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 104.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words ''positive steps'' instead of ''affirmative action'' advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of §104.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of §104.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 104.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 104.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other

cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The reasonable accommodation standard in §104.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the ''business necessity'' standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, colleges and universities. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of ED funds.

17. *Tests and selection criteria.* Revised §104.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Assistant Secretary to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of ''disproportionate, adverse effect'' difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, §104.13(a) has been revised to place the burden on the Assistant Secretary, rather than the recipient, to identify alternate tests.

Section 104.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 104.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary

qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 104.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 104.15 (recruitment), 104.16 (compensation), 104.17 (job classification and structure) and 104.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of §104.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

A proposed section, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 104.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under §104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with §104.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other

students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with §104.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised §104.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with §104.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but §104.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See §104.4(c)(2)(iv), prohibiting unnecessarily separate treatment; §104.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new §104.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 104.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 104.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words ''if construction has commenced'' will be considered to mean ''if groundbreaking has taken place.'' Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical

accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase ''to the maximum extent feasible'' has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

Section 104.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term ''adult education'' refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§104.32 and 104.33 apply only to public programs and §104.39 applies only to private programs; §§104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94–142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the ''process'' requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Under §104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word ''in'' encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational

agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of §104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new §104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of §104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in §104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children ''no later than September 1, 1978,'' but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to §104.33. Section 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of §104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under §104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by §104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence

has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under §104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§104.34 and 104.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for persons with severe intellectual disabilities), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, §104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§104.35 and 104.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. ''Any action'' includes denials of placement.

Paragraphs (b) and (c) of §104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in ''Issues in the Classification of Children,'' a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Paragraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, §104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under §104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of §104.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under §104.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of §104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for persons with intellectual disabilities is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in §104.42(a), the regulation delineates, in §104.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 104.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that §104.42(b)(2)(ii) could be interpreted to require a ''global search'' for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Assistant Secretary for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that

use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 104.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 104.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, ''on the whole'' means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised §104.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §104.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed §104.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 104.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the ''as a whole'' wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of §104.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It shoud be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog

guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§104.42(b)) and will be similarly interpreted.

Under §104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 104.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§106.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with §104.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* A proposed section, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of §104.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 104.46(a), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on §104.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to

those raised under §104.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as §104.43(b) to include the ''as a whole'' concept and will be interpreted in the same manner as §104.43(b).

35. *Nonacademic services.* Section 104.47 establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does §104.38 of subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services has been consolidated with the section regulating providers of welfare and social services. Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, §104.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state social service agencies to take an active role in the enforcement of section 504 with regard to local social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* Section 104.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§104.4(b)(ii) and 104.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in §104.4(b)(2) (i.e., benefits or services which ''afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *'').

Section 104.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 104.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 104.52(b) has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tacticle devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Section 104.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons

with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 104.52(c), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Assistant Secretary may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service.

37. *Treatment of Drug Addicts and Alcoholics.* Section 104.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. Section 104.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains §104.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

SUBPART G—PROCEDURES

In §104.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedureal regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

[45 FR 30936, May 9, 1980, as amended at 55 FR 52141, Dec. 19, 1990; 82 FR 31912, July 11, 2017]

APPENDIX B TO PART 104—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

PART 105—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF EDUCATION

Sec.

AUTHORITY: 29 U.S.C. 794; Pub. L. 111–256, 124 Stat. 2643; unless otherwise noted.

SOURCE: 55 FR 37168, Sept. 7, 1990, unless otherwise noted.

§105.1 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§105.2 Application.

This part applies to all programs or activities conducted by the Department, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§105.3 Definitions.

For purposes of this part, the following definitions apply:

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking

skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Department. For example, auxiliary aids useful for persons with impaired vision include readers, materials in braille, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDDs), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the Department's alleged discriminatory action in sufficient detail to inform the Department of the nature and date of the alleged violation of section 504. It must be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties must describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the Department that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase—

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, drug addiction, and alcoholism;

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities; and

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Department as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Department as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to preschool, elementary, or secondary education services provided by the Department, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or Department policy to receive education services from the Department;

(2) With respect to any other Department program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps

who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Department can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other Department program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §105.30

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

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810); and the Civil Rights Restoration Act of 1987 (Pub. L. 100–259, 102 Stat. 28). As used in this part, section 504 applies only to programs or activities conducted by the Department and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

[55 FR 37168, Sept. 7, 1990, as amended at 82 FR 31912, July 11, 2017]

§§ 105.4–105.9 [Reserved]

§ 105.10 Self-evaluation.

(a) The Department shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any of those policies and practices is required, the Department shall proceed to make the necessary modifications.

(b) The Department shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Department shall, for at least 3 years following completion of the self-evaluation, maintain on file, and make available for public inspection—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 105.11 Notice.

The Department shall make available, to employees, applicants, participants, beneficiaries, and other interested persons, information regarding the provisions of this part and its applicability to the programs or activities conducted by the Department, and make that information available to them in such manner as the Secretary finds necessary to apprise those persons of the protections against discrimination assured them by section 504 and the regulations in this part.

§§ 105.12–105.19 [Reserved]

§ 105.20 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under, any program or activity conducted by the Department.

(b)(1) The Department, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless that action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Department may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Department may not, directly or through contractual or other arrangements, use criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Department may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under, any program or activity conducted by the Department; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Department, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The Department may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Department establish requirements for the program or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Department are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive Order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive Order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Department shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 105.21–105.29 [Reserved]

§ 105.30 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Department. As provided in §105.41(b), the definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§ 105.31 Program accessibility: Discrimination prohibited.

Except as otherwise provided in §105.32, no qualified individual with handicaps shall, because the Department's facilities are inaccessible to or

unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Department.

§ 105.32 Program accessibility: Existing facilities.

(a) *General.* The Department shall operate each program or activity so that the program or activity, viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Department to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the Department to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3)(i) Require the Department to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(ii) The Department has the burden of proving that compliance with §105.32(a) would result in that alteration or those burdens.

(iii) The decision that compliance would result in that alteration or those burdens must be made by the Secretary after considering all of the Department's resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.

(iv) If an action would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration or burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* (i) The Department may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignments of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps.

(ii) The Department is not required to make structural changes in existing facilities if other methods are effective in achieving compliance with this section.

(iii) The Department, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing that Act.

(iv) In choosing among available methods for meeting the requirements of this section, the Department shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of §105.32(a) in historic preservation programs, the Department shall give priority to methods that provide physical access to individuals with handicaps. In cases were a physical alteration to an historic property is not required because of §105.32 (a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audiovisual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The Department shall comply with the obligations established under this section within 60 days of the effective date of this part except that if structural changes in facilities are undertaken, the changes shall be made within 3 years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Department shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete those changes.

(2) The Department shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan must be made available for public inspection.

(3) The plan must, at a minimum—

(i) Identify physical obstacles in the Department's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

§ 105.33 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of, the Department must be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 105.34–105.39 [Reserved]

§ 105.40 Communications.

(a) The Department shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public, as follows:

(1)(i) The Department shall furnish appropriate auxiliary aids if necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Department.

(ii) In determining what type of auxiliary aid is necessary, the Department shall give primary consideration to the request of the individual with handicaps.

(iii) The Department need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) If the Department communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDDs) or equally effective telecommunication systems must be used.

(b) The Department shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Department shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility must be used at each primary entrance of an accessible facility.

(d)(1) This section does not require the Department to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

(2) The Department has the burden of proving that compliance with § 105.40 would result in that alteration or those burdens.

(3) The decision that compliance would result in that alteration or those burdens must be made by the Secretary after considering all Department resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.

(4) If an action required to comply with this section would result in that alteration or those burdens, the Department shall take any other action that would not result in the alteration

or burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§ 105.41 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the Department.

(b) As provided in §105.30, the Department shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Deputy Under Secretary for Management is responsible for coordinating implementation of this section. Complaints may be sent to the U.S. Department of Education, Office of Management, Federal Building No. 6, 400 Maryland Avenue SW., Washington, DC 20202.

(d) The Department shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The Department may extend this time period for good cause.

(e) If the Department receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Department shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the Department of the letter required by §105.41(g). The Department may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Secretary.

(j) If the Secretary determines that additional information is needed for the complainant, he or she shall notify the complainant of the additional information needed to make his or her determination on the appeal.

(k) The Secretary shall notify the complainant of the results of the appeal.

(l) The time limit in paragraph (g) of this section may be extended by the Secretary.

(m) The Secretary may delegate the authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

§ 105.42 Effective date.

The effective date of this part is October 9, 1990.

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—Introduction

Sec.

Subpart B—Coverage

AUTHORITY: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.1 was amended by removing the parenthetical authority citation at the end of §§ 106.1, effective Aug. 14, 2020.

§ 106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

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

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

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.2 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or

activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTES: At 85 FR 30572, May 19, 2020, §106.3 was amended by revising paragraph (a), effective Aug. 14, 2020. For the convenience of the user, the revised text is set forth as follows:

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

* * * * *

2. At 85 FR 30579, May 19, 2020, §106.3 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be

required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.4 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.5 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTES: At 85 FR 30573, May 19, 2020, §106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h), effective Aug. 14, 2020. For the convenience of the user, the added and revised text is set forth as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a ''complainant,''

''respondent,'' ''party,'' or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§106.30, 106.44, and 106.45, the obligation to comply with §§106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

2.At 85 FR 30579, May 19, 2020, §106.6 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.7 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30573, May 19, 2020, §106.8 was revised, effective Aug. 14, 2020. For the convenience of the user, the revised text is set forth as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the ''Title IX Coordinator.'' The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy*—(1) *Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with §106.45 for formal complaints as defined in §106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

§106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational program or activity which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in the education program or activity extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to §106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers;

(ii) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(iii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30573, May 19, 2020, §106.9 was revised, effective Aug. 14, 2020. For the convenience of the user, the revised text is set forth as follows:

§106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held

invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.11 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTES: At 85 FR 30573, May 19, 2020, §106.12 was amended by revising paragraph (b), effective Aug. 14, 2020. For the convenience of the user, the revised text is set forth as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

2. At 85 FR 30579, May 19, 2020, §106.12 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.13 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are

exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93–568, 88 Stat. 1862 amending Sec. 901)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.14 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.15 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.16 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§106.17 Transition plans.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate

unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.17 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

EFFECTIVE DATE NOTE: At 85 FR 30573, May 19, 2020, §106.18 was added, effective Aug. 14, 2020.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of

pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.21 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.22 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.23 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

EFFECTIVE DATE NOTE: At 85 FR 30574, May 19, 2020, §106.24 was added, effective Aug. 14, 2020.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 106.30 Definitions.

(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. ''Notice'' as used in this paragraph includes, but is not limited to, a report of sexual harassment to the

Title IX Coordinator as described in §106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under §106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase ''document filed by a complainant'' means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) ''Sexual assault'' as defined in 20 U.S.C. 1092(f)(6)(A)(v), ''dating violence'' as defined in 34 U.S.C. 12291(a)(10), ''domestic violence'' as defined in 34 U.S.C. 12291(a)(8), or ''stalking'' as defined in 34 U.S.C. 12291(a)(30).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution means an institution of graduate higher education as defined in §106.2(l), an institution of

undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).

EFFECTIVE DATE NOTE: At 85 FR 30574, May 19, 2020, §106.30 was added, effective Aug. 14, 2020.

§106.31 Education programs or activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for instate fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.31 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.32 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.33 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.34 Access to classes and schools.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or

choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities*—(1) *General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§ 106.41 and 106.37(c) of this part.

(c) *Schools*—(1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content

of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term ''school'' includes a ''school within a school,'' which means an administratively separate school located within another school.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62542, Oct. 25, 2006]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.34 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.35 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.36 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar

legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.37 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.38 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.39 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or

activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.40 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.41 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.42 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.43 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, ''education program or activity'' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the

complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with §106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

EFFECTIVE DATE NOTE: At 85 FR 30574, May 19, 2020, §106.44 was added, effective Aug. 14, 2020.

§106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in §106.30 as ''supportive measures''; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title

IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in §106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under §106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the

parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints.* A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular ''party,'' ''complainant,'' or ''respondent'' include the plural, as applicable.

(5) *Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an ''eligible student,'' as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a ''parent,'' as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either

the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the

live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under §106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not

deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

EFFECTIVE DATE NOTE: At 85 FR 30575, May 20, 2020, §106.45 was added, effective Aug. 14, 2020.

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

EFFECTIVE DATE NOTE: At 85 FR 30578, May 20, 2020, §106.47 was added, effective Aug. 14, 2020.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.51 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.52 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.53 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.54 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, §106.55 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.56 Fringe benefits.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or

bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.56 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.57 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.58 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.59 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss or Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.60 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, § 106.61 was amended by removing the parenthetical authority citation at the end of the section, effective Aug. 14, 2020.

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

EFFECTIVE DATE NOTE: At 85 FR 30578, May 20, 2020, § 106.62 was added, effective Aug. 14, 2020.

Subpart F—Procedures [Interim]

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR, part 101.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

EFFECTIVE DATE NOTE: At 85 FR 30578, May 20, 2020, Subpart F was revised, effective Aug. 14, 2020. For the convenience of the user, the revised text is set forth as follows:

Subpart F–Retaliation

§ 106.71 Retaliation.

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or

this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under §106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart G—Procedures

SOURCE: 85 FR 30579, May 19, 2020, unless otherwise noted.

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, subpart G was added, effective Aug. 14, 2020.

§106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR part 101. The definitions in §106.30 do not apply to 34 CFR 100.6–100.11 and 34 CFR part 101.

§106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

SUBJECT INDEX TO TITLE IX PREAMBLE AND REGULATION[1]

EFFECTIVE DATE NOTE: At 85 FR 30579, May 19, 2020, the Subject Index to Title IX Preamble and Regulation was removed, effective Aug. 14, 2020.

[1] Preamble paragraph numbers are in brackets [ ].

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

PART 108—EQUAL ACCESS TO PUBLIC SCHOOL FACILITIES FOR THE BOY SCOUTS OF AMERICA AND OTHER DESIGNATED YOUTH GROUPS

AUTHORITY: 20 U.S.C. 7905, unless otherwise noted.

SOURCE: 71 FR 15002, Mar. 24, 2006, unless otherwise noted.

§ 108.1 Purpose.

The purpose of this part is to implement the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905.

(Authority: 20 U.S.C. 7905)

§ 108.2 Applicability.

This part applies to any public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or limited public forum and that receives funds made available through the Department.

(Authority: 20 U.S.C. 7905)

§ 108.3 Definitions.

The following definitions apply to this part:

(a) *Act* means the Boy Scouts of America Equal Access Act, section 9525 of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1981–82 (20 U.S.C. 7905).

(b) *Boy Scouts* means the organization named ''Boy Scouts of America,'' which has a Federal charter and which is listed as an organization in title 36 of the United States Code (Patriotic and National Observances, Ceremonies, and Organizations) in Subtitle II (Patriotic and National Organizations), Part B (Organizations), Chapter 309 (Boy Scouts of America).

(c) *Covered entity* means any public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or limited public forum and that receives funds made available through the Department.

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

(e) *Designated open forum* means that an elementary school or secondary school designates a time and place for one or more outside youth or community groups to meet on school premises or in school facilities, including during the hours in which attendance at the school is compulsory, for reasons other than to provide the school's educational program.

(f) *Elementary school* means an elementary school as defined by section 9101(18) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1958 (20 U.S.C. 7801).

(g) *Group officially affiliated with any other Title 36 youth group* means a youth group resulting from the chartering process or other process used by that Title 36 youth group to establish official affiliation with youth groups.

(h) *Group officially affiliated with the Boy Scouts* means a youth group formed as a result of a community organization charter issued by the Boy Scouts.

(i) *Limited public forum* means that an elementary school or secondary school grants an offering to, or opportunity for, one or more outside youth or community groups to meet on school premises or in school facilities before or after the hours during which attendance at the school is compulsory.

(j) *Local educational agency* means a local educational agency as defined by section 9101(26) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1961 (20 U.S.C. 7801).

(k) *Outside youth or community group* means a youth or community group that is not affiliated with the school.

(l) *Premises or facilities* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in that property.

(m) *Secondary school* means a secondary school as defined by section 9101(38) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1965 (20 U.S.C. 7801).

(n) *State educational agency* means a State educational agency as defined by section 9101(41) of the Elementary and Secondary Education Act of 1965, as amended by section 901 of the No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425, 1965 (20 U.S.C. 7801).

(o) *Title 36 of the United States Code (as a patriotic society)* means title 36 (Patriotic and National Observances, Ceremonies, and Organizations), Subtitle II (Patriotic and National Organizations) of the United States Code.

(p) *Title 36 youth group* means a group or organization listed in title 36 of the United States Code (as a patriotic society) that is intended to serve young people under the age of 21.

(q) *To sponsor any group officially affiliated with the Boy Scouts or with any other Title 36 youth group* means to obtain a community organization charter issued by the Boy Scouts or to take actions required by any other Title 36 youth group to become a sponsor of that group.

(r) *Youth group* means any group or organization intended to serve young people under the age of 21.

(Authority: 20 U.S.C. 7905)

§ 108.4 Effect of State or local law.

The obligation of a covered entity to comply with the Act and this part is not obviated or alleviated by any State or local law or other requirement.

(Authority: 20 U.S.C. 7905)

§ 108.5 Compliance obligations.

(a) The obligation of covered entities to comply with the Act and this part is

not limited by the nature or extent of their authority to make decisions about the use of school premises or facilities.

(b) Consistent with the requirements of §108.6, a covered entity must provide equal access to any group that is officially affiliated with the Boy Scouts or is officially affiliated with any other Title 36 youth group. A covered entity may require that any group seeking equal access inform the covered entity whether the group is officially affiliated with the Boy Scouts or is officially affiliated with any other Title 36 youth group. A covered entity's failure to request this information is not a defense to a covered entity's noncompliance with the Act or this part.

(Authority: 20 U.S.C. 7905)

§ 108.6 Equal access.

(a) *General.* Consistent with the requirements of paragraph (b) of this section, no covered entity shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group that requests to conduct a meeting within that covered entity's designated open forum or limited public forum. No covered entity shall deny that access or opportunity or discriminate for reasons including the membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts or of the Title 36 youth group.

(b) *Specific requirements*—(1) *Meetings.* Any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group that requests to conduct a meeting in the covered entity's designated open forum or limited public forum must be given equal access to school premises or facilities to conduct meetings.

(2) *Benefits and services.* Any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group that requests to conduct a meeting as described in paragraph (b)(1) of this section must be given equal access to any other benefits and services provided to one or more outside youth or community groups that are allowed to meet in that same forum. These benefits and services may include, but are not necessarily limited to, school-related means of communication, such as bulletin board notices and literature distribution, and recruitment.

(3) *Fees.* Fees may be charged in connection with the access provided under the Act and this part.

(4) *Terms.* Any access provided under the Act and this part to any group officially affiliated with the Boy Scouts or officially affiliated with any other Title 36 youth group, as well as any fees charged for this access, must be on terms that are no less favorable than the most favorable terms provided to one or more outside youth or community groups.

(5) *Nondiscrimination.* Any decisions relevant to the provision of equal access must be made on a nondiscriminatory basis. Any determinations of which youth or community groups are outside groups must be made using objective, nondiscriminatory criteria, and these criteria must be used in a consistent, equal, and nondiscriminatory manner.

(Authority: 20 U.S.C. 7905)

§ 108.7 Voluntary sponsorship.

Nothing in the Act or this part shall be construed to require any school, agency, or school served by an agency to sponsor any group officially affiliated with the Boy Scouts or with any other Title 36 youth group.

(Authority: 20 U.S.C. 7905)

§ 108.8 Assurances.

An applicant for funds made available through the Department to which this part applies must submit an assurance that the applicant will comply with the Act and this part. The assurance shall be in effect for the period during which funds made available through the Department are extended. The Department specifies the form of the assurance, including the extent to which assurances will be required concerning the compliance obligations of subgrantees, contractors and subcontractors, and other participants, and provisions that give the United States a right to seek its judicial enforcement. An applicant may incorporate this assurance by reference in

subsequent applications to the Department.

(Approved by the Office of Management and Budget under control number 1870–0503)

(Authority: 20 U.S.C. 7905)

§ 108.9 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964, which are found in 34 CFR 100.6 through 100.11 and 34 CFR part 101, apply to this part, except that, notwithstanding these provisions and any other provision of law, no funds made available through the Department shall be provided to any school, agency, or school served by an agency that fails to comply with the Act or this part.

(Authority: 20 U.S.C. 7905)

PART 110—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

Sec.

Subpart B—Standards for Determining Age Discrimination

Subpart C—Duties of ED Recipients

Subpart D—Investigation, Conciliation, and Enforcement Procedures

AUTHORITY: 42 U.S.C. 6101 *et seq.*, unless otherwise noted.

SOURCE: 58 FR 40197, July 27, 1993, unless otherwise noted.

Subpart A—General

§ 110.1 What is the purpose of ED's age discrimination regulations?

The purpose of these regulations is to set out ED's rules for implementing the Age Discrimination Act of 1975. The Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act permits federally assisted programs or activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age that meet the requirements of the Act.

(Authority: 42 U.S.C. 6101–6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68056, Nov. 13, 2000]

§ 110.2 To what programs or activities do these regulations apply?

(a) These regulations apply to any program or activity receiving Federal financial assistance from ED.

(b) These regulations do not apply to—

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body that—

(i) Provides any benefits or assistance to persons based on age;

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms; or

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except any program or activity receiving Federal financial assistance for employment under the Job Training Partnership Act (29 U.S.C. 1501 *et seq.*).

(Authority: 42 U.S.C. 6103)

§ 110.3 What definitions apply?

The following definitions apply to these regulations: *Act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94–135).

Action means any act, activity, policy, rule, standard, or method of administration, or the use of any policy, rule, standard, or method of administration.

Age means how old a person is, or the number of years from the date of a person's birth.

Age distinction means any action using age or an age-related term.

Age-related term means a word or words that necessarily imply a particular age or range of ages (e.g., ''children,'' ''adult,'' ''older persons,'' but not ''student'' or ''grade'').

Agency means a Federal department or agency that is empowered to extend financial assistance.

Applicant for Federal financial assistance means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient or subrecipient.

Department means the United States Department of Education.

ED means the United States Department of Education.

Federal financial assistance means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which ED provides or otherwise makes available assistance in the form of—

(a) Funds;

(b) Services of Federal personnel; or

(c) Real and personal property or any interest in or use of property, including—

(1) Transfers or leases of property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

Program or activity means all of the operations of—

(a)(1) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(2) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(b)(1) A college, university, or other postsecondary institution, or a public system of higher education; or

(2) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(c)(1) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(i) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(2) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(d) Any other entity that is established by two or more of the entities described in paragraph (a), (b), or (c) of this section; any part of which is extended Federal financial assistance.

(Authority: 42 U.S.C. 6107)

Recipient means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency,

institution, organization, or other entity, or any person to which Federal financial assistance from ED is extended, directly or through another recipient. ''Recipient'' includes any successor, assignee, or transferee of a recipient, but excludes the ultimate beneficiary of the assistance.

Secretary means the Secretary of Education, or his or her designee.

Subrecipient means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

United States means the fifty States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68056, Nov. 13, 2000]

Subpart B—Standards for Determining Age Discrimination

§ 110.10 Rules against age discrimination.

The rules stated in this section are subject to the exceptions contained in §§ 110.12 and 110.13 of these regulations.

(a) *General rule.* No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(b) *Specific rules.* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements, use age distinctions or take any other actions that have the effect, on the basis of age, of—

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under a program or activity receiving Federal financial assistance; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) *Other forms of discrimination.* The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

(Authority: 42 U.S.C. 6101–6103)

§ 110.11 Definitions of "normal operation" and "statutory objective."

For purposes of these regulations, the terms *normal operation* and *statutory objective* have the following meanings:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

(Authority: 42 U.S.C. 6103)

§ 110.12 Exceptions to the rules against age discrimination: Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action otherwise prohibited by § 110.10 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if—

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic or characteristics must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(c) The other characteristic or characteristics can be reasonably measured or approximated by the use of age; and

(d) The other characteristic or characteristics are impractical to measure directly on an individual basis.

(Authority: 42 U.S.C. 6103)

§ 110.13 Exceptions to the rules against age discrimination: Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 110.10 that is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

(Authority: 42 U.S.C. 6103)

§ 110.14 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 110.12 and 110.13 is on the recipient of Federal financial assistance.

(Authority: 42 U.S.C. 6104)

§ 110.15 Affirmative action by recipients.

Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(Authority: 42 U.S.C. 6103)

§ 110.16 Special benefits for children and the elderly.

If a recipient operating a program or activity provides special benefits to the elderly or to children, the use of age distinctions is presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 110.12.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.17 Age distinctions contained in ED's regulations.

Any age distinction contained in regulations issued by ED is presumed to be necessary to the achievement of a statutory objective of the program or activity to which the regulations apply, notwithstanding the provisions of § 110.12.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

Subpart C—Duties of ED Recipients

§ 110.20 General responsibilities.

Each ED recipient has primary responsibility for ensuring that its program or activity is in compliance with the Act and these regulations and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford ED access to its records to the extent required for ED to determine whether the recipient is in compliance with the Act and these regulations.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.21 Notice to subrecipients.

If the recipient initially receiving funds makes the funds available to a subrecipient, the recipient shall notify the subrecipient of its obligations under the Act and these regulations.

(Authority: 42 U.S.C. 6103)

§ 110.22 Information requirements.

Each recipient shall—

(a) Provide ED with information that ED determines is necessary to ascertain whether the recipient is in compliance with the Act and these regulations; and

(b) Permit reasonable access by ED to the books, records, accounts, reports, and other recipient facilities and sources of information to the extent ED determines is necessary to ascertain whether a recipient is in compliance with the Act and these regulations.

(Authority: 42 U.S.C. 6103)

§ 110.23 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which these

regulations apply shall sign a written assurance, on a form specified by ED, that the program or activity will be operated in compliance with these regulations. An applicant may incorporate this assurance by reference in subsequent applications to ED.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) If Federal financial assistance is provided in the form of real property or interest in the property from ED, the instrument effecting or recording this transfer must contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) If no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) If Federal financial assistance is provided in the form of real property or interest in the property from ED, the covenant must also include a condition coupled with a right to be reserved by ED to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, ED may, upon request of the transferee and if necessary to accomplish that financing and upon conditions that ED deems appropriate, agree to forbear the exercise of the right to revert title for as long as the lien of the mortgage or other encumbrance remains effective.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.24 Recipient assessment of age distinctions.

(a) As part of a compliance review under § 110.30 or a complaint investigation under § 110.31, ED may require a recipient employing the equivalent of 15 or more full-time employees to complete a written self-evaluation, in a manner specified by ED, of any age distinction imposed in its program or activity receiving Federal financial assistance from ED to assess the recipient's compliance with the Act.

(b) Whenever an assessment indicates a violation of the Act or these regulations, the recipient shall take corrective action.

(Authority: 42 U.S.C. 6103)

§ 110.25 Designation of responsible employee, notice, and grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the Act and these regulations, including investigation of any complaints that the recipient receives alleging any actions that are prohibited by the Act and these regulations.

(b) *Notice.* A recipient shall notify its beneficiaries, in a continuing manner, of information regarding the provisions of the Act and these regulations. The notification must also identify the responsible employee by name or title, address, and telephone number.

(c) *Grievance procedures.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by the Act or these regulations.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 110.30 Compliance reviews.

(a) ED may conduct compliance reviews, pre-award reviews, and other similar procedures that permit ED to investigate and correct violations of the Act and of these regulations. ED may conduct these reviews in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of these regulations occurred.

(b) If a compliance review or pre-award review indicates a violation of the Act or these regulations, ED attempts to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, ED arranges for enforcement as described in § 110.35.

(Authority: 42 U.S.C. 6103)

§ 110.31 Complaints.

(a) Any person, individually or as a member of a class or on behalf of others, may file a complaint with ED alleging discrimination prohibited by the Act or by these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged discrimination. However, for good cause shown, ED may extend this time limit.

(b) ED attempts to facilitate the filing of complaints, if possible, by—

(1) Accepting as a complete complaint any written statement that identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant;

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a complete complaint;

(3) Widely disseminating information regarding the obligations of recipients under the Act and these regulations;

(4) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure; and

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact ED for information and assistance regarding the complaint resolution process.

(c) A complaint is considered to be complete on the date that ED receives all the information necessary to process it, as described in paragraph (b)(1) of this section.

(d) ED returns to the complainant any complaint outside the jurisdiction of these regulations and states the reason or reasons why it is outside the jurisdiction of the regulations.

(Authority: 42 U.S.C. 6103)

§ 110.32 Mediation.

(a) ED promptly refers to the Federal Mediation and Conciliation Service or to the mediation agency designated by the Secretary of Health and Human Services, all complaints that—

(1) Fall within the jurisdiction of the Act and these regulations, unless the age distinction complained of is clearly within an exemption under § 110.2(b); and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or to make an informed judgment that an agreement is not possible. The recipient and the complainant need not meet with the mediator at the same time, and the meeting may be conducted by telephone or other means of effective dialogue if a personal meeting between the party and the mediator is impractical.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it. The mediator shall send a copy of the agreement to ED. ED takes no further action on the complaint unless informed that the complainant or the recipient fails to comply with the agreement, at which time ED reinstates the complaint.

(d) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the mediation agency.

(e) The mediation will proceed for a maximum of 60 days after a complaint is filed with ED. Mediation ends if—

(1) 60 days elapse from the time the complaint is received;

(2) Prior to the end of the 60-day period, an agreement is reached; or

(3) Prior to the end of the 60-day period, the mediator determines that agreement cannot be reached.

(f) The mediator shall return unresolved complaints to ED.

(Authority: 42 U.S.C. 6103)

§ 110.33 Investigation.

(a) *Initial investigation.* ED investigates complaints that are unresolved after mediation or reopened because of a violation of the mediation agreement. ED uses methods during the investigation to encourage voluntary resolution of the complaint, including discussions with the complainant and recipient to establish the facts and, if possible, resolve the complaint to the mutual satisfaction of the parties. ED may seek the assistance of any involved State, local, or other Federal agency.

(b) *Formal investigation, conciliation, and hearing.* If ED cannot resolve the complaint during the early stages of the investigation, ED completes the investigation of the complaint and makes formal findings. If the investigation indicates a violation of the Act or these regulations, ED attempts to achieve voluntary compliance. If ED cannot obtain voluntary compliance, ED begins enforcement as described in § 110.35.

(Authority: 42 U.S.C. 6103)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.34 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who—

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of ED's investigation, conciliation, and enforcement process.

(Authority: 42 U.S.C. 6103)

§ 110.35 Compliance procedure.

(a) ED may enforce the Act and these regulations under § 110.35(a) (1) or (2) through—

(1) Termination of, or refusal to grant or continue, a recipient's Federal financial assistance from ED for a program or activity in which the recipient has violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) Any other means authorized by law, including, but not limited to—

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations; or

(ii) Use of any requirement of or referral to any Federal, State, or local government agency that will have the effect of correcting a violation of the Act or of these regulations.

(b) ED limits any termination or refusal under § 110.35(a)(1) to the particular recipient and to the particular program or activity ED finds in violation of the Act or these regulations. ED will not base any part of a termination on a finding with respect to any program or activity that does not receive Federal financial assistance from ED.

(c) ED takes no action under paragraph (a) of this section until—

(1) ED has advised the recipient of its failure to comply with the Act or with these regulations and has determined that voluntary compliance cannot be obtained; and

(2) Thirty days have elapsed after the Secretary has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the program or activity involved. The Secretary files a report if any action is taken under §110.35(a)(1).

(d) The Secretary also may defer granting new Federal financial assistance from ED to a recipient if termination proceedings in §110.35(a)(1) are initiated.

(1) New Federal financial assistance from ED includes all assistance for which ED requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance from ED does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the initiation of termination proceedings.

(2) ED does not begin a deferral until the recipient has received a notice of an opportunity for a hearing under §110.35(a)(1). A deferral may not continue for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and ED. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

(Authority: 42 U.S.C. 6104)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.36 Hearings, decisions, and post-termination proceedings.

(a) The following ED procedural provisions applicable to Title VI of the Civil Rights Act of 1964 also apply to ED's enforcement of these regulations: 34 CFR 100.9 and 100.10 and 34 CFR part 101.

(b) Action taken under section 305 of the Act is subject to judicial review as provided by section 306 of the Act.

(Authority: 42 U.S.C. 6104–6105)

§ 110.37 Procedure for disbursal of funds to an alternate recipient.

(a) If the Secretary withholds funds from a recipient under these regulations, the Secretary may disburse the funds withheld directly to an alternate recipient: any public or nonprofit private organization or agency, or State or political subdivision of the State.

(b) The Secretary requires any alternate recipient to demonstrate—

(1) The ability to comply with the Act and these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

(Authority: 42 U.S.C. 6104)

[58 FR 40197, July 27, 1993, as amended at 65 FR 68057, Nov. 13, 2000]

§ 110.38 Remedial action by recipients.

If ED finds that a recipient has discriminated on the basis of age, the recipient shall take any remedial action that ED may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated or if the entity that has discriminated is a subrecipient, both recipients or recipient and subrecipient may be required to take remedial action.

(Authority: 42 U.S.C. 6103)

§ 110.39 Exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if—

(1) One hundred eighty days have elapsed since the complainant filed the complaint with ED, and ED has made no finding with regard to the complaint; or

(2) ED issues any finding in favor of the recipient.

(b) If ED fails to make a finding within 180 days or issues a finding in favor of the recipient, ED promptly—

(1) Advises the complainant of this fact;

(2) Advises the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Informs the complainant—

(i) That a civil action can be brought only in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that these costs must be demanded in the complaint filed with the court;

(iii) That before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary, the Secretary of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) That the notice shall state the alleged violation of the Act, the relief requested, the court in which the action will be brought, and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

(Authority: 42 U.S.C. 6104)

PARTS 111–199 [RESERVED]

CHAPTER II—OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, DEPARTMENT OF EDUCATION

PART 200—TITLE I—IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

Subpart A—Improving Basic Programs Operated by Local Educational Agencies

STANDARDS AND ASSESSMENTS

Sec.

PARTICIPATION IN NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (NAEP)

SCHOOLWIDE PROGRAMS

QUALIFICATIONS OF PARAPROFESSIONALS

PARTICIPATION OF ELIGIBLE CHILDREN IN PRIVATE SCHOOLS

ALLOCATIONS TO LEAS

FISCAL REQUIREMENTS

Subpart B—Even Start Family Literacy Programs

Subpart C—Migrant Education Program

Subpart D—Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At-Risk of Dropping Out

Subpart E—General Provisions

AUTHORITY: 20 U.S.C. 6301 through 6576, unless otherwise noted.

Section 200.1 also issued under 20 U.S.C. 6311(b)(1).

Section 200.11 also issued under 20 U.S.C. 6311(c)(2), (g)(2)(D), (h)(1)(C)(xii), (h)(2)(C), 6312(c)(3), 9622(d)(1).

Section 200.25 also issued under 20 U.S.C. 6314.

Section 200.26 also issued under 20 U.S.C. 6314.

Section 200.29 also issued under 20 U.S.C. 1413(a)(2)(D), 6311(g)(2)(E), 6314, 6396(b)(4), 7425(c), 7703(d).

Section 200.61 also issued under 20 U.S.C. 6312(e).

Section 200.62 also issued under 20 U.S.C. 6320(a).

Section 200.63 also issued under 20 U.S.C. 6320(b).

Section 200.64 also issued under 20 U.S.C. 6320.

Section 200.65 also issued under 20 U.S.C. 6320(a)(1)(B).

Section 200.68 also issued under 20 U.S.C. 6320(a)(3)(B).

Section 200.73 also issued under 20 U.S.C. 6332(c), 6336(f)(3), 7221e(c).

Section 200.77 also issued under 20 U.S.C. 6313(c)(3)–(5), 6318(a)(3), 6320; 42 U.S.C. 11432(g)(1)(J)(ii)–(iii), 11433(b)(1).

Section 200.78 also issued under 20 U.S.C. 6313(a)(5)(B), (c), 6333(c)(2).

Section 200.79 also issued under 20 U.S.C. 6313(b)(1)(D), (c)(2)(B), 6321(d).

Section 200.81 also issued under 20 U.S.C. 6391–6399.

Section 200.83 also issued under 20 U.S.C. 6396.

Section 200.85 also issued under 20 U.S.C. 6398.

Section 200.87 also issued under 20 U.S.C. 7881(b)(1)(A).

Section 200.88 also issued under 20 U.S.C. 6321(d).

Section 200.89 also issued under 20 U.S.C. 6391–6399, 6571, 18 U.S.C. 1001.

Section 200.90 also issued under 20 U.S.C. 6432, 6454, 6472.

Section 200.100 also issued under 20 U.S.C. 6303, 6303b, 6304.

Section 200.103 also issued under 20 U.S.C. 6315(c)(1)(A)(ii), 6571(a), 8101(4).

SOURCE: 60 FR 34802, July 3, 1995, unless otherwise noted.

Subpart A—Improving Basic Programs Operated by Local Educational Agencies

STANDARDS AND ASSESSMENTS

§ 200.1 State responsibilities for developing challenging academic standards.

(a) *Academic standards in general.* A State must adopt challenging academic content standards and aligned academic achievement standards that will be used by the State, its local educational agencies (LEAs), and its schools to carry out this subpart. These academic standards must—

(1) Be the same academic content standards and aligned academic achievement standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under this subpart, except as provided in paragraph (d) of this section, which applies only to the State's academic achievement standards;

(2) With respect to the academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State, except as provided in paragraph (d) of this section; and

(3) Include at least mathematics, reading/language arts, and science, and may include other subjects determined by the State.

(b) *Academic content standards.* (1) The challenging academic content standards required under paragraph (a) of this section must—

(i) Specify what all students are expected to know and be able to do;

(ii) Contain coherent and rigorous content; and

(iii) Encourage the teaching of advanced skills.

(2) A State's academic content standards may—

(i) Be grade specific; or,

(ii) Cover more than one grade if grade-level content expectations are provided for each of grades 3 through 8.

(3) At the high school level, the academic content standards must define the knowledge and skills that all high school students are expected to know and be able to do in at least reading/language arts, mathematics, and science, irrespective of course titles or years completed.

(c) *Academic achievement standards.* (1) The challenging academic achievement standards required under paragraph (a) of this section must—

(i) Be aligned with the State's challenging academic content standards and with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards; and

(ii) Include the following components for each content area:

(A) Not less than three achievement levels that describe at least—

(*1*) Two levels of high achievement—proficient and advanced—that determine how well students are mastering the material in the State's academic content standards; and

(*2*) A third level of achievement—basic—to provide complete information about the progress of lower-achieving students toward mastering the proficient and advanced levels of achievement.

(B) Descriptions of the competencies associated with each achievement level.

(C) Assessment scores (''cut scores'') that differentiate among the achievement levels as specified in paragraph (c)(1)(ii)(A) of this section, and a description of the rationale and procedures used to determine each achievement level.

(2) A State must develop academic achievement standards for every grade and subject assessed, even if the State's academic content standards cover more than one grade.

(d) *Alternate academic achievement standards.* For students under section 602(3) of the Individuals with Disabilities Education Act (IDEA) with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

(1) Are aligned with the State's challenging academic content standards;

(2) Promote access to the general curriculum, consistent with the IDEA;

(3) Reflect professional judgment as to the highest possible standards achievable by such students;

(4) Are designated in the individualized education program developed under section 614(d)(3) of the IDEA for each such student as the academic achievement standards that will be used for the student; and

(5) Are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014, and § 200.2(b)(3)(ii)(B)(*2*).

(e) *Modified academic achievement standards.* A State may not define or implement for use under this subpart any alternate or modified academic achievement standards for children with disabilities under section 602(3) of the IDEA that are not alternate academic achievement standards that meet the requirements of paragraph (d) of this section.

(f) *English language proficiency standards.* A State must adopt English language proficiency standards that—

(1) Are derived from the four recognized domains of speaking, listening, reading, and writing;

(2) Address the different proficiency levels of English learners; and

(3) Are aligned with the State's challenging academic content standards and aligned academic achievement standards.

(g) *Subjects without standards.* If an LEA serves students under subpart A of this part in subjects for which a State has not developed academic standards, the State must describe in its State plan a strategy for ensuring that those students are taught the same knowledge and skills and held to the same

expectations in those subjects as are all other students.

(h) *Other subjects with standards.* If a State has developed standards in other subjects for all students, the State must apply those standards to students participating under subpart A of this part.

(Approved by the Office of Management and Budget under control number 1810–0576)

[67 FR 45039, July 5, 2002, as amended at 68 FR 68702, Dec. 9, 2003; 72 FR 17778, Apr. 9, 2007; 80 FR 50784, Aug. 21, 2015; 84 FR 31671, July 2, 2019]

§ 200.2 State responsibilities for assessment.

(a)(1) Each State, in consultation with its LEAs, must implement a system of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading/language arts, and science.

(2)(i) The State may also measure the achievement of students in other academic subjects in which the State has adopted challenging State academic standards.

(ii) If a State has developed assessments in other subjects for all students, the State must include students participating under this subpart in those assessments.

(b) The assessments required under this section must:

(1)(i) Except as provided in §§ 200.3, 200.5(b), and 200.6(c) and section 1204 of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (hereinafter ''the Act''), be the same assessments used to measure the achievement of all students; and

(ii) Be administered to all students consistent with § 200.5(a), including the following highly-mobile student populations as defined in paragraph (b)(11) of this section:

(A) Students with status as a migratory child.

(B) Students with status as a homeless child or youth.

(C) Students with status as a child in foster care.

(D) Students with status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty;

(2)(i) Be designed to be valid and accessible for use by all students, including students with disabilities and English learners; and

(ii) Be developed, to the extent practicable, using the principles of universal design for learning. For the purposes of this section, ''universal design for learning'' means a scientifically valid framework for guiding educational practice that—

(A) Provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and

(B) Reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and English learners;

(3)(i)(A) Be aligned with challenging academic content standards and aligned academic achievement standards (hereinafter ''challenging State academic standards'') as defined in section 1111(b)(1)(A) of the Act; and

(B) Provide coherent and timely information about student attainment of those standards and whether a student is performing at the grade in which the student is enrolled; and

(ii)(A)(*1*) Be aligned with the challenging State academic content standards; and

(*2*) Address the depth and breadth of those standards; and

(B)(*1*) Measure student performance based on challenging State academic achievement standards that are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards consistent with section 1111(b)(1)(D) of the Act; or

(*2*) With respect to alternate assessments for students with the most significant cognitive disabilities, measure student performance based on alternate academic achievement standards defined by the State consistent with section 1111(b)(1)(E) of the Act that reflect professional judgment as to the highest possible standards achievable by such students to ensure that a student who meets the alternate academic achievement standards is on track to

pursue postsecondary education or competitive integrated employment, consistent with the purposes of the Rehabilitation Act of 1973, as amended by the Workforce Innovation and Opportunity Act, as in effect on July 22, 2014;

(4)(i) Be valid, reliable, and fair for the purposes for which the assessments are used; and

(ii) Be consistent with relevant, nationally recognized professional and technical testing standards;

(5) Be supported by evidence that—

(i) The assessments are of adequate technical quality—

(A) For each purpose required under the Act; and

(B) Consistent with the requirements of this section; and

(ii) For each assessment administered to meet the requirements of this subpart, is made available to the public, including on the State's Web site;

(6) Be administered in accordance with the frequency described in § 200.5(a);

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills—such as critical thinking, reasoning, analysis, complex problem solving, effective communication, and understanding of challenging content—as defined by the State. These measures may—

(i) Include valid and reliable measures of student academic growth at all achievement levels to help ensure that the assessment results could be used to improve student instruction; and

(ii) Be partially delivered in the form of portfolios, projects, or extended performance tasks;

(8) Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal or family beliefs and attitudes, except that this provision does not preclude the use of—

(i) Constructed-response, short answer, or essay questions; or

(ii) Items that require a student to analyze a passage of text or to express opinions;

(9) Provide for participation in the assessments of all students in the grades assessed consistent with §§ 200.5(a) and 200.6;

(10) At the State's discretion, be administered through—

(i) A single summative assessment; or

(ii) Multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement and, at the State's discretion, student growth, consistent with paragraph (b)(4) of this section;

(11)(i) Consistent with sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, enable results to be disaggregated within each State, LEA, and school by—

(A) Gender;

(B) Each major racial and ethnic group;

(C) Status as an English learner as defined in section 8101(20) of the Act;

(D) Status as a migratory child as defined in section 1309(3) of the Act;

(E) Children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) as compared to all other students;

(F) Economically disadvantaged students as compared to students who are not economically disadvantaged;

(G) Status as a homeless child or youth as defined in section 725(2) of title VII, subtitle B of the McKinney-Vento Homeless Assistance Act, as amended;

(H) Status as a child in foster care. ''Foster care'' means 24-hour substitute care for children placed away from their parents and for whom the agency under title IV–E of the Social Security Act has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, tribal, or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made; and

(I) Status as a student with a parent who is a member of the armed forces on active duty or serves on full-time National Guard duty, where ''armed forces,'' ''active duty,'' and ''full-time National Guard duty'' have the same meanings given them in 10 U.S.C. 101(a)(4), 101(d)(1), and 101(d)(5).

(ii) Disaggregation is not required in the case of a State, LEA, or school in which the number of students in a subgroup is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.

(12) Produce individual student reports consistent with §200.8(a); and

(13) Enable itemized score analyses to be produced and reported to LEAs and schools consistent with §200.8(b).

(c)(1) At its discretion, a State may administer the assessments required under this section in the form of computer-adaptive assessments if such assessments meet the requirements of section 1111(b)(2)(J) of the Act and this section. A computer-adaptive assessment—

(i) Must, except as provided in §200.6(c)(7)(iii), measure a student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled and growth toward those standards; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level.

(2) If a State administers a computer-adaptive assessment, the determination under paragraph (b)(3)(i)(B) of this section of a student's academic proficiency for the grade in which the student is enrolled must be reported on all reports required by §200.8 and section 1111(h) of the Act.

(d) A State must submit evidence for peer review under section 1111(a)(4) of the Act that its assessments under this section and §§200.3, 200.4, 200.5(b), 200.6(c), 200.6(f), 200.6(h), and 200.6(j) meet all applicable requirements.

(e) Information provided to parents under section 1111(b)(2) of the Act must—

(1) Be in an understandable and uniform format;

(2) Be, to the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent with limited English proficiency, be orally translated for such parent; and

(3) Be, upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act (ADA), as amended, provided in an alternative format accessible to that parent.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 10 U.S.C. 101(a)(4), (d)(1), and (d)(5); 20 U.S.C. 1003(24), 1221e–3, 1401(3), 3474, 6311(a)(4), 6311(b)(1)–(2), 6311(h), 6399(3), 6571, and 7801(20); 29 U.S.C. 701 *et seq.;* 29 U.S.C. 794; 42 U.S.C. 2000d–1, 11434a(2), 12102(1), and 12131 *et seq.;* and 45 CFR 1355.20(a))

[81 FR 88931, Dec. 8, 2016]

§ 200.3 Locally selected, nationally recognized high school academic assessments.

(a) *In general.* (1) A State, at the State's discretion, may permit an LEA to administer a nationally recognized high school academic assessment in each of reading/language arts, mathematics, or science, approved in accordance with paragraph (b) of this section, in lieu of the respective statewide assessment under §200.5(a)(1)(i)(B) and (a)(1)(ii)(C) if such assessment meets all requirements of this section.

(2) An LEA must administer the same locally selected, nationally recognized academic assessment to all high school students in the LEA consistent with the requirements in §200.5(a)(1)(i)(B) and (a)(1)(ii)(C), except for students with the most significant cognitive disabilities who are assessed on an alternate assessment aligned with alternate academic achievement standards, consistent with §200.6(c).

(b) *State approval.* If a State chooses to allow an LEA to administer a nationally recognized high school academic assessment under paragraph (a) of this section, the State must:

(1) Establish and use technical criteria to determine if the assessment—

(i) Is aligned with the challenging State academic standards;

(ii) Addresses the depth and breadth of those standards;

(iii) Is equivalent to or more rigorous than the statewide assessments under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, with respect to—

(A) The coverage of academic content;

(B) The difficulty of the assessment;

(C) The overall quality of the assessment; and

(D) Any other aspects of the assessment that the State may establish in its technical criteria;

(iv) Meets all requirements under § 200.2(b), except for § 200.2(b)(1), and ensures that all high school students in the LEA are assessed consistent with §§ 200.5(a) and 200.6; and

(v) Produces valid and reliable data on student academic achievement with respect to all high school students and each subgroup of high school students in the LEA that—

(A) Are comparable to student academic achievement data for all high school students and each subgroup of high school students produced by the statewide assessment at each academic achievement level;

(B) Are expressed in terms consistent with the State's academic achievement standards under section 1111(b)(1)(A) of the Act; and

(C) Provide unbiased, rational, and consistent differentiation among schools within the State for the purpose of the State-determined accountability system under section 1111(c) of the Act, including calculating the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act and annually meaningfully differentiating between schools under section 1111(c)(4)(C) of the Act;

(2) Before approving any nationally recognized high school academic assessment for use by an LEA in the State—

(i) Ensure that the use of appropriate accommodations under § 200.6(b) and (f) does not deny a student with a disability or an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students without disabilities or students who are not English learners; and

(ii) Submit evidence to the Secretary in accordance with the requirements for peer review under section 1111(a)(4) of the Act demonstrating that any such assessment meets the requirements of this section; and

(3)(i) Approve an LEA's request to use a locally selected, nationally recognized high school academic assessment that meets the requirements of this section;

(ii) Disapprove an LEA's request if it does not meet the requirements of this section; or

(iii) Revoke approval for good cause.

(c) *LEA applications.* (1) Before an LEA requests approval from the State to use a locally selected, nationally recognized high school academic assessment, the LEA must—

(i) Notify all parents of high school students it serves—

(A) That the LEA intends to request approval from the State to use a locally selected, nationally recognized high school academic assessment in place of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable;

(B) Of how parents and, as appropriate, students, may provide meaningful input regarding the LEA's request; and

(C) Of any effect of such request on the instructional program in the LEA; and

(ii) Provide an opportunity for meaningful consultation to all public charter schools whose students would be included in such assessments.

(2) As part of requesting approval to use a locally selected, nationally recognized high school academic assessment, an LEA must—

(i) Update its LEA plan under section 1112 or section 8305 of the Act, including to describe how the request was developed consistent with all requirements for consultation under sections 1112 and 8538 of the Act; and

(ii) If the LEA is a charter school under State law, provide an assurance that the use of the assessment is consistent with State charter school law and it has consulted with the authorized public chartering agency.

(3) Upon approval, the LEA must notify all parents of high school students

it serves that the LEA received approval and will use such locally selected, nationally recognized high school academic assessment instead of the statewide academic assessment under § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable.

(4) In each subsequent year following approval in which the LEA elects to administer a locally selected, nationally recognized high school academic assessment, the LEA must notify—

(i) The State of its intention to continue administering such assessment; and

(ii) Parents of which assessment the LEA will administer to students to meet the requirements of § 200.5(a)(1)(i)(B) and (a)(1)(ii)(C), as applicable, at the beginning of the school year.

(5) The notices to parents under this paragraph (c) of this section must be consistent with § 200.2(e).

(d) *Definition.* ''Nationally recognized high school academic assessment'' means an assessment of high school students' knowledge and skills that is administered in multiple States and is recognized by institutions of higher education in those or other States for the purposes of entrance or placement into courses in postsecondary education or training programs.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(H), 6312(a), 6571, 7845, and 7918; 29 U.S.C. 794; 42 U.S.C. 2000d–1)

[81 FR 88932, Dec. 8, 2016]

§ 200.4 State law exception.

(a) If a State provides satisfactory evidence to the Secretary that neither the State educational agency (SEA) nor any other State government official, agency, or entity has sufficient authority under State law to adopt academic content standards, student academic achievement standards, and academic assessments applicable to all students enrolled in the State's public schools, the State may meet the requirements under §§ 200.1 and 200.2 by—

(1) Adopting academic standards and academic assessments that meet the requirements of §§ 200.1 and 200.2 on a Statewide basis and limiting their applicability to students served under subpart A of this part; or

(2) Adopting and implementing policies that ensure that each LEA in the State that receives funds under subpart A of this part will adopt academic standards and academic assessments aligned with those standards that—

(i) Meet the requirements in §§ 200.1 and 200.2; and

(ii) Are applicable to all students served by the LEA.

(b) A State that qualifies under paragraph (a) of this section must—

(1) Establish technical criteria for evaluating whether each LEA's—

(i) Academic content and student academic achievement standards meet the requirements in § 200.1; and

(ii) Academic assessments meet the requirements in § 200.2, particularly regarding validity and reliability, technical quality, alignment with the LEA's academic standards, and inclusion of all students in the grades assessed;

(2) Review and approve each LEA's academic standards and academic assessments to ensure that they—

(i) Meet or exceed the State's technical criteria; and

(ii) For purposes of this section—

(A) Are equivalent to one another in their content coverage, difficulty, and quality;

(B) Have comparable validity and reliability with respect to groups of students described in section 1111(c)(2) of the Act; and

(C) Provide unbiased, rational, and consistent determinations of the annual progress of schools within the State; and

(3) Be able to aggregate, with confidence, data from local assessments to make accountability determinations under section 1111(c) of the Act.

(Authority: 20 U.S.C. 1221e–3, 3474, 6311 (b)(2)(E) and 6571)

[67 FR 45041, July 5, 2002, as amended at 81 FR 88933, Dec. 8, 2016]

§ 200.5 Assessment administration.

(a) *Frequency.* (1) A State must administer the assessments required under § 200.2 annually as follows:

(i) With respect to both the reading/language arts and mathematics assessments—

(A) In each of grades 3 through 8; and

(B) At least once in grades 9 through 12.

(ii) With respect to science assessments, not less than one time during each of—

(A) Grades 3 through 5;

(B) Grades 6 through 9; and

(C) Grades 10 through 12.

(2) A State must administer the English language proficiency assessment required under §200.6(h) annually to all English learners in schools served by the State in all grades in which there are English learners, kindergarten through grade 12.

(3) With respect to any other subject chosen by a State, the State may administer the assessments at its discretion.

(b) *Middle school mathematics exception.* A State that administers an end-of-course mathematics assessment to meet the requirements under paragraph (a)(1)(i)(B) of this section may exempt an eighth-grade student from the mathematics assessment typically administered in eighth grade under paragraph (a)(1)(i)(A) of this section if—

(1) The student instead takes the end-of-course mathematics assessment the State administers to high school students under paragraph (a)(1)(i)(B) of this section;

(2) The student's performance on the high school assessment is used in the year in which the student takes the assessment for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act;

(3) In high school—

(i) The student takes a State-administered end-of-course assessment or nationally recognized high school academic assessment as defined in §200.3(d) in mathematics that—

(A) Is more advanced than the assessment the State administers under paragraph (a)(1)(i)(B) of this section; and

(B) Provides for appropriate accommodations consistent with §200.6(b) and (f); and

(ii) The student's performance on the more advanced mathematics assessment is used for purposes of measuring academic achievement under section 1111(c)(4)(B)(i) of the Act and participation in assessments under section 1111(c)(4)(E) of the Act; and

(4) The State describes in its State plan, with regard to this exception, its strategies to provide all students in the State the opportunity to be prepared for and to take advanced mathematics coursework in middle school.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(v), (b)(2)(C), and (b)(2)(G), and 6571)

[81 FR 88933, Dec. 8, 2016]

§ 200.6 Inclusion of all students.

(a) *Students with disabilities in general.* (1) A State must include students with disabilities in all assessments under section 1111(b)(2) of the Act, with appropriate accommodations consistent with paragraphs (b), (f)(1), and (h)(4) of this section. For purposes of this section, students with disabilities, collectively, are—

(i) All children with disabilities as defined under section 602(3) of the IDEA;

(ii) Students with the most significant cognitive disabilities who are identified from among the students in paragraph (a)(1)(i) of this section; and

(iii) Students with disabilities covered under other acts, including—

(A) Section 504 of the Rehabilitation Act of 1973, as amended; and

(B) Title II of the ADA, as amended.

(2)(i) Except as provided in paragraph (a)(2)(ii)(B) of this section, a student with a disability under paragraph (a)(1) of this section must be assessed with an assessment aligned with the challenging State academic standards for the grade in which the student is enrolled.

(ii) A student with the most significant cognitive disabilities under paragraph (a)(1)(ii) of this section may be assessed with—

(A) The general assessment under paragraph (a)(2)(i) of this section; or

(B) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of

the Act for students with the most significant cognitive disabilities, an alternate assessment under paragraph (c) of this section aligned with the challenging State academic content standards for the grade in which the student is enrolled and the State's alternate academic achievement standards.

(b) *Appropriate accommodations for students with disabilities.* (1) A State's academic assessment system must provide, for each student with a disability under paragraph (a) of this section, the appropriate accommodations, such as interoperability with, and ability to use, assistive technology devices consistent with nationally recognized accessibility standards, that are necessary to measure the academic achievement of the student consistent with paragraph (a)(2) of this section, as determined by—

(i) For each student under paragraph (a)(1)(i) and (ii) of this section, the student's IEP team;

(ii) For each student under paragraph (a)(1)(iii)(A) of this section, the student's placement team; or

(iii) For each student under paragraph (a)(1)(iii)(B) of this section, the individual or team designated by the LEA to make these decisions.

(2) A State must—

(i)(A) Develop appropriate accommodations for students with disabilities;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all students with disabilities are able to participate in academic instruction and assessments consistent with paragraph (a)(2) of this section and with § 200.2(e); and

(ii) Ensure that general and special education teachers, paraprofessionals, teachers of English learners, specialized instructional support personnel, and other appropriate staff receive necessary training to administer assessments and know how to administer assessments, including, as necessary, alternate assessments under paragraphs (c) and (h)(5) of this section, and know how to make use of appropriate accommodations during assessment for all students with disabilities, consistent with section 1111(b)(2)(B)(vii)(III) of the Act.

(3) A State must ensure that the use of appropriate accommodations under this paragraph (b) of this section does not deny a student with a disability—

(i) The opportunity to participate in the assessment; and

(ii) Any of the benefits from participation in the assessment that are afforded to students without disabilities.

(c) *Alternate assessments aligned with alternate academic achievement standards for students with the most significant cognitive disabilities.* (1) If a State has adopted alternate academic achievement standards permitted under section 1111(b)(1)(E) of the Act for students with the most significant cognitive disabilities, the State must measure the achievement of those students with an alternate assessment that—

(i) Is aligned with the challenging State academic content standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled;

(ii) Yields results relative to the alternate academic achievement standards; and

(iii) At the State's discretion, provides valid and reliable measures of student growth at all alternate academic achievement levels to help ensure that the assessment results can be used to improve student instruction.

(2) For each subject for which assessments are administered under § 200.2(a)(1), the total number of students assessed in that subject using an alternate assessment aligned with alternate academic achievement standards under paragraph (c)(1) of this section may not exceed 1.0 percent of the total number of students in the State who are assessed in that subject.

(3) A State must—

(i) Not prohibit an LEA from assessing more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) with an alternate assessment aligned with alternate academic achievement standards;

(ii) Require that an LEA submit information justifying the need of the LEA to assess more than 1.0 percent of

its assessed students in any such subject with such an alternate assessment;

(iii) Provide appropriate oversight, as determined by the State, of an LEA that is required to submit information to the State; and

(iv) Make the information submitted by an LEA under paragraph (c)(3)(ii) of this section publicly available, provided that such information does not reveal personally identifiable information about an individual student.

(4) If a State anticipates that it will exceed the cap under paragraph (c)(2) of this section with respect to any subject for which assessments are administered under § 200.2(a)(1) in any school year, the State may request that the Secretary waive the cap for the relevant subject, pursuant to section 8401 of the Act, for one year. Such request must—

(i) Be submitted at least 90 days prior to the start of the State's testing window for the relevant subject;

(ii) Provide State-level data, from the current or previous school year, to show—

(A) The number and percentage of students in each subgroup of students defined in section 1111(c)(2)(A), (B), and (D) of the Act who took the alternate assessment aligned with alternate academic achievement standards; and

(B) The State has measured the achievement of at least 95 percent of all students and 95 percent of students in the children with disabilities subgroup under section 1111(c)(2)(C) of the Act who are enrolled in grades for which the assessment is required under § 200.5(a);

(iii) Include assurances from the State that it has verified that each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in any subject for which assessments are administered under § 200.2(a)(1) in that school year using an alternate assessment aligned with alternate academic achievement standards—

(A) Followed each of the State's guidelines under paragraph (d) of this section, except paragraph (d)(6); and

(B) Will address any disproportionality in the percentage of students in any subgroup under section 1111(c)(2)(A), (B), or (D) of the Act taking an alternate assessment aligned with alternate academic achievement standards;

(iv) Include a plan and timeline by which—

(A) The State will improve the implementation of its guidelines under paragraph (d) of this section, including by reviewing and, if necessary, revising its definition under paragraph (d)(1), so that the State meets the cap in paragraph (c)(2) of this section in each subject for which assessments are administered under § 200.2(a)(1) in future school years;

(B) The State will take additional steps to support and provide appropriate oversight to each LEA that the State anticipates will assess more than 1.0 percent of its assessed students in a given subject in a school year using an alternate assessment aligned with alternate academic achievement standards to ensure that only students with the most significant cognitive disabilities take an alternate assessment aligned with alternate academic achievement standards. The State must describe how it will monitor and regularly evaluate each such LEA to ensure that the LEA provides sufficient training such that school staff who participate as members of an IEP team or other placement team understand and implement the guidelines established by the State under paragraph (d) of this section so that all students are appropriately assessed; and

(C) The State will address any disproportionality in the percentage of students taking an alternate assessment aligned with alternate academic achievement standards as identified through the data provided in accordance with paragraph (c)(4)(ii)(A) of this section; and

(v) If the State is requesting to extend a waiver for an additional year, meet the requirements in paragraph (c)(4)(i) through (iv) of this section and demonstrate substantial progress towards achieving each component of the prior year's plan and timeline required under paragraph (c)(4)(iv) of this section.

(5) A State must report separately to the Secretary, under section 1111(h)(5) of the Act, the number and percentage of children with disabilities under

paragraph (a)(1)(i) and (ii) of this section taking—

(i) General assessments described in § 200.2;

(ii) General assessments with accommodations; and

(iii) Alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section.

(6) A State may not develop, or implement for use under this part, any alternate or modified academic achievement standards that are not alternate academic achievement standards for students with the most significant cognitive disabilities that meet the requirements of section 1111(b)(1)(E) of the Act.

(7) For students with the most significant cognitive disabilities, a computer-adaptive alternate assessment aligned with alternate academic achievement standards must—

(i) Assess a student's academic achievement based on the challenging State academic content standards for the grade in which the student is enrolled;

(ii) Meet the requirements for alternate assessments aligned with alternate academic achievement standards under paragraph (c) of this section; and

(iii) Meet the requirements in § 200.2, except that the alternate assessment need not measure a student's academic proficiency based on the challenging State academic achievement standards for the grade in which the student is enrolled and growth toward those standards.

(d) *State guidelines for students with the most significant cognitive disabilities.* If a State adopts alternate academic achievement standards for students with the most significant cognitive disabilities and administers an alternate assessment aligned with those standards, the State must—

(1) Establish, consistent with section 612(a)(16)(C) of the IDEA, and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining, on a case-by-case basis, which students with the most significant cognitive disabilities will be assessed based on alternate academic achievement standards. Such guidelines must include a State definition of ''students with the most significant cognitive disabilities'' that addresses factors related to cognitive functioning and adaptive behavior, such that—

(i) The identification of a student as having a particular disability as defined in the IDEA or as an English learner does not determine whether a student is a student with the most significant cognitive disabilities;

(ii) A student with the most significant cognitive disabilities is not identified solely on the basis of the student's previous low academic achievement, or the student's previous need for accommodations to participate in general State or districtwide assessments; and

(iii) A student is identified as having the most significant cognitive disabilities because the student requires extensive, direct individualized instruction and substantial supports to achieve measurable gains on the challenging State academic content standards for the grade in which the student is enrolled;

(2) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on a student's education resulting from taking an alternate assessment aligned with alternate academic achievement standards, such as how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(3) Ensure that parents of students selected to be assessed using an alternate assessment aligned with alternate academic achievement standards under the State's guidelines in paragraph (d) of this section are informed, consistent with § 200.2(e), that their child's achievement will be measured based on alternate academic achievement standards, and how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(4) Not preclude a student with the most significant cognitive disabilities

who takes an alternate assessment aligned with alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma;

(5) Promote, consistent with requirements under the IDEA, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum that is based on the State's academic content standards for the grade in which the student is enrolled;

(6) Incorporate the principles of universal design for learning, to the extent feasible, in any alternate assessments aligned with alternate academic achievement standards that the State administers consistent with § 200.2(b)(2)(ii); and

(7) Develop, disseminate information on, and promote the use of appropriate accommodations consistent with paragraph (b) of this section to ensure that a student with significant cognitive disabilities who does not meet the criteria in paragraph (a)(1)(ii) of this section—

(i) Participates in academic instruction and assessments for the grade in which the student is enrolled; and

(ii) Is assessed based on challenging State academic standards for the grade in which the student is enrolled.

(e) *Definitions with respect to students with disabilities.* Consistent with 34 CFR 300.5, ''assistive technology device'' means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(f) *English learners in general.* (1) Consistent with § 200.2 and paragraphs (g) and (i) of this section, a State must assess English learners in its academic assessments required under § 200.2 in a valid and reliable manner that includes—

(i) Appropriate accommodations with respect to a student's status as an English learner and, if applicable, the student's status under paragraph (a) of this section. A State must—

(A) Develop appropriate accommodations for English learners;

(B) Disseminate information and resources to, at a minimum, LEAs, schools, and parents; and

(C) Promote the use of such accommodations to ensure that all English learners are able to participate in academic instruction and assessments; and

(ii) To the extent practicable, assessments in the language and form most likely to yield accurate and reliable information on what those students know and can do to determine the students' mastery of skills in academic content areas until the students have achieved English language proficiency consistent with the standardized, statewide exit procedures in section 3113(b)(2) of the Act.

(2) To meet the requirements under paragraph (f)(1) of this section, the State must—

(i) Ensure that the use of appropriate accommodations under paragraph (f)(1)(i) of this section and, if applicable, under paragraph (b) of this section does not deny an English learner—

(A) The opportunity to participate in the assessment; and

(B) Any of the benefits from participation in the assessment that are afforded to students who are not English learners; and

(ii) In its State plan, consistent with section 1111(a) of the Act—

(A) Provide its definition for ''languages other than English that are present to a significant extent in the participating student population,'' consistent with paragraph (f)(4) of this section, and identify the specific languages that meet that definition;

(B) Identify any existing assessments in languages other than English, and specify for which grades and content areas those assessments are available;

(C) Indicate the languages identified under paragraph (f)(2)(ii)(A) of this section for which yearly student academic assessments are not available and are needed; and

(D) Describe how it will make every effort to develop assessments, at a minimum, in languages other than English that are present to a significant extent in the participating student population including by providing—

(*1*) The State's plan and timeline for developing such assessments, including a description of how it met the requirements of paragraph (f)(4) of this section;

(*2*) A description of the process the State used to gather meaningful input on the need for assessments in languages other than English, collect and respond to public comment, and consult with educators; parents and families of English learners; students, as appropriate; and other stakeholders; and

(*3*) As applicable, an explanation of the reasons the State has not been able to complete the development of such assessments despite making every effort.

(3) A State may request assistance from the Secretary in identifying linguistically accessible academic assessments that are needed.

(4) In determining which languages other than English are present to a significant extent in a State's participating student population, a State must, at a minimum—

(i) Ensure that its definition of ''languages other than English that are present to a significant extent in the participating student population'' encompasses at least the most populous language other than English spoken by the State's participating student population;

(ii) Consider languages other than English that are spoken by distinct populations of English learners, including English learners who are migratory, English learners who were not born in the United States, and English learners who are Native Americans; and

(iii) Consider languages other than English that are spoken by a significant portion of the participating student population in one or more of a State's LEAs as well as languages spoken by a significant portion of the participating student population across grade levels.

(g) *Assessing reading/language arts in English for English learners.* (1) A State must assess, using assessments written in English, the achievement of an English learner in meeting the State's reading/language arts academic standards if the student has attended schools in the United States, excluding Puerto Rico and, if applicable, students in Native American language schools or programs consistent with paragraph (j) of this section, for three or more consecutive years.

(2) An LEA may continue, for no more than two additional consecutive years, to assess an English learner under paragraph (g)(1) of this section if the LEA determines, on a case-by-case individual basis, that the student has not reached a level of English language proficiency sufficient to yield valid and reliable information on what the student knows and can do on reading/language arts assessments written in English.

(3) The requirements in paragraph (g)(1)–(2) of this section do not permit a State or LEA to exempt English learners from participating in the State assessment system.

(h) *Assessing English language proficiency of English learners.* (1) Each State must—

(i) Develop a uniform, valid, and reliable statewide assessment of English language proficiency, including reading, writing, speaking, and listening skills; and

(ii) Require each LEA to use such assessment to assess annually the English language proficiency, including reading, writing, speaking, and listening skills, of all English learners in kindergarten through grade 12 in schools served by the LEA.

(2) The assessment under paragraph (h)(1) of this section must—

(i) Be aligned with the State's English language proficiency standards under section 1111(b)(1)(F) of the Act;

(ii) Be developed and used consistent with the requirements of § 200.2(b)(2), (4), and (5); and

(iii) Provide coherent and timely information about each student's attainment of the State's English language proficiency standards to parents consistent with § 200.2(e) and section 1112(e)(3) of the Act.

(3) If a State develops a computer-adaptive assessment to measure English language proficiency, the State must ensure that the computer-adaptive assessment—

(i) Assesses a student's language proficiency, which may include growth toward proficiency, in order to measure the student's acquisition of English; and

(ii) Meets the requirements for English language proficiency assessments in paragraph (h) of this section.

(4)(i) A State must provide appropriate accommodations that are necessary to measure a student's English language proficiency relative to the State's English language proficiency standards under section 1111(b)(1)(F) of the Act for each English learner covered under paragraph (a)(1)(i) or (iii) of this section.

(ii) If an English learner has a disability that precludes assessment of the student in one or more domains of the English language proficiency assessment required under section 1111(b)(2)(G) of the Act such that there are no appropriate accommodations for the affected domain(s) (e.g., a nonverbal English learner who because of an identified disability cannot take the speaking portion of the assessment), as determined, on an individualized basis, by the student's IEP team, 504 team, or by the individual or team designated by the LEA to make these decisions under title II of the ADA, as specified in paragraph (b)(1) of this section, a State must assess the student's English language proficiency based on the remaining domains in which it is possible to assess the student.

(5) A State must provide for an alternate English language proficiency assessment for each English learner covered under paragraph (a)(1)(ii) of this section who cannot participate in the assessment under paragraph (h)(1) of this section even with appropriate accommodations.

(i) *Recently arrived English learners.* (1)(i) A State may exempt a recently arrived English learner, as defined in paragraph (k)(2) of this section, from one administration of the State's reading/language arts assessment under § 200.2 consistent with section 1111(b)(3)(A)(i)(I) of the Act.

(ii) If a State does not assess a recently arrived English learner on the State's reading/language arts assessment consistent with section 1111(b)(3)(A)(i)(I) of the Act, the State must count the year in which the assessment would have been administered as the first of the three years in which the student may take the State's reading/language arts assessment in a native language consistent with paragraph (g)(1) of this section.

(iii) A State and its LEAs must report on State and local report cards required under section 1111(h) of the Act the number of recently arrived English learners who are not assessed on the State's reading/language arts assessment.

(iv) Nothing in this section relieves an LEA from its responsibility under applicable law to provide recently arrived English learners with appropriate instruction to enable them to attain English language proficiency as well as grade-level content knowledge in reading/language arts, mathematics, and science.

(2) A State must assess the English language proficiency of a recently arrived English learner pursuant to paragraph (h) of this section.

(3) A State must assess the mathematics and science achievement of a recently arrived English learner pursuant to § 200.2 with the frequency described in § 200.5(a).

(j) *Students in Native American language schools or programs.* (1) Except as provided in paragraph (j)(2) of this section, a State is not required to assess, using an assessment written in English, student achievement in meeting the challenging State academic standards in reading/language arts, mathematics, or science for a student who is enrolled in a school or program that provides instruction primarily in a Native American language if—

(i) The State provides such an assessment in the Native American language to all students in the school or program, consistent with the requirements of § 200.2;

(ii) The State submits evidence regarding any such assessment in the Native American language for peer review as part of its State assessment system, consistent with § 200.2(d), and receives approval that the assessment meets all applicable requirements; and

(iii) For an English learner, as defined in section 8101(20)(C)(ii) of the Act, the State continues to assess the

English language proficiency of such English learner, using the annual English language proficiency assessment required under paragraph (h) of this section, and provides appropriate services to enable him or her to attain proficiency in English.

(2) Notwithstanding paragraph (g) of this section, the State must assess under §200.5(a)(1)(i)(B), using assessments written in English, the achievement of each student enrolled in such a school or program in meeting the challenging State academic standards in reading/language arts, at a minimum, at least once in grades 9 through 12.

(k) *Definitions with respect to English learners and students in Native American language schools or programs.* For the purpose of this section—

(1) ''Native American'' means ''Indian'' as defined in section 6151 of the Act, which includes Alaska Native and members of Federally recognized or State-recognized tribes; Native Hawaiian; and Native American Pacific Islander.

(2) A ''recently arrived English learner'' is an English learner who has been enrolled in schools in the United States for less than twelve months.

(3) The phrase ''schools in the United States'' includes only schools in the 50 States and the District of Columbia.

(Approved by the Office of Management and Budget under control number 1810–0576 and 1810–0581)

(Authority: 20 U.S.C. 1221e-3, 1400 *et seq.*, 3474, 6311(b)(2), 6571, 7491(3), and 7801(20) and (34); 25 U.S.C. 2902; 29 U.S.C. 794; 42 U.S.C. 2000d–1), 12102(1), and 12131; 34 CFR 300.5)

[81 FR 88934, Dec. 8, 2016]

§ 200.7 [Reserved]

§ 200.8 Assessment reports.

(a) *Student reports.* A State's academic assessment system must produce individual student interpretive, descriptive, and diagnostic reports that—

(1)(i) Include information regarding achievement on the academic assessments under §200.2 measured against the State's student academic achievement standards; and

(ii) Help parents, teachers, and principals to understand and address the specific academic needs of students; and

(2) Are provided to parents, teachers, and principals—

(i) As soon as is practicable after the assessment is given; and

(ii) In an understandable and uniform format, consistent with §200.2(e).

(b) *Itemized score analyses for LEAs and schools.* (1) A State's academic assessment system must produce and report to LEAs and schools itemized score analyses, consistent with §200.2(b)(13), so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students.

(2) The requirement to report itemized score analyses in paragraph (b)(1) of this section does not require the release of test items.

(Approved by the Office of Management and Budget under control number 1810–0576)

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(b)(2)(B)(x) and (xii), and 6571)

[67 FR 45042, July 5, 2002, as amended at 81 FR 88938, Dec. 8, 2016]

§ 200.9 Deferral of assessments.

(a) A State may defer the start or suspend the administration of the assessments required under §200.2 for one year for each year for which the amount appropriated for State assessment grants under section 1002(b) of the Act is less than $369,100,000.

(b) A State may not cease the development of the assessments referred to in paragraph (a) of this section even if sufficient funds are not appropriated under section 1002(b) of the Act.

(Authority: 20 U.S.C. 1221e–3, 3474, 6302(b), 6311(b)(2)(I), 6363(a), and 6571)

[81 FR 88938, Dec. 8, 2016]

§ 200.10 Applicability of a State's academic assessments to private schools and private school students.

(a) Nothing in §200.1 or §200.2 requires a private school, including a private school whose students receive services under subpart A of this part, to participate in a State's academic assessment system.

(b)(1) If an LEA provides services to eligible private school students under subpart A of this part, the LEA must,

through timely consultation with appropriate private school officials, determine how services to eligible private school students will be academically assessed and how the results of that assessment will be used to improve those services.

(2) The assessments referred to in paragraph (b)(1) of this section may be the State's academic assessments under § 200.2 or other appropriate academic assessments.

(Authority: 20 U.S.C. 6320, 7886(a))

[67 FR 45043, July 5, 2002]

PARTICIPATION IN NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (NAEP)

§ 200.11 Participation in NAEP.

(a) *State participation.* Each State that receives funds under this subpart must participate in biennial State academic assessments of fourth and eighth grade reading and mathematics under the State National Assessment of Educational Progress (NAEP), if the Department pays the costs of administering those assessments.

(b) *Local participation.* In accordance with section 1112(c)(3) of the ESEA, and notwithstanding section 303(d)(1) of the National Assessment of Educational Progress Authorization Act, an LEA that receives funds under this subpart must participate, if selected, in the State-NAEP assessments referred to in paragraph (a) of this section.

(c) *Report cards.* Each State and LEA must report on its annual State and LEA report card, respectively, the most recent available academic achievement results in grades four and eight on the State's NAEP reading and mathematics assessments under paragraph (a) of this section, compared to the national average of such results. The report cards must include—

(1) The percentage of students at each achievement level reported on the NAEP in the aggregate and, for State report cards, disaggregated for each subgroup described in section 1111(c)(2) of the ESEA; and

(2) The participation rates for children with disabilities and for English learners.

[84 FR 31672, July 2, 2019]

§§ 200.12–200.24 [Reserved]

SCHOOLWIDE PROGRAMS

§ 200.25 Schoolwide programs in general.

(a) *Purpose.* (1) The purpose of a schoolwide program is to improve academic achievement throughout a school so that all students, particularly the lowest-achieving students, demonstrate proficiency related to the challenging State academic standards under § 200.1.

(2) The improved achievement is to result from improving the entire educational program of the school.

(b) *Eligibility.* (1) A school may operate a schoolwide program if—

(i) The school's LEA determines that the school serves an eligible attendance area or is a participating school under section 1113 of the ESEA; and

(ii) Except as provided under paragraph (b)(1)(iii) of this section, for the initial year of the schoolwide program—

(A) The school serves a school attendance area in which not less than 40 percent of the children are from low-income families; or

(B) Not less than 40 percent of the children enrolled in the school are from low-income families.

(iii) A school that does not meet the poverty percentage in paragraph (b)(1)(ii) of this section may operate a schoolwide program if the school receives a waiver from the State to do so, after taking into account how a schoolwide program will best serve the needs of the students in the school in improving academic achievement and other factors.

(2) In determining the percentage of children from low-income families under paragraph (b)(1) of this section, the LEA may use a measure of poverty that is different from the measure or measures of poverty used by the LEA to identify and rank school attendance areas for eligibility and participation under this subpart.

(c) *Participating students and services.* A school operating a schoolwide program is not required to identify—

(1) Particular children as eligible to participate; or

(2) Individual services as supplementary.

(d) *Supplemental funds.* In accordance with the method of determination described in section 1118(b)(2) of the ESEA, a school participating in a schoolwide program must use funds available under this subpart and under any other Federal program included under paragraph (e) of this section and § 200.29 only to supplement the total amount of funds that would, in the absence of the funds under this subpart, be made available from non-Federal sources for that school, including funds needed to provide services that are required by law for children with disabilities and English learners.

(e) *Consolidation of funds.* An eligible school may, consistent with § 200.29, consolidate and use funds or services under subpart A of this part, together with other Federal, State, and local funds that the school receives, to operate a schoolwide program in accordance with §§ 200.25 through 200.29.

(f) *Prekindergarten program.* A school operating a schoolwide program may use funds made available under this subpart to establish or enhance prekindergarten programs for children below the age of 6.

[67 FR 71718, Dec. 2, 2002, as amended at 84 FR 31672, July 2, 2019]

§ 200.26 Core elements of a schoolwide program.

(a) *Comprehensive needs assessment.* (1) A school operating a schoolwide program must conduct a comprehensive needs assessment of the entire school that—

(i) Takes into account information on the academic achievement of all students in the school, including all subgroups of students under section 1111(c)(2) of the ESEA and migratory children as defined in section 1309(3) of the ESEA, relative to the challenging State academic standards under § 200.1 and any other factors as determined by the LEA to—

(A) Help the school understand the subjects and skills for which teaching and learning need to be improved; and

(B) Identify the specific academic needs of students and subgroups of students who are failing, or are at risk of failing, to meet the challenging State academic standards; and

(ii) Assesses the needs of the school relative to each of the components of the schoolwide program under section 1114(b)(7) of the ESEA.

(2) The comprehensive needs assessment must be developed with the participation of individuals who will carry out the schoolwide program plan.

(3) The school must document how it conducted the needs assessment, the results it obtained, and the conclusions it drew from those results.

(b) *Comprehensive plan.* Using data from the comprehensive needs assessment under paragraph (a) of this section, a school that wishes to operate a schoolwide program must develop a comprehensive plan, in accordance with section 1114(b) of the ESEA, that describes how the school will improve academic achievement for all students in the school, but particularly the needs of those students who are failing, or are at risk of failing, to meet the challenging State academic standards and any other factors as determined by the LEA.

(c) *Evaluation.* A school operating a schoolwide program must—

(1) Regularly monitor the implementation of, and results achieved by, the schoolwide program, using data from the State's annual assessments and other indicators of academic achievement;

(2) Determine whether the schoolwide program has been effective in increasing the achievement of students in meeting the challenging State academic standards, particularly for those students who had been furthest from achieving the standards; and

(3) Revise the plan, as necessary, based on the results of the regular monitoring, to ensure continuous improvement of students in the schoolwide program.

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(2) Determine whether the schoolwide program has been effective in increasing the achievement of students in

meeting the challenging State academic standards, particularly for those students who had been furthest from achieving the standards; and

(3) Revise the plan, as necessary, based on the results of the regular monitoring, to ensure continuous improvement of students in the schoolwide program.

(Approved by the Office of Management and Budget under control number 1810–0581)

[67 FR 71718, Dec. 2, 2002, as amended at 84 FR 31673, July 2, 2019]

§§ 200.27–200.28 [Reserved]

§ 200.29 Consolidation of funds in a schoolwide program.

(a)(1) In addition to funds under subpart A of this part, a school may consolidate and use in its schoolwide program Federal funds from any program administered by the Secretary that is included in the most recent notice published for this purpose in the FEDERAL REGISTER.

(2) For purposes of §§ 200.25 through 200.29, the authority to consolidate funds from other Federal programs also applies to services provided to the school with those funds.

(b)(1) Except as provided in paragraphs (b)(2) and (c) of this section, a school that consolidates and uses in a schoolwide program funds from any other Federal program administered by the Secretary—

(i) Is not required to meet the statutory or regulatory requirements of that program applicable at the school level; but

(ii) Must meet the intent and purposes of that program to ensure that the needs of the intended beneficiaries of that program are addressed.

(2) A school that chooses to consolidate funds from other Federal programs must meet the requirements of those programs relating to—

(i) Health;

(ii) Safety;

(iii) Civil rights;

(iv) Student and parental participation and involvement;

(v) Services to private school children;

(vi) Maintenance of effort;

(vii) Comparability of services;

(viii) Use of Federal funds to supplement, not supplant non-Federal funds in accordance with § 200.25(d); and

(ix) Distribution of funds to SEAs or LEAs.

(c) A school must meet the following requirements if the school consolidates and uses funds from these programs in its schoolwide program:

(1) *Migrant education.* Before the school chooses to consolidate in its schoolwide program funds received under part C of Title I of the ESEA, the school must—

(i) Use these funds, in consultation with parents of migratory children or organizations representing those parents, or both, first to meet the unique educational needs of migratory students that result from the effects of their migratory lifestyle, and those other needs that are necessary to permit these students to participate effectively in school, as identified through the comprehensive Statewide needs assessment under § 200.83; and

(ii) Document that these needs have been met.

(2) *Indian education.* The school may consolidate funds received under subpart 1 of part A of title VI of the ESEA if—

(i) The parent committee established by the LEA under section 6114(c)(4) of the ESEA approves the inclusion of these funds;

(ii) The schoolwide program is consistent with the purpose described in section 6111 of the ESEA; and

(iii) The LEA identifies in its application how the use of such funds in a schoolwide program will produce benefits to Indian students that would not be achieved if the funds are not used in a schoolwide program.

(3) *Special education.* (i) The school may consolidate funds received under part B of the IDEA.

(ii) However, the amount of funds consolidated may not exceed the amount received by the LEA under part B of IDEA for that fiscal year, divided by the number of children with disabilities in the jurisdiction of the LEA, and multiplied by the number of children with disabilities participating in the schoolwide program.

(iii) The school may also consolidate funds received under section 7003(d) of

the ESEA (Impact Aid) for children with disabilities in a schoolwide program.

(iv) A school that consolidates funds under part B of IDEA or section 7003(d) of the ESEA may use those funds for any activities under its schoolwide program plan but must comply with all other requirements of part B of IDEA, to the same extent it would if it did not consolidate funds under part B of IDEA or section 7003(d) of the ESEA in the schoolwide program.

(d) A school that consolidates and uses in a schoolwide program funds under subpart A of this part or from any other Federal program administered by the Secretary—

(1) Is not required to maintain separate fiscal accounting records, by program, that identify the specific activities supported by those particular funds; but

(2) Must maintain records that demonstrate that the schoolwide program, as a whole, addresses the intent and purposes of each of the Federal programs whose funds were consolidated to support the schoolwide program.

(e) Each State must modify or eliminate State fiscal and accounting barriers so that schools can easily consolidate funds from other Federal, State, and local sources in their schoolwide programs to improve educational opportunities and reduce unnecessary fiscal and accounting requirements.

[67 FR 71720, Dec. 2, 2002; 68 FR 1008, Jan. 8, 2003; 84 FR 31673, July 2, 2019]

§§ 200.30–200.54 [Reserved]

QUALIFICATIONS OF PARAPROFESSIONALS

§§ 200.55–200.57 [Reserved]

§ 200.58 Qualifications of paraprofessionals.

(a) *Applicability*. (1) An LEA must ensure that each paraprofessional who is hired by the LEA and who works in a program supported with funds under subpart A of this part meets the requirements in paragraph (b) of this section and, except as provided in paragraph (e) of this section, the requirements in either paragraph (c) or (d) of this section.

(2) For the purpose of this section, the term ''paraprofessional''—

(i) Means an individual who provides instructional support consistent with § 200.59; and

(ii) Does not include individuals who have only non-instructional duties (such as providing technical support for computers, providing personal care services, or performing clerical duties).

(3) For the purpose of paragraph (a) of this section, a paraprofessional working in ''a program supported with funds under subpart A of this part'' is—

(i) A paraprofessional in a targeted assisted school who is paid with funds under subpart A of this part;

(ii) A paraprofessional in a schoolwide program school; or

(iii) A paraprofessional employed by an LEA with funds under subpart A of this part to provide instructional support to a public school teacher covered under § 200.55 who provides equitable services to eligible private school students under § 200.62.

(b) *All paraprofessionals*. A paraprofessional covered under paragraph (a) of this section, regardless of the paraprofessional's hiring date, must have earned a secondary school diploma or its recognized equivalent.

(c) *New paraprofessionals*. A paraprofessional covered under paragraph (a) of this section who is hired after January 8, 2002 must have—

(1) Completed at least two years of study at an institution of higher education;

(2) Obtained an associate's or higher degree; or

(3)(i) Met a rigorous standard of quality, and can demonstrate—through a formal State or local academic assessment—knowledge of, and the ability to assist in instructing, as appropriate—

(A) Reading/language arts, writing, and mathematics; or

(B) Reading readiness, writing readiness, and mathematics readiness.

(ii) A secondary school diploma or its recognized equivalent is necessary, but not sufficient, to meet the requirement in paragraph (c)(3)(i) of this section.

(d) *Existing paraprofessionals*. Each paraprofessional who was hired on or before January 8, 2002 must meet the requirements in paragraph (c) of this section no later than January 8, 2006.

(e) *Exceptions*. A paraprofessional does not need to meet the requirements

in paragraph (c) or (d) of this section if the paraprofessional—

(1)(i) Is proficient in English and a language other than English; and

(ii) Acts as a translator to enhance the participation of limited English proficient children under subpart A of this part; or

(2) Has instructional-support duties that consist solely of conducting parental involvement activities.

(Authority: 20 U.S.C. 6319(c)–(f))

[82 FR 31707, July 7, 2017]

§§ 200.59–200.60 [Reserved]

§ 200.61 Parents' right to know.

(a) *Information for parents.* (1) At the beginning of each school year, an LEA that receives funds under this subpart must notify the parents of each student attending a title I school that the parents may request, and the LEA will provide the parents on request and in a timely manner, information regarding the professional qualifications of the student's classroom teachers, including, at a minimum, the following:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.

(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.

(iii) Whether the teacher is teaching in the field of discipline of the certification of the teacher.

(iv) Whether the parent's child is provided services by paraprofessionals and, if so, their qualifications.

(2) A school that participates under this subpart must provide to each parent—

(i) Information on the level of achievement and academic growth, if applicable and available, of the parent's child on each of the State academic assessments required under section 1111(b)(2) of the ESEA; and

(ii) Timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks by, a teacher who does not meet applicable State certification or licensure requirements at the grade level and subject area in which the teacher has been assigned.

(b) *Testing transparency.* (1) At the beginning of each school year, an LEA that receives funds under this subpart must notify the parents of each student attending a title I school that the parents may request, and the LEA will provide the parents on request in a timely manner, information regarding any State or LEA policy regarding student participation in any assessments mandated by section 1111(b)(2) of the ESEA and by the State or LEA, which must include a policy, procedure, or parental right to opt the child out of such assessment, where applicable.

(2) Each LEA that receives funds under this subpart must make widely available through public means (including by posting in a clear and easily accessible manner on the LEA's website and, where practicable, on the website of each school served by the LEA) for each grade served by the LEA, information on each assessment required by the State to comply with section 1111 of the ESEA, other assessments required by the State, and, where such information is available and feasible to report, assessments required districtwide by the LEA, consistent with section 1112(e)(2)(B)–(C) of the ESEA.

(c) *Language Instruction for English learners*—(1) *Notice.* (i) An LEA using funds under this subpart or title III of the ESEA to provide a language instruction educational program as determined under title III must, not later than 30 days after the beginning of the school year unless paragraph (c)(1)(ii) of this section applies, inform parents of an English learner identified for participation or participating in such a program of the information in section 1112(e)(3)(A) of the ESEA.

(ii) For a child who has not been identified as an English learner prior to the beginning of the school year but is identified as an English learner during such school year, an LEA must notify the child's parents during the first two weeks of the child being placed in a language instruction educational program consistent with paragraph (c)(1)(i) of this section.

(2) *Parental participation.* An LEA receiving funds under this subpart must

implement an effective means of outreach, consistent with paragraph (c)(3) of this section, to parents of English learners to inform parents how the parents can—

(i) Be involved in the education of their children; and

(ii) Be active participants in assisting their children to—

(A) Attain English proficiency;

(B) Achieve at high levels within a well-rounded education; and

(C) Meet the challenging State academic standards expected of all students.

(3) *Parent meetings.* Implementing an effective means of outreach under paragraph (c)(2) of this section must include holding, and sending notice of opportunities for, regular meetings for the purpose of formulating and responding to recommendations from parents of English learners assisted under this subpart or title III.

(4) *Basis for admission or exclusion.* A student may not be admitted to, or excluded from, any federally assisted education program on the basis of a surname or language-minority status.

(d) *Notice and format.* The notice and information provided to parents under this section must meet the requirements in § 200.2(e).

[84 FR 31673, July 2, 2019]

PARTICIPATION OF ELIGIBLE CHILDREN IN PRIVATE SCHOOLS

§ 200.62 Responsibilities for providing services to private school children.

(a) After timely and meaningful consultation with appropriate officials of private schools, an LEA must—

(1) In accordance with §§ 200.62 through 200.67 and section 1117 of the ESEA, provide, individually or in combination, as requested by private school officials to best meet the needs of eligible children, special educational services, instructional services (including evaluations to determine the progress being made in meeting such students' academic needs), counseling, mentoring, one-on-one tutoring, or other benefits under this subpart (such as dual or concurrent enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment) that address their needs, on an equitable basis and in a timely manner, to eligible children who are enrolled in private elementary and secondary schools; and

(2) Ensure that teachers and families of participating private school children participate, on an equitable basis, in accordance with § 200.65 in services and activities developed pursuant to section 1116 of the ESEA.

(b)(1) Eligible private school children are children who—

(i) Reside in participating public school attendance areas of the LEA, regardless of whether the private school they attend is located in the LEA; and

(ii) Meet the criteria in section 1115(c) of the ESEA.

(2) Among the eligible private school children, the LEA must select children to participate, consistent with § 200.64.

(c) The services and other benefits an LEA provides under this section must be secular, neutral and nonideological.

[82 FR 31709, July 7, 2017, as amended at 84 FR 31674, July 2, 2019]

§ 200.63 Consultation.

(a) In order to have timely and meaningful consultation, an LEA must consult with appropriate officials of private schools during the design and development of the LEA's program for eligible private school children, as well as their teachers and families under § 200.65. The goal of consultation is reaching agreement on how to provide equitable and effective programs for eligible private school children, and the results of that agreement must be transmitted to the ombudsman designated under § 200.68.

(b) At a minimum, the LEA must consult on the following:

(1) How the LEA will identify the needs of eligible private school children.

(2) What services the LEA will offer to eligible private school children.

(3) How and when the LEA will make decisions about the delivery of services.

(4) How, where, and by whom the LEA will provide services to eligible private school children.

(5) How the LEA will assess academically the services to eligible private school children in accordance with

§ 200.10, and how the LEA will use the results of that assessment to improve Title I services.

(6) The size and scope of the equitable services that the LEA will provide to eligible private school children, and, consistent with § 200.64(a), the proportion of funds that the LEA will allocate for these services, and how the LEA determines that proportion of funds.

(7) The method or sources of data that the LEA will use under § 200.64(a) to determine the number of private school children from low-income families residing in participating public school attendance areas, including whether the LEA will extrapolate data if a survey is used.

(8) Whether the LEA will provide services directly or through a separate government agency, consortium, entity, or third-party contractor.

(9) Whether to provide equitable services to eligible private school children—

(i) By creating a pool or pools of funds with all of the funds allocated under § 200.64(a)(2) based on all the children from low-income families in a participating school attendance area who attend private schools; or

(ii) In a participating school attendance area who attend private schools with the proportion of funds allocated under § 200.64(a)(2) based on the number of children from low-income families who attend private schools.

(10) When, including the approximate time of day, the LEA will provide services.

(11) Whether the LEA will consolidate and use funds under subpart A of this part with eligible funds available for services to private school children under applicable programs, as defined in section 8501(b)(1) of the ESEA, to provide services to eligible private school children.

(12) The equitable services the LEA will provide to teachers and families of participating private school children.

(c)(1) Consultation by the LEA must—

(i) Include meetings of the LEA and appropriate officials of the private schools; and

(ii) Occur before the LEA makes any decision that affects the opportunity of eligible private school children to participate in Title I programs.

(2) The LEA must meet with officials of the private schools throughout the implementation and assessment of the Title I services.

(d)(1) Consultation must include—

(i) A discussion of service delivery mechanisms the LEA can use to provide equitable services to eligible private school children; and

(ii) A thorough consideration and analysis of the views of the officials of the private schools on the provision of services through a contract with a third-party provider.

(2) If the LEA disagrees with the views of the officials of the private schools on the provision of services through a contract, the LEA must provide in writing to the officials of the private schools the reasons why the LEA chooses not to use a contractor.

(e)(1)(i) The LEA must maintain in its records and provide to the SEA a written affirmation, signed by officials of each private school with participating children or appropriate private school representatives, that the required consultation has occurred.

(ii) The LEA's written affirmation must provide the option for private school officials to indicate their belief that timely and meaningful consultation has not occurred or that the program design is not equitable with respect to eligible private school children.

(2) If the officials of the private schools do not provide the affirmations within a reasonable period of time, the LEA must submit to the SEA documentation that the required consultation occurred.

(f)(1) An official of a private school has the right to complain to the SEA that the LEA did not—

(i) Engage in timely and meaningful consultation;

(ii) Consider the views of the official of the private school; or

(iii) Make a decision that treats the private school students equitably.

(2) If a private school official wishes to file a complaint, the official must provide the basis of the noncompliance by the LEA to the SEA and the LEA must forward the appropriate documentation to the SEA.

(3) An SEA must provide equitable services directly or through contracts with public or private agencies, organizations, or institutions if the appropriate private school officials have—

(i) Requested that the SEA provide such services directly; and

(ii) Demonstrated that the LEA has not met the requirements of §§ 200.62 through 200.67 in accordance with the SEA's procedures for making such a request.

[82 FR 31709, July 7, 2017, as amended at 84 FR 31674, July 2, 2019]

§ 200.64 Factors for determining equitable participation of private school children.

(a) *Equal expenditures.* (1) Funds expended by an LEA under this subpart for services for eligible private school children in the aggregate must be equal to the proportion of funds generated by private school children from low-income families who reside in participating public school attendance areas under paragraph (a)(2) of this section.

(2) An LEA must determine the proportional share of funds available for services for eligible private school children based on the total amount of funds received by the LEA under subpart 2 of part A of title I of the ESEA prior to any allowable expenditures or transfers by the LEA.

(3)(i) To obtain a count of private school children from low-income families who reside in participating public school attendance areas, the LEA may—

(A) Use the same poverty data the LEA uses to count public school children;

(B)(*1*) Use comparable poverty data from a survey of families of private school students that, to the extent possible, protects the families' identity; and

(*2*) Extrapolate data from the survey based on a representative sample if complete actual data are unavailable;

(C) Use comparable poverty data from a different source, such as scholarship applications;

(D) Apply the low-income percentage of each participating public school attendance area to the number of private school children who reside in that school attendance area; or

(E) Use an equated measure of low income correlated with the measure of low income used to count public school children.

(ii) An LEA may count private school children from low-income families every year or every two years.

(iii) After timely and meaningful consultation in accordance with § 200.63, the LEA shall have the final authority in determining the method used to calculate the number of private school children from low-income families.

(4) An SEA must provide notice in a timely manner to appropriate private school officials in the State of the allocation of funds for educational services and other benefits that LEAs have determined are available for eligible private school children.

(5) An LEA must obligate funds generated to provide equitable services for eligible private school children in the fiscal year for which the funds are received by the LEA.

(b) *Services on an equitable basis.* (1) The services that an LEA provides to eligible private school children must be equitable in comparison to the services and other benefits that the LEA provides to public school children participating under subpart A of this part.

(2) Services are equitable if the LEA—

(i) Addresses and assesses the specific needs and educational progress of eligible private school children on a comparable basis as public school children;

(ii) Meets the equal expenditure requirements under paragraph (a) of this section; and

(iii) Provides private school children with an opportunity to participate that—

(A) Is equitable to the opportunity provided to public school children; and

(B) Provides reasonable promise of the private school children achieving the high levels called for by the State's student academic achievement standards or equivalent standards applicable to the private school children.

(3)(i) The LEA may provide services to eligible private school children either directly or through arrangements

with another LEA or a third-party provider.

(ii) If the LEA contracts with a third-party provider—

(A) The provider must be independent of the private school; and

(B) The contract must be under the control and supervision of the LEA.

(4) After timely and meaningful consultation under § 200.63, the LEA must make the final decisions with respect to the services it will provide to eligible private school children.

[82 FR 31709, July 7, 2017, as amended at 84 FR 31675, July 2, 2019]

§ 200.65 Determining equitable participation of teachers and families of participating private school children.

(a) From the proportional share reserved for equitable services under § 200.77(d), an LEA shall ensure that teachers and families of participating private school children participate on an equitable basis in services and activities under this subpart.

(b) After consultation with appropriate private school officials, the LEA must provide services and activities under paragraph (a) of this section either—

(1) In conjunction with the LEA's services and activities for teachers and families; or

(2) Independently.

[84 FR 31675, July 2, 2019]

§ 200.66 Requirements to ensure that funds do not benefit a private school.

(a) An LEA must use funds under subpart A of this part to provide services that supplement, and in no case supplant, the services that would, in the absence of Title I services, be available to participating private school children.

(b)(1) The LEA must use funds under subpart A of this part to meet the special educational needs of participating private school children.

(2) The LEA may not use funds under subpart A of this part for—

(i) The needs of the private school; or

(ii) The general needs of children in the private school.

(Authority: 20 U.S.C. 6320(a), 6321(b))

[82 FR 31710, July 7, 2017]

§ 200.67 Requirements concerning property, equipment, and supplies for the benefit of private school children.

(a) The LEA must keep title to and exercise continuing administrative control of all property, equipment, and supplies that the LEA acquires with funds under subpart A of this part for the benefit of eligible private school children.

(b) The LEA may place equipment and supplies in a private school for the period of time needed for the program.

(c) The LEA must ensure that the equipment and supplies placed in a private school—

(1) Are used only for Title I purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The LEA must remove equipment and supplies from a private school if—

(1) The LEA no longer needs the equipment and supplies to provide Title I services; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than Title I purposes.

(e) The LEA may not use funds under subpart A of this part for repairs, minor remodeling, or construction of private school facilities.

[82 FR 31710, July 7, 2017]

§ 200.68 Ombudsman.

To help ensure equity for eligible private school children, teachers, and other educational personnel, an SEA must designate an ombudsman to monitor and enforce the requirements in §§ 200.62 through 200.67.

[84 FR 31675, July 2, 2019]

§ 200.69 [Reserved]

ALLOCATIONS TO LEAS

§ 200.70 Allocation of funds to LEAs in general.

(a) The Secretary allocates basic grants, concentration grants, targeted

grants, and education finance incentive grants, through SEAs, to each eligible LEA for which the Bureau of the Census has provided data on the number of children from low-income families residing in the school attendance areas of the LEA (hereinafter referred to as the ''Census list'').

(b) In establishing eligibility and allocating funds under paragraph (a) of this section, the Secretary counts children ages 5 to 17, inclusive (hereinafter referred to as ''formula children'')—

(1) From families below the poverty level based on the most recent satisfactory data available from the Bureau of the Census;

(2) From families above the poverty level receiving assistance under the Temporary Assistance for Needy Families program under Title IV of the Social Security Act;

(3) Being supported in foster homes with public funds; and

(4) Residing in local institutions for neglected children.

(c) Except as provided in §§ 200.72, 200.75, and 200.100, an SEA may not change the Secretary's allocation to any LEA that serves an area with a total census population of at least 20,000 persons.

(d) In accordance with § 200.74, an SEA may use an alternative method, approved by the Secretary, to distribute the State's share of basic grants, concentration grants, targeted grants, and education finance incentive grants to LEAs that serve an area with a total census population of less than 20,000 persons.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31710, July 7, 2017]

§ 200.71 LEA eligibility.

(a) *Basic grants.* An LEA is eligible for a basic grant if the number of formula children is—

(1) At least 10; and

(2) Greater than two percent of the LEA's total population ages 5 to 17 years, inclusive.

(b) *Concentration grants.* An LEA is eligible for a concentration grant if—

(1) The LEA is eligible for a basic grant under paragraph (a) of this section; and

(2) The number of formula children exceeds—

(i) 6,500; or

(ii) 15 percent of the LEA's total population ages 5 to 17 years, inclusive.

(c) *Targeted grants.* An LEA is eligible for a targeted grant if the number of formula children is—

(1) At least 10; and

(2) At least five percent of the LEA's total population ages 5 to 17 years, inclusive.

(d) *Education finance incentive grants.* An LEA is eligible for an education finance incentive grant if the number of formula children is—

(1) At least 10; and

(2) At least five percent of the LEA's total population ages 5 to 17 years, inclusive.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31710, July 7, 2017]

§ 200.72 Procedures for adjusting allocations determined by the Secretary to account for eligible LEAs not on the Census list.

(a) *General.* For each LEA not on the Census list (hereinafter referred to as a ''new'' LEA), an SEA must determine the number of formula children and the number of children ages 5 to 17, inclusive, in that LEA.

(b) *Determining LEA eligibility.* An SEA must determine basic grant, concentration grant, targeted grant, and education finance incentive grant eligibility for each new LEA and re-determine eligibility for the LEAs on the Census list, as appropriate, based on the number of formula children and children ages 5 to 17, inclusive, determined in paragraph (a) of this section.

(c) *Adjusting LEA allocations.* An SEA must adjust the LEA allocations calculated by the Secretary to determine allocations for eligible new LEAs based on the number of formula children determined in paragraph (a) of this section.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31711, July 7, 2017]

§ 200.73 Applicable hold-harmless provisions.

(a) *General.* (1) Except as authorized under paragraph (c) of this section and § 200.100(d)(2), an SEA may not reduce

the allocation of an eligible LEA below the hold-harmless amounts established under paragraph (a)(4) of this section.

(2) The hold-harmless protection limits the maximum reduction of an LEA's allocation compared to the LEA's allocation for the preceding year.

(3) Except as provided in § 200.100(d), an SEA must apply the hold-harmless requirement separately for basic grants, concentration grants, targeted grants, and education finance incentive grants as described in paragraph (a)(4) of this section.

(4) Under sections 1122(c) and 1125A(f)(3) of the ESEA, the hold-harmless percentage varies based on the LEA's proportion of formula children, as shown in the following table:

LEA's number of formula children ages 5 to 17, inclusive, as a percentage of its total population of children ages 5 to 17, inclusive	Hold-harmless percentage	Applicable grant formulas
(i) 30% or more	95	Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants.
(ii) 15% or more but less than 30%	90	
(iii) Less than 15%	85	

(b) *Targeted grants and education finance incentive grants.* The number of formula children used to determine the hold-harmless percentage is the number before applying the weights described in section 1125 and section 1125A of the ESEA.

(c) *Adjustment for insufficient funds.* If the amounts made available to the State are insufficient to pay the full amount that each LEA is eligible to receive under paragraph (a)(4) of this section, the SEA must ratably reduce the allocations for all LEAs in the State to the amount available.

(d) *Eligibility for hold-harmless protection.* (1) An LEA must meet the eligibility requirements for a basic grant, targeted grant, or education finance incentive grant under § 200.71 in order for the applicable hold-harmless provision to apply.

(2) An LEA not meeting the eligibility requirements for a concentration grant under § 200.71 must be paid its hold-harmless amount for four consecutive years.

(e) *Hold-harmless protection for a newly opened or significantly expanded charter school LEA.* An SEA must calculate a hold-harmless base for the prior year for a newly opened or significantly expanded charter school LEA that, as applicable, reflects the new or significantly expanded enrollment of the charter school LEA.

[82 FR 31711, July 7, 2017, as amended at 84 FR 31675, July 2, 2019]

§ 200.74 Use of an alternative method to distribute grants to LEAs with fewer than 20,000 residents.

(a) For eligible LEAs serving an area with a total census population of less than 20,000 persons (hereinafter referred to as ''small LEAs''), an SEA may apply to the Secretary to use an alternative method to distribute basic grant, concentration grant, targeted grant, and education finance incentive grant funds.

(b) In its application, the SEA must—

(1) Identify the alternative data it proposes to use; and

(2) Assure that it has established a procedure through which a small LEA that is dissatisfied with the determination of its grant may appeal directly to the Secretary.

(c) The SEA must base its alternative method on population data that best reflect the current distribution of children from low-income families among the State's small LEAs and use the same poverty measure consistently for small LEAs across the State for all Title I, part A programs.

(d) Based on the alternative poverty data selected, the SEA must—

(1) Re-determine eligibility of its small LEAs for basic grants, concentration grants, targeted grants, and education finance incentive grants in accordance with § 200.71;

(2) Calculate allocations for small LEAs in accordance with the provisions of sections 1124, 1124A, 1125, and 1125A of the ESEA, as applicable; and

(3) Ensure that each LEA receives the hold-harmless amount to which it is entitled under § 200.73.

(e) The amount of funds available for redistribution under each formula is the separate amount determined by the Secretary under sections 1124, 1124A, 1125, and 1125A of the ESEA for eligible small LEAs after the SEA has made the adjustments required under § 200.72(c).

(f) If the amount available for redistribution to small LEAs under an alternative method is not sufficient to satisfy applicable hold-harmless requirements, the SEA must ratably reduce all eligible small LEAs to the amount available.

(Authority: 20 U.S.C. 6333–6337)

[82 FR 31711, July 7, 2017]

§ 200.75 Special procedures for allocating concentration grant funds in small States.

(a) In a State in which the number of formula children is less than 0.25 percent of the national total on January 8, 2002 (hereinafter referred to as a ''small State''), an SEA may either—

(1) Allocate concentration grants among eligible LEAs in the State in accordance with §§ 200.72 through 200.74, as applicable; or

(2) Without regard to the allocations determined by the Secretary—

(i) Identify those LEAs in which the number or percentage of formula children exceeds the statewide average number or percentage of those children; and

(ii) Allocate concentration grant funds, consistent with § 200.73, among the LEAs identified in paragraph (a)(2)(i) of this section based on the number of formula children in each of those LEAs.

(b) If the SEA in a small State uses an alternative method under § 200.74, the SEA must use the poverty data approved under the alternative method to identify those LEAs with numbers or percentages of formula children that exceed the statewide average number or percentage of those children for the State as a whole.

(Authority: 20 U.S.C. 6334(b))

[82 FR 31711, July 7, 2017]

§ 200.76 [Reserved]

§ 200.77 Reservation of funds by an LEA.

Before allocating funds in accordance with § 200.78, an LEA must reserve funds as are reasonable and necessary to—

(a) Provide services comparable to those provided to children in participating school attendance areas and schools to serve—

(1)(i) Homeless children and youths, including providing educationally related support services to children in shelters and other locations where homeless children may live.

(ii) Funds reserved under paragraph (a)(1)(i) of this section may be—

(A) Determined based on a needs assessment of homeless children and youths in the LEA, taking into consideration the number and needs of those children, which may be the same needs assessment as conducted under section 723(b)(1) of the McKinney-Vento Homeless Assistance Act; and

(B) Used to provide homeless children and youths with services not ordinarily provided to other students under this subpart, including providing—

(*1*) Funding for the liaison designated under section 722(g)(1)(J)(ii) of the McKinney-Vento Homeless Assistance Act; and

(*2*) Transportation pursuant to section 722(g)(1)(J)(iii) of that Act;

(2) Children in local institutions for neglected children; and

(3) If appropriate—

(i) Children in local institutions for delinquent children; and

(ii) Neglected and delinquent children in community-day school programs;

(4) An LEA must determine the amount of funds reserved under paragraphs (a)(1)(i) and (a)(2) and (3) of this section based on the total allocation received by the LEA under subpart 2 of part A of title I of the ESEA prior to any allowable expenditures or transfers by the LEA;

(b) Provide, where appropriate under section 1113(c)(4) of the ESEA, financial incentives and rewards to teachers who serve students in title I schools identified for comprehensive support and improvement activities or targeted

support and improvement activities under section 1111(d) of the ESEA for the purpose of attracting and retaining qualified and effective teachers;

(c) Meet the requirements for parental involvement in section 1116(a)(3) of the ESEA;

(d) Provide and administer equitable services in accordance with § 200.64(a);

(e) Administer programs for public school children under this subpart; and

(f) Conduct other authorized activities, such as early childhood education, school improvement and coordinated services.

[82 FR 31712, July 7, 2017, as amended at 84 FR 31675, July 2, 2019]

§ 200.78 Allocation of funds to school attendance areas and schools.

(a)(1) After reserving funds, as applicable, under § 200.77, including funds for equitable services for private school students, their teachers, and their families, an LEA must allocate funds under this subpart to school attendance areas and schools, identified as eligible and selected to participate under section 1113(a) or (b) of the ESEA, in rank order on the basis of the total number of public school children from low-income families in each area or school.

(2) To determine the number of children from low-income families in a secondary school, an LEA must use—

(i) The same measure of poverty it uses for elementary schools; or

(ii) An accurate estimate of the number of students from low-income families by applying the average percentage of students from low-income families in the elementary school attendance areas that feed into the secondary school to the number of students enrolled in the secondary school if—

(A) The LEA conducts outreach to secondary schools within the LEA to inform the schools of the option to use this measure; and

(B) A majority of the secondary schools approve the use of this measure.

(3) If an LEA ranks its school attendance areas and schools by grade span groupings, the LEA may determine the percentage of children from low-income families in the LEA as a whole or for each grade span grouping.

(b)(1) Except as provided in paragraphs (b)(2) and (d) of this section, an LEA must allocate to each participating school attendance area or school an amount for each low-income child that is at least 125 percent of the per-pupil amount of funds the LEA received for that year under part A, subpart 2 of Title I. The LEA must calculate this per-pupil amount before it reserves funds under § 200.77, using the poverty measure selected by the LEA under section 1113(a)(5) of the ESEA.

(2) If an LEA is serving only school attendance areas or schools in which the percentage of children from low-income families is 35 percent or more, the LEA is not required to allocate a per-pupil amount of at least 125 percent.

(c) An LEA is not required to allocate the same per-pupil amount to each participating school attendance area or school provided the LEA allocates higher per-pupil amounts to areas or schools with higher concentrations of poverty than to areas or schools with lower concentrations of poverty.

(d) An LEA may reduce the amount of funds allocated under this section to a school attendance area or school if the area or school is spending supplemental State or local funds for programs that meet the requirements in § 200.79(b).

(e) If an LEA contains two or more counties in their entirety, the LEA must distribute to schools within each county a share of the LEA's total grant that is no less than the county's share of the child count used to calculate the LEA's grant.

[82 FR 31712, July 7, 2017, as amended at 84 FR 31676, July 2, 2019]

FISCAL REQUIREMENTS

§ 200.79 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.

(a) For the purpose of determining compliance with the supplement not supplant requirement in section 1118(b) and the comparability requirement in section 1118(c) of the ESEA, a grantee or subgrantee under this subpart may exclude supplemental State and local funds spent in any school attendance

area or school for programs that meet the intent and purposes of title I of the ESEA.

(b) A program meets the intent and purposes of Title I if the program either—

(1)(i) Is implemented in a school in which the percentage of children from low-income families is at least 40 percent;

(ii) Is designed to promote schoolwide reform and upgrade the entire educational operation of the school to support students in their achievement toward meeting the challenging State academic standards that all students are expected to meet;

(iii) Is designed to meet the educational needs of all students in the school, particularly the needs of students who are failing, or are most at risk of failing, to meet the challenging State academic standards; and

(iv) Uses the State's assessment system under §200.2 to review the effectiveness of the program; or

(2)(i) Serves only students who are failing, or are most at risk of failing, to meet the challenging State academic standards;

(ii) Provides supplementary services designed to meet the special educational needs of the students who are participating in the program to support their achievement toward meeting the State's student academic achievement standards; and

(iii) Uses the State's assessment system under §200.2 to review the effectiveness of the program.

(c) The conditions in paragraph (b) of this section also apply to supplemental State and local funds expended under section 1113(b)(1)(D) and 1113(c)(2)(B) of the ESEA.

[82 FR 31713, July 7, 2017, as amended at 84 FR 31676, July 2, 2019]

Subpart B—Even Start Family Literacy Program

§200.80 [Reserved]

Subpart C—Migrant Education Program

SOURCE: 67 FR 71736, Dec. 2, 2002, unless otherwise noted.

§200.81 Program definitions.

The following definitions apply to programs and projects operated under this subpart:

(a) *Agricultural work or employment* means the production or initial processing of raw agricultural products such as crops, trees, dairy products, poultry, or livestock. It consists of work performed for wages or personal subsistence.

(b) *Consolidated Student Record* means the MDEs for a migratory child that have been submitted by one or more SEAs and consolidated into a single, uniquely identified record available through MSIX.

(c) *Fishing work or employment* means the catching or initial processing of fish or shellfish or the raising or harvesting of fish or shellfish at fish farms. It consists of work performed for wages or personal subsistence.

(d) [Reserved]

(e) *Migrant Student Information Exchange (MSIX)* means the nationwide system administered by the Department for linking and exchanging specified educational and health information for all migratory children.

(f) *Migratory agricultural worker* means an individual who made a qualifying move in the preceding 36 months and, after doing so, engaged in new temporary or seasonal employment or personal subsistence in agriculture, which may be dairy work or the initial processing of raw agricultural products. If an individual did not engage in such new employment soon after a qualifying move, such individual may be considered a migratory agricultural worker if the individual actively sought such new employment and has a recent history of moves for temporary or seasonal agricultural employment.

(g) *Migratory child* means a child or youth who made a qualifying move in the preceding 36 months as a migratory agricultural worker or a migratory fisher; or with, or to join, a parent or spouse who is a migratory agricultural worker or a migratory fisher.

(h) *Migratory fisher* means an individual who made a qualifying move in the preceding 36 months and, after doing so, engaged in new temporary or seasonal employment or personal subsistence in fishing. If the individual did

not engage in such new employment soon after a qualifying move, the individual may be considered a migratory fisher if the individual actively sought such new employment and has a recent history of moves for temporary or seasonal fishing employment.

(i) *Minimum Data Elements (MDEs)* means the educational and health information for migratory children that the Secretary requires each SEA that receives a grant of MEP funds to collect, maintain, and submit to MSIX, and use under this part. MDEs may include—

(1) Immunization records and other health information;

(2) Academic history (including partial credit), credit accrual, and results from State assessments required under the ESEA;

(3) Other academic information essential to ensuring that migratory children achieve to high academic standards; and

(4) Information regarding eligibility for services under the Individuals with Disabilities Education Act.

(j) *Move* or *Moved* means a change from one residence to another residence that occurs due to economic necessity.

(k) *MSIX Memorandum of Understanding (MOU)* means the agreement between the Department and an SEA that governs the interconnection of the State migrant student records system(s) and MSIX, including the terms under which the agency will abide by the agreement based upon its review of all relevant technical, security, and administrative issues.

(l) *MSIX Interconnection Security Agreement* means the agreement between the Department and an SEA that specifies the technical and security requirements for establishing, maintaining, and operating the interconnection between the State migrant student records system and MSIX. The MSIX Interconnection Security Agreement supports the MSIX MOU and documents the requirements for connecting the two information technology systems, describes the security controls to be used to protect the systems and data, and contains a topological drawing of the interconnection.

(m) *Personal subsistence* means that the worker and the worker's family, as a matter of economic necessity, consume, as a substantial portion of their food intake, the crops, dairy products, or livestock they produce or the fish they catch.

(n) *Qualifying work* means temporary employment or seasonal employment in agricultural work or fishing work.

(o) *Seasonal employment* means employment that occurs only during a certain period of the year because of the cycles of nature and that, by its nature, may not be continuous or carried on throughout the year.

(p) *Temporary employment* means employment that lasts for a limited period of time, usually a few months, but no longer than 12 months. It typically includes employment where the employer states that the worker was hired for a limited time frame; the worker states that the worker does not intend to remain in that employment indefinitely; or the SEA has determined on some other reasonable basis that the employment is temporary. The definition includes employment that is constant and available year-round only if, within 18 months after the effective date of this regulation and at least once every three years thereafter, the SEA documents that, given the nature of the work, of those workers whose children were previously determined to be eligible based on the State's prior determination of the temporary nature of such employment (or the children themselves if they are the workers), virtually no workers remained employed by the same employer more than 12 months.

[73 FR 44123, July 29, 2008, as amended at 81 FR 28970, May 10, 2016; 83 FR 42440, Aug. 22, 2018; 84 FR 31676, July 2, 2019]

§ 200.82 Use of program funds for unique program function costs.

An SEA may use the funds available from its State Migrant Education Program (MEP) to carry out other administrative activities, beyond those allowable under § 200.100(b)(4), that are unique to the MEP, including those that are the same or similar to administrative activities performed by LEAs in the State under subpart A of this

part. These activities include but are not limited to—

(a) Statewide identification and recruitment of eligible migratory children;

(b) Interstate and intrastate coordination of the State MEP and its local projects with other relevant programs and local projects in the State and in other States;

(c) Procedures for providing for educational continuity for migratory children through the timely transfer of educational and health records, beyond that required generally by State and local agencies;

(d) Collecting and using information for accurate distribution of subgrant funds;

(e) Development of a statewide needs assessment and a comprehensive State plan for MEP service delivery;

(f) Supervision of instructional and support staff;

(g) Establishment and implementation of a State parent advisory council; and

(h) Conducting an evaluation of the effectiveness of the State MEP.

(Authority: 20 U.S.C. 6392, 6571)

[67 FR 71736, Dec. 2, 2002; 68 FR 19152, Apr. 18, 2003]

§ 200.83 Responsibilities of SEAs to implement projects through a comprehensive needs assessment and a comprehensive State plan for service delivery.

(a) An SEA that receives a grant of MEP funds must develop and update a written comprehensive State plan for service delivery based on a current statewide needs assessment that, at a minimum, has the following components:

(1) *Performance targets.* The plan must specify—

(i) Performance targets that the State has adopted for all children in reading and mathematics achievement, high school graduation, and the number of school dropouts, as well as the State's performance targets, if any, for school readiness; and

(ii) Any other performance targets that the State has identified for migratory children.

(2) *Needs assessment.* The plan must include an identification and assessment of—

(i) The unique educational needs of migratory children that result from the children's migratory lifestyle; and

(ii) Other needs of migratory students that must be met in order for migratory children to participate effectively in school.

(3) *Measurable program outcomes.* The plan must include the measurable program outcomes (i.e., objectives) that a State's migrant education program will produce to meet the identified unique needs of migratory children and help migratory children achieve the State's performance targets identified in paragraph (a)(1) of this section.

(4) *Service delivery.* The plan must describe the strategies that the SEA will pursue on a statewide basis to achieve the measurable program outcomes in paragraph (a)(3) of this section by addressing—

(i) The unique educational needs of migratory children consistent with paragraph (a)(2)(i) of this section; and

(ii) Other needs of migratory children consistent with paragraph (a)(2)(ii) of this section.

(5) *Evaluation.* The plan must describe how the State will evaluate the effectiveness of its program.

(b) The SEA must develop its comprehensive State plan for service delivery in consultation with the State parent advisory council or, for SEAs not operating programs for one school year in duration, in consultation with the parents of migratory children. This consultation must be in a format and language that the parents understand.

(c) Each SEA receiving MEP funds must ensure that its local operating agencies comply with the comprehensive State plan for service delivery.

(Approved by the Office of Management and Budget under control number 1810–0662)

[67 FR 71736, Dec. 2, 2002, as amended at 68 FR 19152, Apr. 18, 2003; 73 FR 44124, July 29, 2008; 84 FR 31677, July 2, 2019]

§ 200.84 Responsibilities for evaluating the effectiveness of the MEP and using evaluations to improve services to migratory children.

(a) Each SEA must determine the effectiveness of its MEP through a written evaluation that measures the implementation and results achieved by the program against the State's performance targets in § 200.83(a)(1), particularly for those students who have priority for service as defined in section 1304(d) of the ESEA.

(b) SEAs and local operating agencies receiving MEP funds must use the results of the evaluation carried out by an SEA under paragraph (a) of this section to improve the services provided to migratory children.

(Authority: 20 U.S.C. 6394)

[81 FR 28970, May 10, 2016]

§ 200.85 Responsibilities of SEAs for the electronic exchange through MSIX of specified educational and health information of migratory children.

(a) *MSIX State record system and data exchange requirements.* In order to receive a grant of MEP funds, an SEA must collect, maintain, and submit to MSIX MDEs and otherwise exchange and use information on migratory children in accordance with the requirements of this section. Failure of an SEA to do so constitutes a failure under section 454 of the General Education Provisions Act, 20 U.S.C. 1234c, to comply substantially with a requirement of law applicable to the funds made available under the MEP.

(b) *MSIX data submission requirements*—(1) *General.* (i) In order to satisfy the requirements of paragraphs (b)(2) and (3) of this section, an SEA that receives a grant of MEP funds must submit electronically to MSIX the MDEs applicable to the child's age and grade level. An SEA must collect and submit the MDEs applicable to the child's age and grade level, regardless of the type of school in which the child is enrolled (*e.g.*, public, private, or home school), or whether a child is enrolled in any school.

(ii) For migratory children who are or were enrolled in private schools, the SEA meets its responsibility under paragraph (b)(1)(i) of this section for collecting MDEs applicable to the child's age and grade level by advising the parent of the migratory child, or the migratory child if the child is emancipated, of the necessity of requesting the child's records from the private school, and by facilitating the parent or emancipated child's request to the private school that it provide all necessary information from the child's school records—

(A) Directly to the parent or emancipated child, in which case the SEA must follow up directly with the parent or child; or

(B) To the SEA, or a specific local operating agency, for forwarding to MSIX, in which case the SEA must follow up with the parent, emancipated child, or the private school to make sure that the records requested by the parent or emancipated child have been forwarded.

(iii) For migratory children who are or were enrolled in home schools, the SEA meets its responsibility under paragraph (b)(1)(i) of this section for collecting MDEs applicable to the child's age and grade level by requesting these records, either directly or through a local operating agency, directly from the parent or emancipated child.

(2) *Start-up data submissions.* No later than 90 calendar days after the effective date of these regulations, an SEA must collect and submit to MSIX each of the MDEs described in paragraph (b)(1)(i) of this section applicable to the child's age and grade level for every migratory child who is eligible to receive MEP services in the State on the effective date of these regulations, other than through continuation of services provided under section 1304(e) of the ESEA.

(3) *Subsequent data submissions.* An SEA must comply with the following timelines for subsequent data submissions throughout the entire calendar year whether or not local operating agencies or LEAs in the State are closed for summer or intersession periods.

(i) *Migratory children for whom an SEA has approved a new Certificate of Eligibility.* For every migratory child for whom an SEA approves a new Certificate of Eligibility under § 200.89(c) after

the effective date of these regulations—

(A) An SEA must collect and submit to MSIX the MDEs described in paragraph (b)(1)(i) of this section within 10 working days of approving a new Certificate of Eligibility for the migratory child. The SEA is not required to collect and submit MDEs in existence before its approval of a new Certificate of Eligibility for the child except as provided in paragraph (b)(3)(i)(B) of this section; and

(B) An SEA that approves a new Certificate of Eligibility for a secondary school-aged migratory child must also—

(*1*) Collect and submit to MSIX within 10 working days of approving a new Certificate of Eligibility for the child MDEs from the most recent secondary school in that State attended previously by the migratory child; and

(*2*) Notify MSIX within 30 calendar days if one of its local operating agencies obtains records from a secondary school attended previously in another State by the migratory child.

(ii) *End of term submissions.* (A) Within 30 calendar days of the end of an LEA's or local operating agency's fall, spring, summer, or intersession terms, an SEA must collect and submit to MSIX all MDE updates and newly available MDEs for migratory children who were eligible for the MEP during the term and for whom the SEA submitted data previously under paragraph (b)(2) or (b)(3)(i) of this section.

(B) When a migratory child's MEP eligibility expires before the end of a school year, an SEA must submit all MDE updates and newly available MDEs for the child through the end of the school year.

(iii) *Change of residence submissions.* (A) Within four working days of receiving notification from MSIX that a migratory child in its State has changed residence to a new local operating agency within the State or another SEA has approved a new Certificate of Eligibility for a migratory child, an SEA must collect and submit to MSIX all new MDEs and MDE updates that have become available to the SEA or one of its local operating agencies since the SEA's last submission of MDEs to MSIX for the child.

(B) An SEA or local operating agency that does not yet have a new MDE or MDE update for a migratory child when it receives a change of residence notification from MSIX must submit the MDE to MSIX within four working days of the date that the SEA or one of its local operating agencies obtains the MDE.

(c) *Use of Consolidated Student Records.* In order to facilitate school enrollment, grade and course placement, accrual of high school credits, and participation in the MEP, each SEA that receives a grant of MEP funds must—

(1) Use, and require each of its local operating agencies to use, the Consolidated Student Record for all migratory children who have changed residence to a new school district within the State or in another State;

(2) Encourage LEAs that are not local operating agencies receiving MEP funds to use the Consolidated Student Record for all migratory children described in paragraph (c)(1) of this section; and

(3) Establish procedures, develop and disseminate guidance, and provide training in the use of Consolidated Student Records to SEA, local operating agency, and LEA personnel who have been designated by the SEA as authorized MSIX users under paragraph (f)(2) of this section.

(d) *MSIX data quality.* Each SEA that receives a grant of MEP funds must—

(1) Use, and require each of its local operating agencies to use, reasonable and appropriate methods to ensure that all data submitted to MSIX are accurate and complete; and

(2) Respond promptly, and ensure that each of its local operating agencies responds promptly, to any request by the Department for information needed to meet the Department's responsibility for the accuracy and completeness of data in MSIX in accordance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a(e)(6) and (g)(1)(C) or (D).

(e) *Procedures for MSIX data correction by parents, guardians, and migratory children.* Each SEA that receives a grant of MEP funds must establish and implement written procedures that

allow a parent or guardian of a migratory child, or a migratory child, to ask the SEA to correct or determine the correctness of MSIX data. An SEA's written procedures must meet the following minimum requirements:

(1) *Response to parents, guardians, and migratory children.* (i) Within 30 calendar days of receipt of a data correction request from a parent, guardian, or migratory child, an SEA must—

(A) Send a written or electronic acknowledgement to the requester;

(B) Investigate the request;

(C) Decide whether to revise the data as requested; and

(D) Send the requester a written or electronic notice of the SEA's decision.

(ii) If an SEA determines that data it submitted previously to MSIX should be corrected, the SEA must submit the revised data to MSIX within four working days of its decision to correct the data. An SEA is not required to notify MSIX if it decides not to revise the data as requested.

(iii)(A) If a parent, guardian, or migratory child requests that an SEA correct or determine the correctness of data that was submitted to MSIX by another SEA, within four working days of receipt of the request, the SEA must send the data correction request to the SEA that submitted the data to MSIX.

(B) An SEA that receives an MSIX data correction request from another SEA under this paragraph must respond as if it received the data correction request directly from the parent, guardian, or migratory child.

(2) *Response to SEAs.* An SEA or local operating agency that receives a request for information from an SEA that is responding to a parent's, guardian's, or migratory child's data correction request under paragraph (e)(1) of this section must respond in writing within ten working days of receipt of the request.

(3) *Response to the Department.* An SEA must respond in writing within ten working days to a request from the Department for information needed by the Department to respond to an individual's request to correct or amend a Consolidated Student Record under the Privacy Act of 1974, as amended, 5 U.S.C. 552a(d)(2) and 34 CFR 5b.7.

(f) *MSIX data protection.* Each SEA that receives a grant of MEP funds must—

(1) Enter into and carry out its responsibilities in accordance with an MSIX MOU, an MSIX Interconnection Security Agreement, and other information technology agreements required by the Secretary in accordance with applicable Federal requirements;

(2) Establish and implement written procedures to protect the integrity, security, and confidentiality of Consolidated Student Records, whether in electronic or print format, through appropriate administrative, technical, and physical safeguards established in accordance with the MSIX MOU and MSIX Interconnection Security Agreement. An SEA's written procedures must include, at a minimum, reasonable methods to ensure that—

(3) Require all authorized users to complete the User Application Form approved by the Secretary before providing them access to MSIX. An SEA may also develop its own documentation for approving user access to MSIX provided that it contains the same information as the User Application Form approved by the Secretary; and

(4) Retain the documentation required for approving user access to MSIX for three years after the date the SEA terminates the user's access.

[81 FR 28970, May 10, 2016, as amended at 84 FR 31677, July 2, 2019]

EFFECTIVE DATE NOTE: At 81 FR 28970, May 10, 2016, § 200.85 was revised. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 200.86 Use of MEP funds in schoolwide projects.

Funds available under part C of Title I of the ESEA may be used in a schoolwide program subject to the requirements of § 200.29(c)(1).

(Authority: 20 U.S.C. 6396)

[67 FR 71736, Dec. 2, 2002; 68 FR 19152, Apr. 18, 2003]

§ 200.87 Responsibilities for participation of children in private schools.

An SEA and its operating agencies must conduct programs and projects

under this subpart in a manner consistent with the basic requirements of section 8501 of the ESEA.

[67 FR 71736, Dec. 2, 2002, as amended at 84 FR 31677, July 2, 2019]

§ 200.88 Exclusion of supplemental State and local funds from supplement, not supplant and comparability determinations.

(a) For purposes of determining compliance with the comparability requirement in section 1118(c) and the supplement, not supplant requirement in section 1118(b) of the ESEA, a grantee or subgrantee under part C of title I of the ESEA may exclude supplemental State and local funds expended in any school attendance area or school for carrying out special programs that meet the intent and purposes of part C of title I.

(b) Before funds for a State and local program may be excluded for purposes of these requirements, the SEA must make an advance written determination that the program meets the intent and purposes of part C of Title I.

(c) A program meets the intent and purposes of part C of Title I if it meets the following requirements:

(1) The program is specifically designed to meet the unique educational needs of migratory children, as defined in section 1309(3) of the ESEA.

(2) The program is based on performance targets related to educational achievement that are similar to those used in programs funded under part C of Title I of the ESEA, and is evaluated in a manner consistent with those program targets.

(3) The grantee or subgrantee keeps, and provides access to, records that ensure the correctness and verification of these requirements.

(4) The grantee monitors program performance to ensure that these requirements are met.

(Approved by the Office of Management and Budget under control number 1810–0662)

[67 FR 71736, Dec. 2, 2002; 68 FR 19152, Apr. 18, 2003; 84 FR 31677, July 2, 2019]

§ 200.89 Re-interviewing; eligibility documentation; and quality control.

(a) [Reserved]

(b) *Responsibilities of SEAs for re-interviewing to ensure the eligibility of children under the MEP*—(1) *Retrospective re-interviewing.* (i) As a condition for the continued receipt of MEP funds in FY 2006 and subsequent years, an SEA under a corrective action issued by the Secretary under paragraph (b)(2)(vii) or (d)(7) of this section must, as required by the Secretary—

(A) Conduct a statewide re-interviewing process consistent with paragraph (b)(1)(ii) of this section; and

(B) Consistent with paragraph (b)(1)(iii) of this section, report to the Secretary on the procedures it has employed, its findings, its defect rate, and corrective actions it has taken or will take to avoid a recurrence of any problems found.

(ii) At a minimum, the re-interviewing process must include—

(A) Selection of a sample of identified migratory children (from the child counts of a particular year as directed by the Secretary) randomly selected on a statewide basis to allow the State to estimate the statewide proportion of eligible migratory children at a 95 percent confidence level with a confidence interval of plus or minus 5 percent.

(B) Use of independent re-interviewers (i.e., interviewers who are neither SEA or local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested) trained to conduct personal interviews and to understand and apply program eligibility requirements; and

(C) Calculation of a defect rate based on the number of sampled children determined ineligible as a percentage of those sampled children whose parent/guardian was actually re-interviewed.

(iii) At a minimum, the report must include—

(A) An explanation of the sample and procedures used in the SEA's re-interviewing process;

(B) The findings of the re-interviewing process, including the determined defect rate;

(C) An acknowledgement that the Secretary may adjust the child counts for 2000–2001 and subsequent years downward based on the defect rate that the Secretary accepts;

(D) A summary of the types of defective eligibility determinations that the

SEA identified through the re-interviewing process;

(E) A summary of the reasons why each type of defective eligibility determination occurred; and

(F) A summary of the corrective actions the SEA will take to address the identified problems.

(2) *Prospective re-interviewing.* As part of the system of quality controls identified in paragraph (d) of this section, an SEA that receives MEP funds must annually validate child eligibility determinations from the current performance reporting period (September 1 to August 31) through re-interviews for a randomly selected sample of children identified as migratory during the same performance reporting period. In conducting these re-interviews, an SEA must—

(i) Except as specified in paragraphs (b)(2)(i)(A) and (B) of this section, use one or more re-interviewers who may be SEA or local operating agency staff members working to administer or operate the State MEP, or any other person trained to conduct personal interviews and to understand and apply program eligibility requirements, but who did not work on the initial eligibility determinations being tested;

(A) At least once every three years until September 1, 2020, SEAs must use one or more independent re-interviewers (*i.e.*, interviewers who are neither SEA nor local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct personal interviews and to understand and apply program eligibility requirements).

(B) Beginning September 1, 2020, an SEA must use one or more independent re-interviewers to validate child eligibility determinations made during one of the first three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change that directly impacts child eligibility (as determined by the Secretary). Therefore, the entire sample of eligibility determinations to be tested by independent re-interviewers must be drawn from children determined to be eligible in a single performance period, based on eligibility requirements that include the major statutory or regulatory change.

(ii) Select a random sample of identified migratory children so that a sufficient number of eligibility determinations in the current performance reporting period are tested on a statewide basis or within categories associated with identified risk factors (*e.g.*, experience of recruiters, size or growth in local migratory child population, effectiveness of local quality control procedures) in order to help identify possible problems with the State's child eligibility determinations;

(iii) Conduct re-interviews with the parents or guardians of the children in the sample. States must use a face-to-face approach to conduct these re-interviews unless circumstances make face-to-face re-interviews impractical and necessitate the use of an alternative method such as telephone re-interviewing;

(iv) Determine and document in writing whether the child eligibility determination and the information on which the determination was based were true and correct;

(v) Stop serving any children found not to be eligible and remove them from the data base used to compile counts of eligible children;

(vi) Certify and report to the Department the results of re-interviewing in the SEA's annual report of the number of migratory children in the State required by the Secretary; and

(vii) Implement corrective actions or improvements to address the problems identified by the State (including the identification and removal of other ineligible children in the total population), and any corrective actions, including retrospective re-interviewing, required by the Secretary.

(c) *Responsibilities of SEAs to document the eligibility of migratory children.* (1) An SEA and its operating agencies must use the Certificate of Eligibility (COE) form established by the Secretary to document the State's determination of the eligibility of migratory children.

(2) In addition to the form required under paragraph (c)(1) of this section, the SEA and its operating agencies

must maintain any additional documentation the SEA requires to confirm that each child found eligible for this program meets all of the eligibility definitions in section 1309 of the ESEA and § 200.81.

(3) An SEA is responsible for the accuracy of all the determinations of the eligibility of migratory children identified in the State.

(d) *Responsibilities of an SEA to establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children.* An SEA must establish and implement a system of quality controls for the proper identification and recruitment of eligible migratory children on a statewide basis. At a minimum, this system of quality controls must include the following components:

(1) Training to ensure that recruiters and all other staff involved in determining eligibility and in conducting quality control procedures know the requirements for accurately determining and documenting child eligibility under the MEP.

(2) Supervision and annual review and evaluation of the identification and recruitment practices of individual recruiters.

(3) A formal process for resolving eligibility questions raised by recruiters and their supervisors and for ensuring that this information is communicated to all local operating agencies.

(4) An examination by qualified individuals at the SEA or local operating agency level of each COE to verify that the written documentation is sufficient and that, based on the recorded data, the child is eligible for MEP services.

(5) A process for the SEA to validate that eligibility determinations were properly made, including conducting prospective re-interviewing as described in paragraph (b)(2).

(6) Documentation that supports the SEA's implementation of this quality-control system and of a record of actions taken to improve the system where periodic reviews and evaluations indicate a need to do so.

(7) A process for implementing corrective action if the SEA finds COEs that do not sufficiently document a child's eligibility for the MEP, or in response to internal State audit findings and recommendations, or monitoring or audit findings of the Secretary.

[73 FR 44124, July 29, 2008, as amended at 83 FR 42440, Aug. 22, 2018; 84 FR 31677, July 2, 2019; 84 FR 64423, Nov. 22, 2019]

Subpart D—Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At-Risk of Dropping Out

SOURCE: 67 FR 71736, Dec. 2, 2002, unless otherwise noted.

§ 200.90 Program definitions.

(a) The following definition applies to the programs authorized in part D, subparts 1 and 2 of Title I of the ESEA:

Children and youth means the same as ''children'' as that term is defined in § 200.103(a).

(b) The following definitions apply to the programs authorized in part D, subpart 1 of Title I of the ESEA:

Institution for delinquent children and youth means, as determined by the SEA, a public or private residential facility that is operated primarily for the care of children and youth who—

(i) Have been adjudicated to be delinquent or in need of supervision; and

(ii) Have had an average length of stay in the institution of at least 30 days.

Institution for neglected children and youth means, as determined by the SEA, a public or private residential facility, other than a foster home, that is operated primarily for the care of children and youth who—

(i) Have been committed to the institution or voluntarily placed in the institution under applicable State law due to abandonment, neglect, or death of their parents or guardians; and

(ii) Have had an average length of stay in the institution of at least 30 days.

Regular program of instruction means an educational program (not beyond grade 12) in an institution or a community day program for neglected or delinquent children that consists of classroom instruction in basic school subjects such as reading, mathematics, and career and technical education, and that is supported by non-Federal

funds. Neither the manufacture of goods within the institution nor activities related to institutional maintenance are considered classroom instruction.

(c) The following definition applies to the local agency program authorized in part D, subpart 2 of title I of the ESEA:

Locally operated correctional facility means a facility in which persons are confined as a result of a conviction for a criminal offense, including persons under 21 years of age. The term also includes a local public or private institution and community day program or school not operated by the State that serves delinquent children and youth.

[67 FR 71736, Dec. 2, 2002, as amended at 84 FR 31677, July 2, 2019]

§ 200.91 SEA counts of eligible children.

To receive an allocation under part D, subpart 1 of Title I of the ESEA, an SEA must provide the Secretary with a count of children and youth under the age of 21 enrolled in a regular program of instruction operated or supported by State agencies in institutions or community day programs for neglected or delinquent children and youth and adult correctional institutions as specified in paragraphs (a) and (b) of this section.

(a) *Enrollment.* (1) To be counted, a child or youth must be enrolled in a regular program of instruction for at least—

(i) 20 hours per week if in an institution or community day program for neglected or delinquent children; or

(ii) 15 hours per week if in an adult correctional institution.

(2) The State agency must specify the date on which the enrollment of neglected or delinquent children is determined under paragraph (a)(1) of this section, except that the date specified must be—

(i) Consistent for all institutions or community day programs operated by the State agency; and

(ii) Represent a school day in the calendar year preceding the year in which funds become available.

(b) *Adjustment of enrollment.* The SEA must adjust the enrollment for each institution or community day program served by a State agency by—

(1) Multiplying the number determined in paragraph (a) of this section by the number of days per year the regular program of instruction operates; and

(2) Dividing the result of paragraph (b)(1) of this section by 180.

(c) *Date of submission.* The SEA must annually submit the data in paragraph (b) of this section no later than January 31.

(Approved by the Office of Management and Budget under control number 1810–0060)

(Authority: 20 U.S.C. 6432)

§§ 200.92–200.99 [Reserved]

Subpart E—General Provisions

SOURCE: 67 FR 71738, Dec. 2, 2002, unless otherwise noted.

§ 200.100 Reservation of funds for school improvement, State administration, and direct student services.

A State must reserve funds for school improvement, and may reserve funds for State administration and direct student services as follows:

(a) *School improvement.* (1) To carry out school improvement activities and the State's statewide system of technical assistance and support for LEAs authorized under sections 1003 and 1111(d) of the ESEA, an SEA must reserve the greater of—

(i) Seven percent from the sum of the amounts allocated to the State under section 1002(a) of the ESEA; or

(ii) The sum of the total amount that the State—

(A) Reserved for fiscal year 2016 under section 1003(a) of the ESEA as in effect on December 9, 2015; and

(B) Received for fiscal year 2016 under section 1003(g) of the ESEA as in effect on December 9, 2015.

(2) For fiscal year 2018 and subsequent years, in reserving funds under paragraph (a)(1) of this section, a State may not reduce the sum of the allocations an LEA receives under subpart 2 of part A of title I of the ESEA below the sum of the allocations the LEA received under subpart 2 for the preceding fiscal year.

(3) If funds under section 1002(a) are insufficient in a given fiscal year to implement both paragraphs (a)(1) and

(2) of this section, a State is not required to reserve the full amount required under paragraph (a)(1) of this section.

(b) *State administration.*(1) An SEA may reserve for State administrative activities authorized in sections 1004 and 1603 of the ESEA no more than the greater of—

(i) One percent from each of the amounts allocated to the State or Outlying Area under section 1002(a), (c), and (d) of the ESEA; or

(ii) $400,000 ($50,000 for the Outlying Areas).

(2)(i) An SEA reserving $400,000 under paragraph (b)(1)(ii) of this section must reserve proportionate amounts from each of the amounts allocated to the State or Outlying Area under section 1002(a), but is not required to reserve proportionate amounts from section 1002(a), (c), and (d) of the ESEA.

(ii) If an SEA reserves funds from the amounts allocated to the State or Outlying Area under section 1002(c) or (d) of the ESEA, the SEA may not reserve from those allocations more than the amount the SEA would have reserved if it had reserved proportionate amounts from section 1002(a), (c), and (d) of the ESEA.

(3) If the sum of the amounts allocated to all the States under section 1002(a), (c), and (d) of the ESEA is greater than $14,000,000,000, an SEA may not reserve more than one percent of the amount the State would receive if $14,000,000,000 had been allocated among the States under section 1002(a), (c), and (d) of the ESEA.

(4) An SEA may use the funds it has reserved under paragraph (b) of this section to perform general administrative activities necessary to carry out, at the State level, any of the programs authorized under Title I, parts A, C, and D of the ESEA.

(c) *Direct student services.* To carry out direct student services authorized under section 1003A of the ESEA, an SEA may, after meaningful consultation with geographically diverse LEAs, reserve not more than three percent of the amounts allocated to the State under subpart 2 of part A of title I of the ESEA for each fiscal year.

(d) *Reservations and hold-harmless.* In reserving funds under paragraphs (b) and (c) of this section, an SEA may—

(1) Proportionately reduce each LEA's total allocation received under section 1002(a) of the ESEA while ensuring that no LEA receives in total less than the hold-harmless percentage under §200.73(a)(4), except that, when the amount remaining is insufficient to pay all LEAs the hold-harmless amount provided in §200.73, the SEA shall ratably reduce each LEA's hold-harmless allocation to the amount available; or

(2) Proportionately reduce each LEA's total allocation received under subpart 2 of part A of title I of the ESEA even if an LEA's total allocation falls below its hold-harmless percentage under §200.73(a)(4).

(Approved by the Office of Management and Budget under control number 1810–0622)

[67 FR 71736, Dec. 2, 2002, as amended at 84 FR 31677, July 2, 2019]

§§ 200.101–200.102 [Reserved]

§ 200.103 Definitions.

The following definitions apply to programs operated under this part:

(a) *Child with a disability* means child with a disability, as defined in section 602(3) of the IDEA.

(b) *Children* means—

(1) Persons up through age 21 who are entitled to a free public education through grade 12; and

(2) Preschool children below the age and grade level at which the agency provides free public education.

(c) *Fiscal year* means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another 12-month period normally used by the SEA for record-keeping.

[67 FR 71738, Dec. 2, 2002, as amended at 72 FR 17781, Apr. 9, 2007; 84 FR 31678, July 2, 2019]

INNOVATIVE ASSESSMENT DEMONSTRATION AUTHORITY

§ 200.104 Innovative assessment demonstration authority.

(a) *In general.* (1) The Secretary may provide a State educational agency

(SEA), or consortium of SEAs, with authority to establish and operate an innovative assessment system in its public schools (hereinafter referred to as ''innovative assessment demonstration authority'').

(2) An SEA or consortium of SEAs may implement the innovative assessment demonstration authority during its demonstration authority period and, if applicable, extension or waiver period described in § 200.108(a) and (c), after which the Secretary will either approve the system for statewide use consistent with § 200.107 or withdraw the authority consistent with § 200.108(b).

(b) *Definitions.* For purposes of §§ 200.104 through 200.108—

(1) *Affiliate member of a consortium* means an SEA that is formally associated with a consortium of SEAs that is implementing the innovative assessment demonstration authority, but is not yet a full member of the consortium because it is not proposing to use the consortium's innovative assessment system under the demonstration authority, instead of, or in addition to, its statewide assessment under section 1111(b)(2) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (hereinafter ''the Act'') for purposes of accountability and reporting under sections 1111(c) and 1111(h) of the Act.

(2) *Demonstration authority period* refers to the period of time over which an SEA, or consortium of SEAs, is authorized to implement the innovative assessment demonstration authority, which may not exceed five years and does not include the extension or waiver period under § 200.108. An SEA must use its innovative assessment system in all participating schools instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the Act for purposes of accountability and reporting under section 1111(c) and 1111(h) of the Act in each year of the demonstration authority period.

(3) *Innovative assessment system* means a system of assessments, which may include any combination of general assessments or alternate assessments aligned with alternate academic achievement standards, in reading/language arts, mathematics, or science administered in at least one required grade under § 200.5(a)(1) and section 1111(b)(2)(B)(v) of the Act that—

(i) Produces—

(A) An annual summative determination of each student's mastery of grade-level content standards aligned to the challenging State academic standards under section 1111(b)(1) of the Act; or

(B) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the Act and aligned with the State's academic content standards for the grade in which the student is enrolled, an annual summative determination relative to such alternate academic achievement standards for each such student; and

(ii) May, in any required grade or subject, include one or more of the following types of assessments:

(A) Cumulative year-end assessments.

(B) Competency-based assessments.

(C) Instructionally embedded assessments.

(D) Interim assessments.

(E) Performance-based assessments.

(F) Another innovative assessment design that meets the requirements under § 200.105(b).

(4) *Participating LEA* means a local educational agency (LEA) in the State with at least one school participating in the innovative assessment demonstration authority.

(5) *Participating school* means a public school in the State in which the innovative assessment system is administered under the innovative assessment demonstration authority instead of, or in addition to, the statewide assessment under section 1111(b)(2) of the Act and where the results of the school's students on the innovative assessment system are used by its State and LEA for purposes of accountability and reporting under section 1111(c) and 1111(h) of the Act.

(c) *Peer review of applications.* (1) An SEA or consortium of SEAs seeking innovative assessment demonstration authority under paragraph (a) of this section must submit an application to the

Secretary that demonstrates how the applicant meets all application requirements under § 200.105 and that addresses all selection criteria under § 200.106.

(2) The Secretary uses a peer review process, including a review of the SEA's application to determine that it meets or will meet each of the requirements under § 200.105 and sufficiently addresses each of the selection criteria under § 200.106, to inform the Secretary's decision of whether to award the innovative assessment demonstration authority to an SEA or consortium of SEAs. Peer review teams consist of experts and State and local practitioners who are knowledgeable about innovative assessment systems, including—

(i) Individuals with past experience developing innovative assessment and accountability systems that support all students and subgroups of students described in section 1111(c)(2) of the Act (e.g., psychometricians, measurement experts, researchers); and

(ii) Individuals with experience implementing such innovative assessment and accountability systems (e.g., State and local assessment directors, educators).

(3)(i) If points or weights are assigned to the selection criteria under § 200.106, the Secretary will inform applicants in the application package or a notice published in the FEDERAL REGISTER of—

(A) The total possible score for all of the selection criteria under § 200.106; and

(B) The assigned weight or the maximum possible score for each criterion or factor under that criterion.

(ii) If no points or weights are assigned to the selection criteria and selected factors under § 200.106, the Secretary will evaluate each criterion equally and, within each criterion, each factor equally.

(d) *Initial demonstration period.* (1) The initial demonstration period is the first three years in which the Secretary awards at least one SEA, or consortium of SEAs, innovative assessment demonstration authority, concluding with publication of the progress report described in section 1204(c) of the Act. During the initial demonstration period, the Secretary may provide innovative assessment demonstration authority to—

(i) No more than seven SEAs in total, including those SEAs participating in consortia; and

(ii) Consortia that include no more than four SEAs.

(2) An SEA that is an affiliate member of a consortium is not included in the application under paragraph (c) of this section or counted toward the limitation in consortia size under paragraph (d)(1)(ii) of this section.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

[81 FR 88966, Dec. 8, 2016]

§ 200.105 Demonstration authority application requirements.

An SEA or consortium of SEAs seeking the innovative assessment demonstration authority must submit to the Secretary, at such time and in such manner as the Secretary may reasonably require, an application that includes the following:

(a) *Consultation.* Evidence that the SEA or consortium has developed an innovative assessment system in collaboration with—

(1) Experts in the planning, development, implementation, and evaluation of innovative assessment systems, which may include external partners; and

(2) Affected stakeholders in the State, or in each State in the consortium, including—

(i) Those representing the interests of children with disabilities, English learners, and other subgroups of students described in section 1111(c)(2) of the Act;

(ii) Teachers, principals, and other school leaders;

(iii) LEAs;

(iv) Representatives of Indian tribes located in the State;

(v) Students and parents, including parents of children described in paragraph (a)(2)(i) of this section; and

(vi) Civil rights organizations.

(b) *Innovative assessment system.* A demonstration that the innovative assessment system does or will—

(1) Meet the requirements of section 1111(b)(2)(B) of the Act, except that an innovative assessment—

(i) Need not be the same assessment administered to all public elementary and secondary school students in the State during the demonstration authority period described in § 200.104(b)(2) or extension period described in § 200.108 and prior to statewide use consistent with § 200.107, if the innovative assessment system will be administered initially to all students in participating schools within a participating LEA, provided that the statewide academic assessments under § 200.2(a)(1) and section 1111(b)(2) of the Act are administered to all students in any non-participating LEA or any non-participating school within a participating LEA; and

(ii) Need not be administered annually in each of grades 3–8 and at least once in grades 9–12 in the case of reading/language arts and mathematics assessments, and at least once in grades 3–5, 6–9, and 10–12 in the case of science assessments, so long as the statewide academic assessments under § 200.2(a)(1) and section 1111(b)(2) of the Act are administered in any required grade and subject under § 200.5(a)(1) in which the SEA does not choose to implement an innovative assessment;

(2)(i) Align with the challenging State academic content standards under section 1111(b)(1) of the Act, including the depth and breadth of such standards, for the grade in which a student is enrolled; and

(ii) May measure a student's academic proficiency and growth using items above or below the student's grade level so long as, for purposes of meeting the requirements for reporting and school accountability under sections 1111(c) and 1111(h) of the Act and paragraphs (b)(3) and (b)(7)–(9) of this section, the State measures each student's academic proficiency based on the challenging State academic standards for the grade in which the student is enrolled;

(3) Express student results or competencies consistent with the challenging State academic achievement standards under section 1111(b)(1) of the Act and identify which students are not making sufficient progress toward, and attaining, grade-level proficiency on such standards;

(4)(i) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable for all students and for each subgroup of students described in § 200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, to the results generated by the State academic assessments described in § 200.2(a)(1) and section 1111(b)(2) of the Act for such students. Consistent with the SEA's or consortium's evaluation plan under § 200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period in one of the following ways:

(A) Administering full assessments from both the innovative and statewide assessment systems to all students enrolled in participating schools, such that at least once in any grade span (*i.e.*, 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered to all such students. As part of this determination, the innovative assessment and statewide assessment need not be administered to an individual student in the same school year.

(B) Administering full assessments from both the innovative and statewide assessment systems to a demographically representative sample of all students and subgroups of students described in section 1111(c)(2) of the Act, from among those students enrolled in participating schools, such that at least once in any grade span (*i.e.*, 3–5, 6–8, or 9–12) and subject for which there is an innovative assessment, a statewide assessment in the same subject would also be administered in the same school year to all students included in the sample.

(C) Including, as a significant portion of the innovative assessment system in each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the statewide assessment system that, at a minimum, have been previously pilot tested or field tested for use in the statewide assessment system.

(D) Including, as a significant portion of the statewide assessment system in

each required grade and subject in which both an innovative and statewide assessment are administered, items or performance tasks from the innovative assessment system that, at a minimum, have been previously pilot tested or field tested for use in the innovative assessment system.

(E) An alternative method for demonstrating comparability that an SEA can demonstrate will provide for an equally rigorous and statistically valid comparison between student performance on the innovative assessment and the statewide assessment, including for each subgroup of students described in §200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act; and

(ii) Generate results, including annual summative determinations as defined in paragraph (b)(7) of this section, that are valid, reliable, and comparable, for all students and for each subgroup of students described in §200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, among participating schools and LEAs in the innovative assessment demonstration authority. Consistent with the SEA's or consortium's evaluation plan under §200.106(e), the SEA must plan to annually determine comparability during each year of its demonstration authority period;

(5)(i) Provide for the participation of all students, including children with disabilities and English learners;

(ii) Be accessible to all students by incorporating the principles of universal design for learning, to the extent practicable, consistent with §200.2(b)(2)(ii); and

(iii) Provide appropriate accommodations consistent with §200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act;

(6) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the Act, annually measure in each participating school progress on the Academic Achievement indicator under section 1111(c)(4)(B) of the Act of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the Act, who are required to take such assessments consistent with paragraph (b)(1)(ii) of this section;

(7) Generate an annual summative determination of achievement, using the annual data from the innovative assessment, for each student in a participating school in the demonstration authority that describes—

(i) The student's mastery of the challenging State academic standards under section 1111(b)(1) of the Act for the grade in which the student is enrolled; or

(ii) In the case of a student with the most significant cognitive disabilities assessed with an alternate assessment aligned with alternate academic achievement standards under section 1111(b)(1)(E) of the Act, the student's mastery of those standards;

(8) Provide disaggregated results by each subgroup of students described in §200.2(b)(11)(i)(A)–(I) and sections 1111(b)(2)(B)(xi) and 1111(h)(1)(C)(ii) of the Act, including timely data for teachers, principals and other school leaders, students, and parents consistent with §200.8 and section 1111(b)(2)(B)(x) and (xii) and section 1111(h) of the Act, and provide results to parents in a manner consistent with paragraph (b)(4)(i) of this section and §200.2(e); and

(9) Provide an unbiased, rational, and consistent determination of progress toward the State's long-term goals for academic achievement under section 1111(c)(4)(A) of the Act for all students and each subgroup of students described in section 1111(c)(2) of the Act and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B) of the Act for participating schools relative to non-participating schools so that the SEA may validly and reliably aggregate data from the system for purposes of meeting requirements for—

(i) Accountability under sections 1003 and 1111(c) and (d) of the Act, including how the SEA will identify participating and non-participating schools in a consistent manner for comprehensive and targeted support and improvement under section 1111(c)(4)(D) of the Act; and

(ii) Reporting on State and LEA report cards under section 1111(h) of the Act.

(c) *Selection criteria.* Information that addresses each of the selection criteria under § 200.106.

(d) *Assurances.* Assurances that the SEA, or each SEA in a consortium, will—

(1) Continue use of the statewide academic assessments in reading/language arts, mathematics, and science required under § 200.2(a)(1) and section 1111(b)(2) of the Act—

(i) In all non-participating schools; and

(ii) In all participating schools for which such assessments will be used in addition to innovative assessments for accountability purposes under section 1111(c) of the Act consistent with paragraph (b)(1)(ii) of this section or for evaluation purposes consistent with § 200.106(e) during the demonstration authority period;

(2) Ensure that all students and each subgroup of students described in section 1111(c)(2) of the Act in participating schools are held to the same challenging State academic standards under section 1111(b)(1) of the Act as all other students, except that students with the most significant cognitive disabilities may be assessed with alternate assessments aligned with alternate academic achievement standards consistent with § 200.6 and section 1111(b)(1)(E) and (b)(2)(D) of the Act, and receive the instructional support needed to meet such standards;

(3) Report the following annually to the Secretary, at such time and in such manner as the Secretary may reasonably require:

(i) An update on implementation of the innovative assessment demonstration authority, including—

(A) The SEA's progress against its timeline under § 200.106(c) and any outcomes or results from its evaluation and continuous improvement process under § 200.106(e); and

(B) If the innovative assessment system is not yet implemented statewide consistent with § 200.104(a)(2), a description of the SEA's progress in scaling up the system to additional LEAs or schools consistent with its strategies under § 200.106(a)(3)(i), including updated assurances from participating LEAs consistent with paragraph (e)(2) of this section.

(ii) The performance of students in participating schools at the State, LEA, and school level, for all students and disaggregated for each subgroup of students described in section 1111(c)(2) of the Act, on the innovative assessment, including academic achievement and participation data required to be reported consistent with section 1111(h) of the Act, except that such data may not reveal any personally identifiable information.

(iii) If the innovative assessment system is not yet implemented statewide, school demographic information, including enrollment and student achievement information, for the subgroups of students described in section 1111(c)(2) of the Act, among participating schools and LEAs and for any schools or LEAs that will participate for the first time in the following year, and a description of how the participation of any additional schools or LEAs in that year contributed to progress toward achieving high-quality and consistent implementation across demographically diverse LEAs in the State consistent with the SEA's benchmarks described in § 200.106(a)(3)(iii).

(iv) Feedback from teachers, principals and other school leaders, and other stakeholders consulted under paragraph (a)(2) of this section, including parents and students, from participating schools and LEAs about their satisfaction with the innovative assessment system;

(4) Ensure that each participating LEA informs parents of all students in participating schools about the innovative assessment, including the grades and subjects in which the innovative assessment will be administered, and, consistent with section 1112(e)(2)(B) of the Act, at the beginning of each school year during which an innovative assessment will be implemented. Such information must be—

(i) In an understandable and uniform format;

(ii) To the extent practicable, written in a language that parents can understand or, if it is not practicable to provide written translations to a parent

with limited English proficiency, be orally translated for such parent; and

(iii) Upon request by a parent who is an individual with a disability as defined by the Americans with Disabilities Act, provided in an alternative format accessible to that parent; and

(5) Coordinate with and provide information to, as applicable, the Institute of Education Sciences for purposes of the progress report described in section 1204(c) of the Act and ongoing dissemination of information under section 1204(m) of the Act.

(e) *Initial implementation in a subset of LEAs or schools.* If the innovative assessment system will initially be administered in a subset of LEAs or schools in a State—

(1) A description of each LEA, and each of its participating schools, that will initially participate, including demographic information and its most recent LEA report card under section 1111(h)(2) of the Act; and

(2) An assurance from each participating LEA, for each year that the LEA is participating, that the LEA will comply with all requirements of this section.

(f) *Application from a consortium of SEAs.* If an application for the innovative assessment demonstration authority is submitted by a consortium of SEAs—

(1) A description of the governance structure of the consortium, including—

(i) The roles and responsibilities of each member SEA, which may include a description of affiliate members, if applicable, and must include a description of financial responsibilities of member SEAs;

(ii) How the member SEAs will manage and, at their discretion, share intellectual property developed by the consortium as a group; and

(iii) How the member SEAs will consider requests from SEAs to join or leave the consortium and ensure that changes in membership do not affect the consortium's ability to implement the innovative assessment demonstration authority consistent with the requirements and selection criteria in this section and § 200.106.

(2) While the terms of the association with affiliate members are defined by each consortium, consistent with § 200.104(b)(1) and paragraph (f)(1)(i) of this section, for an affiliate member to become a full member of the consortium and to use the consortium's innovative assessment system under the demonstration authority, the consortium must submit a revised application to the Secretary for approval, consistent with the requirements of this section and § 200.106 and subject to the limitation under § 200.104(d).

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571; 29 U.S.C. 794; 42 U.S.C. 2000d–1; 42 U.S.C. 12101; 42 U.S.C. 12102)

]81 FR 88967, Dec. 8, 2016]

§ 200.106 Demonstration authority selection criteria.

The Secretary reviews an application by an SEA or consortium of SEAs seeking innovative assessment demonstration authority consistent with § 200.104(c) based on the following selection criteria:

(a) *Project narrative.* The quality of the SEA's or consortium's plan for implementing the innovative assessment demonstration authority. In determining the quality of the plan, the Secretary considers—

(1) The rationale for developing or selecting the particular innovative assessment system to be implemented under the demonstration authority, including—

(i) The distinct purpose of each assessment that is part of the innovative assessment system and how the system will advance the design and delivery of large-scale, statewide academic assessments in innovative ways; and

(ii) The extent to which the innovative assessment system as a whole will promote high-quality instruction, mastery of challenging State academic standards, and improved student outcomes, including for each subgroup of students described in section 1111(c)(2) of the Act;

(2) The plan the SEA or consortium, in consultation with any external partners, if applicable, has to—

(i) Develop and use standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments throughout the demonstration authority period, consistent with relevant nationally recognized

professional and technical standards, to ensure inter-rater reliability and comparability of innovative assessment results consistent with § 200.105(b)(4)(ii), which may include evidence of inter-rater reliability; and

(ii) Train evaluators to use such strategies, if applicable; and

(3) If the system will initially be administered in a subset of schools or LEAs in a State—

(i) The strategies the SEA, including each SEA in a consortium, will use to scale the innovative assessment to all schools statewide, with a rationale for selecting those strategies;

(ii) The strength of the SEA's or consortium's criteria that will be used to determine LEAs and schools that will initially participate and when to approve additional LEAs and schools, if applicable, to participate during the requested demonstration authority period; and

(iii) The SEA's plan, including each SEA in a consortium, for how it will ensure that, during the demonstration authority period, the inclusion of additional LEAs and schools continues to reflect high-quality and consistent implementation across demographically diverse LEAs and schools, or contributes to progress toward achieving such implementation across demographically diverse LEAs and schools, including diversity based on enrollment of subgroups of students described in section 1111(c)(2) of the Act and student achievement. The plan must also include annual benchmarks toward achieving high-quality and consistent implementation across participating schools that are, as a group, demographically similar to the State as a whole during the demonstration authority period, using the demographics of initially participating schools as a baseline.

(b) *Prior experience, capacity, and stakeholder support.* (1) The extent and depth of prior experience that the SEA, including each SEA in a consortium, and its LEAs have in developing and implementing the components of the innovative assessment system. An SEA may also describe the prior experience of any external partners that will be participating in or supporting its demonstration authority in implementing those components. In evaluating the extent and depth of prior experience, the Secretary considers—

(i) The success and track record of efforts to implement innovative assessments or innovative assessment items aligned to the challenging State academic standards under section 1111(b)(1) of the Act in LEAs planning to participate; and

(ii) The SEA's or LEA's development or use of—

(A) Effective supports and appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act for administering innovative assessments to all students, including English learners and children with disabilities, which must include professional development for school staff on providing such accommodations;

(B) Effective and high-quality supports for school staff to implement innovative assessments and innovative assessment items, including professional development; and

(C) Standardized and calibrated tools, rubrics, methods, or other strategies for scoring innovative assessments, with documented evidence of the validity, reliability, and comparability of annual summative determinations of achievement, consistent with § 200.105(b)(4) and (7).

(2) The extent and depth of SEA, including each SEA in a consortium, and LEA capacity to implement the innovative assessment system considering the availability of technological infrastructure; State and local laws; dedicated and sufficient staff, expertise, and resources; and other relevant factors. An SEA or consortium may also describe how it plans to enhance its capacity by collaborating with external partners that will be participating in or supporting its demonstration authority. In evaluating the extent and depth of capacity, the Secretary considers—

(i) The SEA's analysis of how capacity influenced the success of prior efforts to develop and implement innovative assessments or innovative assessment items; and

(ii) The strategies the SEA is using, or will use, to mitigate risks, including those identified in its analysis, and

support successful implementation of the innovative assessment.

(3) The extent and depth of State and local support for the application for demonstration authority in each SEA, including each SEA in a consortium, as demonstrated by signatures from the following:

(i) Superintendents (or equivalent) of LEAs, including participating LEAs in the first year of the demonstration authority period.

(ii) Presidents of local school boards (or equivalent, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iii) Local teacher organizations (including labor organizations, where applicable), including within participating LEAs in the first year of the demonstration authority.

(iv) Other affected stakeholders, such as parent organizations, civil rights organizations, and business organizations.

(c) *Timeline and budget.* The quality of the SEA's or consortium's timeline and budget for implementing the innovative assessment demonstration authority. In determining the quality of the timeline and budget, the Secretary considers—

(1) The extent to which the timeline reasonably demonstrates that each SEA will implement the system statewide by the end of the requested demonstration authority period, including a description of—

(i) The activities to occur in each year of the requested demonstration authority period;

(ii) The parties responsible for each activity; and

(iii) If applicable, how a consortium's member SEAs will implement activities at different paces and how the consortium will implement interdependent activities, so long as each non-affiliate member SEA begins using the innovative assessment in the same school year consistent with § 200.104(b)(2); and

(2) The adequacy of the project budget for the duration of the requested demonstration authority period, including Federal, State, local, and nonpublic sources of funds to support and sustain, as applicable, the activities in the timeline under paragraph (c)(1) of this section, including—

(i) How the budget will be sufficient to meet the expected costs at each phase of the SEA's planned expansion of its innovative assessment system; and

(ii) The degree to which funding in the project budget is contingent upon future appropriations at the State or local level or additional commitments from non-public sources of funds.

(d) *Supports for educators, students, and parents.* The quality of the SEA or consortium's plan to provide supports that can be delivered consistently at scale to educators, students, and parents to enable successful implementation of the innovative assessment system and improve instruction and student outcomes. In determining the quality of supports, the Secretary considers—

(1) The extent to which the SEA or consortium has developed, provided, and will continue to provide training to LEA and school staff, including teachers, principals, and other school leaders, that will familiarize them with the innovative assessment system and develop teacher capacity to implement instruction that is informed by the innovative assessment system and its results;

(2) The strategies the SEA or consortium has developed and will use to familiarize students and parents with the innovative assessment system;

(3) The strategies the SEA will use to ensure that all students and each subgroup of students under section 1111(c)(2) of the Act in participating schools receive the support, including appropriate accommodations consistent with § 200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act, needed to meet the challenging State academic standards under section 1111(b)(1) of the Act; and

(4) If the system includes assessment items that are locally developed or locally scored, the strategies and safeguards (e.g., test blueprints, item and task specifications, rubrics, scoring tools, documentation of quality control procedures, inter-rater reliability checks, audit plans) the SEA or consortium has developed, or plans to develop, to validly and reliably score

such items, including how the strategies engage and support teachers and other staff in designing, developing, implementing, and validly and reliably scoring high-quality assessments; how the safeguards are sufficient to ensure unbiased, objective scoring of assessment items; and how the SEA will use effective professional development to aid in these efforts.

(e) *Evaluation and continuous improvement.* The quality of the SEA's or consortium's plan to annually evaluate its implementation of innovative assessment demonstration authority. In determining the quality of the evaluation, the Secretary considers—

(1) The strength of the proposed evaluation of the innovative assessment system included in the application, including whether the evaluation will be conducted by an independent, experienced third party, and the likelihood that the evaluation will sufficiently determine the system's validity, reliability, and comparability to the statewide assessment system consistent with the requirements of § 200.105(b)(4) and (9); and

(2) The SEA's or consortium's plan for continuous improvement of the innovative assessment system, including its process for—

(i) Using data, feedback, evaluation results, and other information from participating LEAs and schools to make changes to improve the quality of the innovative assessment; and

(ii) Evaluating and monitoring implementation of the innovative assessment system in participating LEAs and schools annually.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

[81 FR 88969, Dec. 8, 2016]

§ 200.107 Transition to statewide use.

(a)(1) After an SEA has scaled its innovative assessment system to operate statewide in all schools and LEAs in the State, the SEA must submit evidence for peer review under section 1111(a)(4) of the Act and § 200.2(d) to determine whether the system may be used for purposes of both academic assessments and the State accountability system under sections 1111(b)(2), (c), and (d) and 1003 of the Act.

(2) An SEA may only use the innovative assessment system for the purposes described in paragraph (a)(1) of this section if the Secretary determines that the system is of high quality consistent with paragraph (b) of this section.

(b) Through the peer review process of State assessments and accountability systems under section 1111(a)(4) of the Act and § 200.2(d), the Secretary determines that the innovative assessment system is of high quality if—

(1) An innovative assessment developed in any grade or subject under § 200.5(a)(1) and section 1111(b)(2)(B)(v) of the Act—

(i) Meets all of the requirements under section 1111(b)(2) of the Act and § 200.105(b) and (c);

(ii) Provides coherent and timely information about student achievement based on the challenging State academic standards under section 1111(b)(1) of the Act;

(iii) Includes objective measurements of academic achievement, knowledge, and skills; and

(iv) Is valid, reliable, and consistent with relevant, nationally recognized professional and technical standards;

(2) The SEA provides satisfactory evidence that it has examined the statistical relationship between student performance on the innovative assessment in each subject area and student performance on other measures of success, including the measures used for each relevant grade-span within the remaining indicators (*i.e.,* indicators besides Academic Achievement) in the statewide accountability system under section 1111(c)(4)(B)(ii)–(v) of the Act, and how the inclusion of the innovative assessment in its Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act affects the annual meaningful differentiation of schools under section 1111(c)(4)(C) of the Act;

(3) The SEA has solicited information, consistent with the requirements under § 200.105(d)(3)(iv), and taken into account feedback from teachers, principals, other school leaders, parents, and other stakeholders under § 200.105(a)(2) about their satisfaction with the innovative assessment system; and

(4) The SEA has demonstrated that the same innovative assessment system was used to measure—

(i) The achievement of all students and each subgroup of students described in section 1111(c)(2) of the Act, and that appropriate accommodations were provided consistent with §200.6(b) and (f)(1)(i) under section 1111(b)(2)(B)(vii) of the Act; and

(ii) For purposes of the State accountability system consistent with section 1111(c)(4)(E) of the Act, progress on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act of at least 95 percent of all students, and 95 percent of students in each subgroup of students described in section 1111(c)(2) of the Act.

(c) With respect to the evidence submitted to the Secretary to make the determination described in paragraph (b)(2) of this section, the baseline year for any evaluation is the first year that a participating LEA in the State administered the innovative assessment system under the demonstration authority.

(d) In the case of a consortium of SEAs, evidence may be submitted for the consortium as a whole so long as the evidence demonstrates how each member SEA meets each requirement of paragraph (b) of this section applicable to an SEA.

(Authority: 20 U.S.C. 1221e–3, 3474, 6311(a), 6364, 6571)

[81 FR 88971, Dec. 8, 2016]

§ 200.108 Extension, waivers, and withdrawal of authority.

(a) *Extension.* (1) The Secretary may extend an SEA's demonstration authority period for no more than two years if the SEA submits to the Secretary—

(i) Evidence that its innovative assessment system continues to meet the requirements under §200.105 and the SEA continues to implement the plan described in its application in response to the selection criteria in §200.106 in all participating schools and LEAs;

(ii) A high-quality plan, including input from stakeholders under §200.105(a)(2), for transitioning to statewide use of the innovative assessment system by the end of the extension period; and

(iii) A demonstration that the SEA and all LEAs that are not yet fully implementing the innovative assessment system have sufficient capacity to support use of the system statewide by the end of the extension period.

(2) In the case of a consortium of SEAs, the Secretary may extend the demonstration authority period for the consortium as a whole or for an individual member SEA.

(b) *Withdrawal of demonstration authority.* (1) The Secretary may withdraw the innovative assessment demonstration authority provided to an SEA, including an individual SEA member of a consortium, if at any time during the approved demonstration authority period or extension period, the Secretary requests, and the SEA does not present in a timely manner—

(i) A high-quality plan, including input from stakeholders under §200.105(a)(2), to transition to full statewide use of the innovative assessment system by the end of its approved demonstration authority period or extension period, as applicable; or

(ii) Evidence that—

(A) The innovative assessment system meets all requirements under §200.105, including a demonstration that the innovative assessment system has met the requirements under §200.105(b);

(B) The SEA continues to implement the plan described in its application in response to the selection criteria in §200.106;

(C) The innovative assessment system includes and is used to assess all students attending participating schools in the demonstration authority, consistent with the requirements under section 1111(b)(2) of the Act to provide for participation in State assessments, including among each subgroup of students described in section 1111(c)(2) of the Act, and for appropriate accommodations consistent with §200.6(b) and (f)(1)(i) and section 1111(b)(2)(B)(vii) of the Act;

(D) The innovative assessment system provides an unbiased, rational, and consistent determination of progress toward the State's long-term goals and measurements of interim progress for academic achievement under section 1111(c)(4)(A) of the Act for all students

and subgroups of students described in section 1111(c)(2) of the Act and a comparable measure of student performance on the Academic Achievement indicator under section 1111(c)(4)(B)(i) of the Act for participating schools relative to non-participating schools; or

(E) The innovative assessment system demonstrates comparability to the statewide assessments under section 1111(b)(2) of the Act in content coverage, difficulty, and quality.

(2)(i) In the case of a consortium of SEAs, the Secretary may withdraw innovative assessment demonstration authority for the consortium as a whole at any time during its demonstration authority period or extension period if the Secretary requests, and no member of the consortium provides, the information under paragraph (b)(1)(i) or (ii) of this section.

(ii) If innovative assessment demonstration authority for one or more SEAs in a consortium is withdrawn, the consortium may continue to implement the authority if it can demonstrate, in an amended application to the Secretary that, as a group, the remaining SEAs continue to meet all requirements and selection criteria in §§ 200.105 and 200.106.

(c) *Waiver authority.* (1) At the end of the extension period, an SEA that is not yet approved consistent with § 200.107 to implement its innovative assessment system statewide may request a waiver from the Secretary consistent with section 8401 of the Act to delay the withdrawal of authority under paragraph (b) of this section for the purpose of providing the SEA with the time necessary to receive approval to transition to use of the innovative assessment system statewide under § 200.107(b).

(2) The Secretary may grant an SEA a one-year waiver to continue the innovative assessment demonstration authority, if the SEA submits, in its request under paragraph (c)(1) of this section, evidence satisfactory to the Secretary that it—

(i) Has met all of the requirements under paragraph (b)(1) of this section and of §§ 200.105 and 200.106; and

(ii) Has a high-quality plan, including input from stakeholders under § 200.105(a)(2), for transition to statewide use of the innovative assessment system, including peer review consistent with § 200.107, in a reasonable period of time.

(3) In the case of a consortium of SEAs, the Secretary may grant a one-year waiver consistent with paragraph (c)(1) of this section for the consortium as a whole or for individual member SEAs, as necessary.

(d) *Return to the statewide assessment system.* If the Secretary withdraws innovative assessment demonstration authority consistent with paragraph (b) of this section, or if an SEA voluntarily terminates use of its innovative assessment system prior to the end of its demonstration authority, extension, or waiver period under paragraph (c) of this section, as applicable, the SEA must—

(1) Return to using, in all LEAs and schools in the State, a statewide assessment that meets the requirements of section 1111(b)(2) of the Act; and

(2) Provide timely notice to all participating LEAs and schools of the withdrawal of authority and the SEA's plan for transition back to use of a statewide assessment.

(Authority: 20 U.S.C. 1221e–3, 3474, 6364, 6571)

[81 FR 88971, Dec. 8, 2016]

§ 200.109 [Reserved]

PART 206—SPECIAL EDUCATIONAL PROGRAMS FOR STUDENTS WHOSE FAMILIES ARE ENGAGED IN MIGRANT AND OTHER SEASONAL FARMWORK—HIGH SCHOOL EQUIVALENCY PROGRAM AND COLLEGE ASSISTANCE MIGRANT PROGRAM

Subpart A—General

Sec.

AUTHORITY: 20 U.S.C. 1070d–2, unless otherwise noted.

SOURCE: 46 FR 35075, July 6, 1981, unless otherwise noted.

Subpart A—General

§ 206.1 What are the special educational programs for students whose families are engaged in migrant and other seasonal farmwork?

(a) *High School Equivalency Program.* The High School Equivalency Program (HEP) is designed to assist persons who are eligible under § 206.3—to obtain the equivalent of a secondary school diploma and subsequently to gain employment or be placed in an institution of higher education (IHE) or other postsecondary education or training.

(b) *College Assistance Migrant Program.* The College Assistance Migrant Program (CAMP) is designed to assist persons who are eligible under § 206.3—who are enrolled or are admitted for enrollment on a full-time basis in the first academic year at an IHE.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992]

§ 206.2 Who is eligible to participate as a grantee?

(a) *Eligibility.* An IHE or a private nonprofit organization may apply for a grant to operate a HEP or CAMP project.

(b) *Cooperative planning.* If a private nonprofit organization other than an IHE applies for a HEP or a CAMP grant, that agency must plan the project in cooperation with an IHE and must propose to operate the project, or in the case of a HEP grant, some aspects of the project, with the facilities of that IHE.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

§ 206.3 Who is eligible to participate in a project?

(a) *General.* To be eligible to participate in a HEP or a CAMP project—

(1) A person, or his or her immediate family member, must have spent a minimum of 75 days during the past 24 months as a migrant or seasonal farmworker; or

(2) The person must have participated (with respect to HEP within the last 24 months), or be eligible to participate, in programs under 34 CFR part 200, subpart C (Title I—Migrant Education Program) or 20 CFR part 633 (Employment and Training Administration, Department of Labor—Migrant and Seasonal Farmworker Programs).

(b) *Special HEP qualifications.* To be eligible to participate in a HEP project, a person also must—

(1) Not have earned a secondary school diploma or its equivalent;

(2) Not be currently enrolled in an elementary or secondary school;

(3) Be 16 years of age or over, or beyond the age of compulsory school attendance in the State in which he or she resides; and

(4) Be determined by the grantee to need the academic and supporting services and financial assistance provided

by the project in order to attain the equivalent of a secondary school diploma and to gain employment or be placed in an IHE or other postsecondary education or training.

(c) *Special CAMP qualifications.* To be eligible to participate in a CAMP project, a person also must—

(1) Be enrolled or be admitted for enrollment as a full-time student at the participating IHE;

(2) Not be beyond the first academic year of a program of study at the IHE, as determined under the standards of the IHE; and

(3) Be determined by the grantee to need the academic and supporting services and financial assistance provided by the project in order to complete an academic program of study at the IHE.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65769, Oct. 26, 2010]

§ 206.4 What regulations apply to these programs?

The following regulations apply to HEP and CAMP:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) [Reserved]

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions That Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(6) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(7) [Reserved]

(8) 34 CFR part 86 (Drug-Free Schools and Campuses).

(9) 34 CFR part 97 (Protection of Human Subjects).

(10) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(11) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 206.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474, and the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 58 FR 11539, Feb. 26, 1993; 75 FR 65770, Oct. 26, 2010; 79 FR 76095, Dec. 19, 2014]

§ 206.5 What definitions apply to these programs?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1(c) (EDGAR, Definitions):

Applicant
Application
Award
Elementary school
EDGAR
Facilities
Grant
Grantee
Minor remodeling
Nonprofit
Private
Project
Public
Secondary school
Secretary
State

(b) *Definitions in the grants administration regulations.* The following terms used in this part are defined in 2 CFR part 200, as adopted in 2 CFR part 3474:

Budget
Equipment
Supplies

(c) *Program definitions.* The following additional definitions apply specifically to HEP and CAMP:

(1) *Act* means the Higher Education Act of 1965, as amended.

(2) *Agricultural activity* means:

(i) Any activity directly related to the production of crops, dairy products, poultry, or livestock;

(ii) Any activity directly related to the cultivation or harvesting of trees; or

(iii) Any activity directly related to fish farms.

(3) *Farmwork* means any agricultural activity, performed for either wages or

personal subsistence, on a farm, ranch, or similar establishment.

(4) *Full-time*, with respect to an individual, means a student who is carrying a full-time academic workload, as defined in 34 CFR part 690 (regulations for the Pell Grant Program).

(5) *Immediate family member* means one or more of the following:

(i) A spouse.

(ii) A parent, step-parent, adoptive parent, foster parent, or anyone with guardianship.

(iii) Any person who—

(A) Claims the individual as a dependent on a Federal income tax return for either of the previous two years, or

(B) Resides in the same household as the individual, supports that individual financially, and is a relative of that individual.

(6) *Institution of higher education* means an educational institution that:

(i) Is in a State;

(ii) Is authorized by that State to provide a program of education beyond secondary school;

(iii) Is a public or nonprofit institution;

(iv) Admits as a regular student only a person who:

(A) Has a secondary school diploma;

(B) Has the recognized equivalent of a secondary school diploma; or

(C) Is beyond the age of compulsory school attendance in that State and has the ability to benefit from the training offered by the institution;

(v) Provides:

(A) An educational program for which it awards a bachelor's degree; or

(B) At least a two-year program that is acceptable for full credit toward a bachelor's degree;

(vi)(A) Is accredited by a nationally recognized accrediting agency or association;

(B) Has satisfactorily assured the Secretary that it will meet the accreditation standards of a nationally recognized accrediting agency or association within a reasonable time considering the resources available to the institution, the period of time, if any, it has operated, and its effort to meet accreditation standards; or

(C) Has its credits accepted on transfer by at least three accredited institutions on the same basis as those institutions accept transfer credits from fully accredited institutions.

(7) *Migrant farmworker* means a seasonal farmworker—as defined in paragraph (c)(8) of this section—whose employment required travel that precluded the farmworker from returning to his or her domicile (permanent place of residence) within the same day.

(8) *Seasonal farmworker* means a person whose primary employment was in farmwork on a temporary or seasonal basis (that is, not a constant year-round activity) for a period of at least 75 days within the past 24 months.

(d) *Other definitions.* For purposes of determining program eligibility under § 206.3(a)(2), the definitions in 34 CFR 200.81 (Title I—Migrant Education Program) and 20 CFR 633.104 (Employment and Training Administration, Department of Labor—Migrant and Seasonal Farmworker Programs) apply.

(Authority: 20 U.S.C. 1070d–2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65770, Oct. 26, 2010; 79 FR 76095, Dec. 19, 2014]

Subpart B—What Kinds of Activities Does the Secretary Assist Under These Programs?

§ 206.10 What types of services may be provided?

(a) *General.* A grantee may use funds under HEP or CAMP to support approved projects designed to provide academic and supporting services and financial assistance to eligible participants as described in § 206.3.

(b) *Types of services*—(1) *HEP projects.* A HEP project may provide the following types of services to assist participants in obtaining the equivalent of a secondary school diploma, and as needed, to assure the success of the participants in meeting the project's objectives and in succeeding at the secondary school level and beyond:

(i) Recruitment services to reach persons who are eligible under § 206.3 (a) and (b).

(ii) Educational services that provide instruction designed to help students pass an examination and obtain a certificate that meets the guidelines for

high school equivalency established by the State in which the project is located.

(iii) Supportive services that include the following:

(A) Personal, vocational, and academic counseling;

(B) Placement services designed to place students in a university, college, or junior college program (including preparation for college entrance examinations), or in military services or career positions; and

(C) Health services.

(iv) Information concerning and assistance in obtaining available student financial aid.

(v) Stipends for high school equivalency program participants.

(vi) Housing for those enrolled in residential programs.

(vii) Exposure to cultural events, academic programs, and other educational and cultural activities usually not available to migrant youth.

(viii) Other essential supportive services, (such as transportation and child care) as needed, to ensure the success of eligible students.

(ix) Other activities to improve persistence and retention in postsecondary education.

(2) *CAMP projects.* A CAMP project may provide the following types of services to assist the participants in meeting the project's objectives and in succeeding in an academic program of study at the IHE:

(i) Outreach and recruitment services to reach persons who are eligible under § 206.3 (a) and (c).

(ii) Supportive and instructional services to improve placement, persistence, and retention in postsecondary education, including:

(A) Personal, academic, career economic education, or personal finance counseling as an ongoing part of the program;

(B) Tutoring and academic-skillbuilding instruction and assistance;

(C) Assistance with special admissions;

(D) Health services; and

(E) Other services as necessary to assist students in completing program requirements.

(iii) Assistance in obtaining student financial aid that includes, but is not limited to, the following:

(A) Stipends.

(B) Scholarships.

(C) Student travel.

(D) Career-oriented work-study.

(E) Books and supplies.

(F) Tuition and fees.

(G) Room and board.

(H) Other assistance necessary to assist students in completing their first year of college or university.

(iv) Housing support for students living in institutional facilities and commuting students.

(v) Exposure to cultural events, academic programs, and other activities not usually available to migrant youth.

(vi) Internships.

(vii) Other essential supportive services (such as transportation and child care) as necessary to ensure the success of eligible students.

(c) The health services, and other financial support services provided to participating students must:

(1) Be necessary to ensure their participation in the HEP or CAMP; and

(2) Not detract, because of the amount, from the basic educational services provided under those programs.

(Authority: 20 U.S.C. 1070d–2(b) and (c))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65770, Oct. 26, 2010]

§ 206.11 What types of CAMP services must be provided?

(a) In addition to the services provided in § 206.10(b)(2), CAMP projects must provide follow-up services for project participants after they have completed their first year of college.

(b) Follow-up services may include—

(1) Monitoring and reporting the academic progress of students who participated in the project during their first year of college and their subsequent years in college;

(2) Referring these students to on- or off-campus providers of counseling services, academic assistance, or financial aid, and coordinating those services, assistance, and aid with other non-program services, assistance, and aid, including services, assistance, and

aid provided by community-based organizations, which may include mentoring and guidance; and

(3) For students attending two-year institutions of higher education, encouraging the students to transfer to four-year institutions of higher education, where appropriate, and monitoring the rate of transfer of those students.

(c) Grantees may not use more than 10 percent of funds awarded to them for follow-up services.

(Authority: 20 U.S.C. 1070d-2(c))

[57 FR 60407, Dec. 18, 1992, as amended at 75 FR 65770, Oct. 26, 2010]

Subpart C—How Does One Apply for a Grant?

§ 206.20 What must be included in an application?

In applying for a grant, an applicant shall:

(a) Follow the procedures and meet the requirements stated in subpart C of 34 CFR part 75 (EDGAR-Direct Grant Programs);

(b) Submit a grant application that:

(1) Covers a period of five years unless extraordinary circumstances warrant a shorter period; and

(2) Includes an annual budget of not less than $180,000;

(c) Include a management plan that contains:

(1) Assurances that the staff has a demonstrated knowledge of and will be sensitive to the unique characteristics and needs of the migrant and seasonal farmworker population; and

(2) Provisions for:

(i) Staff inservice training;

(ii) Training and technical assistance;

(iii) Staff travel;

(iv) Student travel;

(v) Interagency coordination; and

(vi) Project evaluation; and

(d) Provide the following assurances:

(1) The grantee will develop and implement a plan for identifying, informing, and recruiting eligible participants who are most in need of the academic and supporting services and financial assistance provided by the project.

(2) The grantee will develop and implement a plan for identifying and using the resources of the participating IHE and the community to supplement and enhance the services provided by the project.

(Authority: 20 U.S.C. 1070d–2(a) and (d)-(f))

(Approved by the Office of Management and Budget under control number 1810–0055)

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987; 57 FR 60407, Dec. 18, 1992; 75 FR 65770, Oct. 26, 2010]

Subpart D—How Does the Secretary Make a Grant to an Applicant?

§ 206.30 How does the Secretary evaluate an application?

The Secretary evaluates an application under the procedures in 34 CFR part 75.

(Authority: 20 U.S.C. 1070d–2(a) and (e))

[62 FR 10403, Mar. 6, 1997]

§ 206.31 How does the Secretary evaluate points for prior experience for HEP and CAMP service delivery?

(a) In the case of an applicant for a HEP award, the Secretary considers the applicant's experience in implementing an expiring HEP project with respect to—

(1) Whether the applicant served the number of participants described in its approved application;

(2) The extent to which the applicant met or exceeded its funded objectives with regard to project participants, including the targeted number and percentage of—

(i) Participants who received a general educational development (GED) credential; and

(ii) GED credential recipients who were reported as entering postsecondary education programs, career positions, or the military; and

(3) The extent to which the applicant met the administrative requirements, including recordkeeping, reporting, and financial accountability under the terms of the previously funded award.

(b) In the case of an applicant for a CAMP award, the Secretary considers

the applicant's experience in implementing an expiring CAMP project with respect to—

(1) Whether the applicant served the number of participants described in its approved application;

(2) The extent to which the applicant met or exceeded its funded objectives with regard to project participants, including the targeted number and percentage of participants who—

(i) Successfully completed the first year of college; and

(ii) Continued to be enrolled in postsecondary education after completing their first year of college; and

(3) The extent to which the applicant met the administrative requirements, including recordkeeping, reporting, and financial accountability under the terms of the previously funded award.

(Authority: 20 U.S.C. 1070d–2(e))

[75 FR 65770, Oct. 26, 2010]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 206.40 What restrictions are there on expenditures?

Funds provided under HEP or CAMP may not be used for construction activities, other than minor construction-related activities such as the repair or minor remodeling or alteration of facilities.

(Authority: Sec. 418A(a); 20 U.S.C. 1070d–2)

PART 222—IMPACT AID PROGRAMS

Subpart A—General

Sec.

Subpart B—Payments for Federal Property Under Section 8002 of the Act

Subpart C—Payments for Federally Connected Children Under Section 8003(b) of the Act

Subpart D—Payments Under Section 8003(d) of the Act for Local Educational Agencies That Serve Children With Disabilities

Subpart E—Payments for Heavily Impacted Local Educational Agencies Under Section 8003(b)(2) of the Act

Subpart F [Reserved]

Subpart G—Special Provisions for Local Educational Agencies That Claim Children Residing on Indian Lands

GENERAL

INDIAN POLICIES AND PROCEDURES

INDIAN POLICIES AND PROCEDURES COMPLAINT AND HEARING PROCEDURES

WITHHOLDING AND RELATED PROCEDURES FOR INDIAN POLICIES AND PROCEDURES

Subpart H [Reserved]

Subpart I—Facilities Assistance and Transfers Under Section 8008 of the Act

Subpart J—Impact Aid Administrative Hearings and Judicial Review Under Section 8011 of the Act

Subpart K—Determinations Under Section 8009 of the Act

AUTHORITY: 20 U.S.C. 7701–7714; Pub. L. 111–256, 124 Stat. 2643; unless otherwise noted.

SOURCE: 60 FR 50778, Sept. 29, 1995, unless otherwise noted.

Subpart A—General

§ 222.1 What is the scope of this part?

The regulations in this part govern the provision of financial assistance under title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) to local educational agencies (LEAs) in areas affected by Federal activities.

(Authority: 20 U.S.C. 7701–7714)

§ 222.2 What definitions apply to this part?

(a)(1) The following terms defined in section 8013 of the Act apply to this part:

Armed forces
Average per-pupil expenditure
Construction
Current expenditures
Indian lands
Local contribution percentage
Low-rent housing
Modernization
School facilities

(2) The following term defined in § 222.30 applies to this part:

Free public education

(b) The following terms defined in section 9101 of the ESEA (General Provisions) also apply to this part:

Average daily attendance (ADA)
Child
County
Department
Outlying area
Parent
Secretary
State
State educational agency (SEA)

(c) In addition, the following definitions apply to this part:

Act means title VIII of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

Applicant means any LEA that files an application for financial assistance under section 8002 or section 8003 of the Act and the regulations in this part implementing those provisions. Except as provided in section 8005(d)(4) of the Act, an SEA may be an applicant for assistance under section 8003 only if the SEA directly operates and maintains facilities for providing free public education for the children it claims in its application.

(Authority: 20 U.S.C. 7705 and 7713(9))

Application means a complete and signed application in the form approved by the Secretary, filed by an applicant.

(Authority: 20 U.S.C. 7705)

Federally connected children means children described in section 8003 or section 8010(c)(2) of the Act.

(Authority: 20 U.S.C. 7703(a)(1) and 7710(c); 37 U.S.C. 101)

Federal property. (1) The term means—

(i) Federal property described in section 8013; and

(ii) Ships that are owned by the United States and whose home ports are located upon Federal property described in this definition.

(2) Notwithstanding paragraph (1) of this definition, for the purpose of section 8002 the term does not include—

(i) Any real property that the United States does not own in fee simple, except for Indian lands described in section 8013(7), and transferred property described in section 8002(d); and

(ii) Real property described in section 8002(c) (real property with respect to which payments are being made under section 13 of the Tennessee Valley Authority Act of 1933).

(Authority: 20 U.S.C. 7702(c) and (d), and 7713(5) and (7))

Fiscally dependent LEA means an LEA that does not have the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes.

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Fiscally independent LEA means an LEA that has the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes within the limits established by State law.

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Local educational agency (LEA) is defined in section 8013(9). Except for an SEA qualifying under section 8005(d)(4), the term includes an SEA only so long as—

(1) The SEA directly operates and maintains the facilities for providing free public education for the children it claims in its application;

(2) The children claimed by the SEA actually are attending those State-operated facilities; and

(3) The SEA does not, through a tuition arrangement, contract, or by any other means, pay another entity to operate and maintain facilities for those children.

(Authority: 20 U.S.C. 7705(d)(4) and 7713(9))

Local real property tax rate for current expenditure purposes. (1) For a fiscally independent LEA, the term means the entire tax levied on real property within the LEA, if all but a *de minimis* amount of the total proceeds from the tax levy are available to that LEA for current expenditures (as defined in section 8013).

(2) For a fiscally dependent LEA, the term means the following:

(i) The entire tax levied by the general government on real property if all but a *de minimis* amount of the total proceeds from that tax levy are available to the LEA for current expenditures (as defined in section 8013);

(ii) That portion of a local real property tax rate designated by the general government for current expenditure purposes (as defined in section 8013); or

(iii) If no real property tax levied by the general government meets the criteria in paragraphs (2)(i) or (ii) of this definition, an imputed tax rate that the Secretary determines by—

(A) Dividing the total local real property tax revenue available for current expenditures of the general government by the total revenue from all local sources available for current expenditures of the general government;

(B) Multiplying the figure obtained in paragraph (2)(iii)(A) of this definition by the revenue received by the LEA for current expenditures (as defined in section 8013) from the general government; and

(C) Dividing the figure obtained in paragraph (2)(iii)(B) of this definition by the total current actual assessed value of all real property in the district.

(3) The term does not include any portion of a tax or revenue that is restricted to or dedicated for any specific purpose other than current expenditures (as defined in section 8013).

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Membership means the following:

(1)(i) The definition given to the term by State law; or

(ii) If State law does not define the term, the number of children listed on an LEA's current enrollment records on its survey date(s).

(2) The term includes children for whom the applicant is responsible for providing a free public education, but who are attending schools other than those operated by the applicant under a tuition arrangement described in paragraph (4) of the definition of ''free public education'' in § 222.30.

(3) The term does not include children who—

(i) Have never attended classes in schools of the LEA or of another educational entity with which the LEA has a tuition arrangement;

(ii) Have permanently left the LEA;

(iii) Otherwise have become ineligible to attend classes there; or

(iv) Attend the schools of the applicant LEA under a tuition arrangement with another LEA that is responsible for providing them a free public education; or

(v) Reside in a State other than the State in which the LEA is located, unless the student is covered by the provisions of—

(A) Section 7010(c) of the Act; or

(B) A formal State tuition or enrollment agreement.

(Authority: 20 U.S.C. 7703 and 8801(1))

Parent employed on Federal property. (1) The term means:

(i) An employee of the Federal government who reports to work on, or whose place of work is located on, Federal property, including a Federal employee who reports to an alternative duty station on the survey date, but whose regular duty station is on Federal property.

Example 1: Lauren, a Virginia resident, is an employee of the U.S. Department of Defense. Her physical duty station is in the Pentagon in Arlington, Virginia, and her children attend LEA A in Virginia. Lauren meets the definition of a ''parent employed on Federal property'' as she is both a Federal employee and her duty station is on eligible Federal property in the same State as LEA A. Thus LEA A may claim Lauren's children on its Impact Aid application.

Example 2: Alex, a Virginia resident, is an employee of the U.S. Department of Defense. His physical duty station is in the Pentagon in Arlington, Virginia, and his children attend LEA B in Virginia. On the survey date, Alex was teleworking from his home. For purposes of LEA B's Impact Aid application, Alex meets the definition of a ''parent employed on Federal property,'' as he is both a Federal employee and his duty station is on eligible Federal property in the same State as LEA B, even though Alex was at an alternative duty station on the survey date because he teleworked. LEA B may claim Alex's children on its Impact Aid application.

Example 3: Elroy is an employee of the U.S. Department of Education. His normal duty station is on eligible Federal property located in Washington, DC. Elroy's place of

residence is in Virginia, and his children attend LEA C in Virginia. Elroy, a Federal employee, does not meet the definition of a ''parent employed on Federal property.'' The statute requires that the Federal property on which a parent is employed be in the same State as the LEA (ESEA section 7003(a)(1)(G)), and because the Federal property where Elroy works is not in the same State as LEA C, LEA C may not claim Elroy's children.

(ii) A person not employed by the Federal government but who spends more than 50 percent of his or her working time on Federal property (whether as an employee or self-employed) when engaged in farming, grazing, lumbering, mining, or other operations that are authorized by the Federal government, through a lease or other arrangement, to be carried out entirely or partly on Federal property.

Example 1: Xavier, a dealer at a casino on eligible Indian lands in Utah, reports to work at the casino as his normal duty station and works his eight hour shift at the casino. Xavier's child attends school in LEA D in Utah. For purposes of Impact Aid, Xavier meets the definition of a ''parent employed on Federal property'' because, although Xavier is not a Federal employee, his duty station is the casino, which is located on an eligible Federal property within the same State as LEA D. LEA D may claim Xavier's children on its Impact Aid application.

Example 2: Becca works at a privately owned convenience store on leased property on a military installation in Maine. Becca's children attend school at a LEA E, a Maine public school district. On a daily basis, including on the survey date, Becca reports to work at the convenience store where she works her entire shift. Becca meets the definition of a ''parent employed on Federal property'' for LEA E because, although Becca is not a Federal employee, her duty station is the convenience store, which is located on an eligible Federal property within the same State as LEA E. LEA E may claim Becca's children on its Impact Aid application.

Example 3: Zoe leases Federal property in Massachusetts to grow lima beans. Zoe's daughter attends LEA F, a Massachusetts public school. On the survey date, Zoe has a valid lease agreement to carry out farming operations that are authorized by the Federal government. Zoe also has a crop of corn on an adjacent field that is not on Federal property. On the survey date, Zoe spent 75 percent of her day harvesting lima beans and 25 percent of her day harvesting corn. Because Zoe spent more than 50 percent of her day working on farming operations that are authorized by the Federal government on leased Federal property in the same State her daughter attends school, Zoe meets the definition of a ''parent employed on Federal property,'' and LEA F can claim her daughter on its Impact Aid application.

Example 4: Frank is a private contractor with an office on a military installation and an office on private property, both of which are located in Maryland. His time is split between the two offices. Frank's children attend public school in Maryland in LEA G. On the survey date, Frank reported to his office on the military installation. He spent 4 of his 8 hours at the office on the military installation and 4 hours at the privately owned office facility. Frank's children attend LEA G, a Maryland public school. Frank meets the definition of a ''parent employed on Federal property'' because he reported to work on the military installation and he spent at least 50 percent of his time on Federal property conducting operations that are authorized by the Federal government on eligible Federal property in the same State as LEA G. LEA G may claim Frank's children on its Impact Aid application.

(2) Except as provided in paragraph (1)(ii) of this definition, the term does not include a person who is not employed by the Federal government and reports to work at a location not on Federal property, even though the individual provides services to operations or activities authorized to be carried out on Federal property.

Example 1: Maria delivers bread to the convenience store and the commissary, which are both eligible Federal properties located on a military installation in Florida. Maria's son attends school in LEA H, a Florida public school district. On a daily basis, including the survey date, Maria reports to a privately owned warehouse on private property to get her inventory for delivery. Maria is not a Federal employee and her duty station is the warehouse located on private property. She therefore does not meet the definition of a ''parent employed on Federal property'' for purposes of Impact Aid. LEA H may not claim Maria's children on its Impact Aid application.

Example 2: Lorenzo is a construction worker who is working on an eligible Federal property in Arizona, but each day he reports to his construction office located on private property to get his daily assignments and meet with the crew before going to the jobsite. Lorenzo's twins attend LEA I, in Arizona. Lorenzo is not a Federal employee and his duty station is the construction office and not the Federal property. Lorenzo therefore does not meet the definition of a ''parent employed on Federal property.'' LEA I

may not claim Lorenzo's children on its Impact Aid application.

Example 3: Aubrey, a defense contractor, routinely reports to work at her duty station on private property in California. Aubrey's children attend LEA J in California. On the survey date, Aubrey attends an all-day meeting on a military installation. Aubrey is not a Federal employee and she does not normally report to work on eligible Federal property; as a result, Aubrey is not an eligible parent employed on Federal property, and LEA J cannot claim her children on its Impact Aid application.

(Authority: 20 U.S.C. 7703)

Real property. (1) The term means—

(i) Land; and

(ii) Improvements (such as buildings and appurtenances to those buildings, railroad lines, utility lines, pipelines, and other permanent fixtures), except as provided in paragraph (2).

(2) The term does not include—

(i) Improvements that are classified as personal property under State law; or

(ii) Equipment and movable machinery, such as motor vehicles, movable house trailers, farm machinery, rolling railroad stock, and floating dry docks, unless that equipment or movable machinery is classified as real property or subject to local real property taxation under State law.

(Authority: 20 U.S.C. 7702 and 7713(5))

Revenues derived from local sources. (1) The term means—

(i) Tax funds derived from real estate; and

(ii) Other taxes or receipts that are received from the county, and any other local tax or miscellaneous receipts.

(2)(i) For the purpose of paragraph (1)(i) of this definition, the term *tax funds derived from real estate* means—

(A) Locally received funds that are derived from local taxation of real property;

(B) Tax funds that are received on account of Wherry-Spence housing projects (12 U.S.C. 1702 *et seq.*) located on private property; and

(C) All local real property tax funds that are received from either the county or the State, serving as a collecting agency, and that are returned to the LEA for expenditure by that agency.

(ii) The term does not include—

(A) Any payments under this Act or the Johnson-O'Malley Act (25 U.S.C. 452);

(B) Tax payments that are received on account of Wherry-Spence housing projects located on federally owned property; or

(C) Local real property tax funds that are received by the State and distributed to LEAs on a per-pupil or formula basis.

(Authority: 20 U.S.C. 7713(11))

State aid means any contribution, no repayment of which is expected, made by a State to or on behalf of an LEA within the State for the support of free public education.

(Authority: 20 U.S.C. 7703)

Uniformed services means the United States Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(a)(1); 37 U.S.C. 101)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33161, June 11, 2015; 81 FR 64740, Sept. 20, 2016]

§ 222.3 How does a local educational agency apply for assistance under section 8002 or 8003 of the Act?

An LEA must meet the following application requirements to be considered for a payment under section 8002 or 8003:

(a) Except as provided in paragraphs (b) and (d) of this section, on or before January 31 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003, the LEA must—

(1) File with the Secretary a complete and signed application for payment under section 8002 or section 8003; and

(2) Certify to the Secretary that it will file, and file, a copy of the application referred to in paragraph (a) of this section with its SEA.

(b)(1) If any of the following events that give rise to eligibility for payment occur after the filing deadline in paragraph (a)(1) of this section, an LEA

must file a complete and signed application within the time limits required by paragraph (b)(2) of this section:

(i) The United States Government initiates or reactivates a Federal activity, or acquires real property.

(ii) The United States Congress enacts new legislation.

(iii) A reorganization of school districts takes place.

(iv) Property, previously determined by the Secretary not to be Federal property, is determined in writing by the Secretary to be Federal property.

(2) Except as provided in paragraph (d) of this section, within 60 days after the applicable event occurs but not later than June 30 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003, the LEA must—

(i) File an application with the Secretary as permitted by paragraph (b)(1) of this section; and

(ii) File a copy of that application with its SEA.

(c)(1) If the SEA wishes to notify the Secretary of any inconsistencies or other concerns with an LEA's application, the SEA must do so—

(i) For an application subject to the filing deadlines in paragraph (a)(1) of this section, on or before February 15 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003; and

(ii) On or before fifteen days following the date by which an application subject to the filing deadlines in paragraph (b) of this section must be filed.

(2) The Secretary does not process for payment a timely filed application until any concerns timely raised by the SEA are resolved. If the Secretary does not receive comments or notification from the SEA by the applicable deadline set forth in paragraph (c)(1) of this section, the Secretary assumes that the data and statements in the application are, to the best of the SEA's knowledge, true, complete, and correct.

(d) If a filing date in this section falls on a Saturday, Sunday, or Federal holiday, the deadline for filing is the next succeeding business day.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015; 81 FR 64741, Sept. 20, 2016]

§ 222.4 How does the Secretary determine when an application is timely filed?

To be timely filed under § 222.3, an application must be received by the Secretary on or before the applicable filing date.

[62 FR 35412, July 1, 1997, as amended at 80 FR 33162, June 11, 2015]

§ 222.5 When may a local educational agency amend its application?

(a) An LEA may amend its application following any of the events described in § 222.3(b)(1) by submitting a written request to the Secretary and a copy to its SEA no later than the earlier of the following events:

(1) The 60th day following the applicable event.

(2) By June 30 of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(b) The LEA also may amend its application based on actual data regarding eligible Federal properties or federally connected children if—

(1) Those data were not available at the time the LEA filed its application (*e.g.*, due to a second membership count of students) and are acceptable to the Secretary; and

(2) The LEA submits a written request to the Secretary with a copy to its SEA no later than the end of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(Authority: 20 U.S.C. 7705)

[80 FR 33162, June 11, 2015, as amended at 81 FR 64741, Sept. 20, 2016]

§ 222.6 Which applications does the Secretary accept?

(a) The Secretary accepts or approves for payment any otherwise approvable application under section 8002 or section 8003 that is timely filed with the

Secretary in accordance with §§ 222.3, 222.4, and 222.5, as applicable.

(b) The Secretary does not accept or approve for payment any section 8002 or section 8003 application that is not timely filed with the Secretary as described in paragraph (a) of this section, except as follows:

(1) The Secretary accepts and approves for payment any otherwise approvable application filed within—

(i) 60 days from the application deadline established in § 222.3; or

(ii) 60 days from the date of the Secretary's written notice of an LEA's failure to comply with the applicable filing date.

(2) The Secretary reduces the payment for applications described in paragraph (b)(1) of this section by 10 percent of the amount that would have been paid if the LEA had timely filed the application.

(Authority: 20 U.S.C. 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

§ 222.7 What information may a local educational agency submit after the application deadline?

(a) *General.* Except as indicated in paragraph (b) of this section, the Secretary does not consider information submitted by an applicant after the deadlines prescribed in this subpart for submission of applications and amendments to applications.

(b) *Information solicited by the Secretary.* The Secretary may solicit from an applicant at any time additional information to process an application.

(Authority: 20 U.S.C. 7702, 7703, 7705, 7706)

§ 222.8 What action must an applicant take upon a change in its boundary, classification, control, governing authority, or identity?

(a) Any applicant that is a party to an annexation, consolidation, deconsolidation, merger, or other similar action affecting its boundaries, classification, control, governing authority, or identity must provide the following information to the Secretary as soon as practicable:

(1) A description of the character and extent of the change.

(2) The effective date of the change.

(3) Full identification of all predecessor and successor LEAs.

(4) Full information regarding the disposition of the assets and liabilities of all predecessor LEAs.

(5) Identification of the governing body of all successor LEAs.

(6) The name and address of each authorized representative officially designated by the governing body of each successor LEA for purposes of the Act.

(b) If a payment is made under section 8002 or 8003 to an LEA that has ceased to be a legally constituted entity during the regular school term due to an action described in paragraph (a) of this section, the LEA may retain that payment if—

(1) An adjustment is made in the payment of a successor LEA to account for the payment to the predecessor LEA; or

(2)(i) The payment amount does not exceed the amount the predecessor LEA would have been eligible to receive if the change in boundaries or organization had not taken place; and

(ii) A successor LEA is not an eligible applicant.

(c) A predecessor LEA receiving any portion of a payment under section 8002 or 8003 that exceeds the amount allowed by paragraph (b)(2)(i) of this section must return the excessive portion to the Secretary, unless the Secretary determines otherwise under section 8012 of the Act.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7702 and 7703)

§ 222.9 What records must a local educational agency maintain?

Except as otherwise provided in § 222.10—

(a) An LEA must maintain adequate written records to support the amount of payment it received under the Act for any fiscal year;

(b) On request, the LEA must make its records available to the Secretary for the purpose of examination or audit; and

(c) Each applicant must submit such reports and information as the Secretary may require to determine the

amount that the applicant may be paid under the Act.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 1232f, 7702, 7703, 7704, 7706)

§ 222.10 How long must a local educational agency retain records?

An LEA must retain the records described in § 222.9 until the later of—

(a) Three years after the last payment for a fiscal year; or

(b) If the records have been questioned on Federal audit or review, until the question is finally resolved and any necessary adjustments to payments have been made.

(Authority: 20 U.S.C. 1232f, 7702, 7703, 7704, 7706)

§ 222.11 How does the Secretary recover overpayments?

Except as otherwise provided in §§ 222.12–222.18, the Secretary adjusts for and recovers overpayments as follows:

(a) If the Secretary determines that an LEA has received a payment in excess of what it should have received under the Act and this part, the Secretary deducts the amount of the overpayment from subsequent payments for which the LEA is eligible under the Act.

(b)(1) If the LEA is not eligible for subsequent payments under the Act, the LEA must promptly refund the amount of the overpayment to the Secretary.

(2) If the LEA does not promptly repay the amount of the overpayment or promptly enter into a repayment agreement with the Secretary, the Secretary may use the procedures in 34 CFR part 30 to offset that amount against payments from other Department programs or, under the circumstances permitted in part 30, to request that another agency offset the debt.

(Authority: 20 U.S.C. 1226a–1, 7702, 7703, 7706, 7712)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35412, July 1, 1997]

§ 222.12 What overpayments are eligible for forgiveness under section 8012 of the Act?

(a) The Secretary considers as eligible for forgiveness under section 8012 of the Act (''eligible overpayment'') any amount that is more than an LEA was eligible to receive for a particular fiscal year under the Act, except for the types of overpayments listed in § 222.13.

(b) The Secretary applies §§ 222.14–222.18 in forgiving, in whole or part, an LEA's obligation to repay an eligible overpayment that resulted from error either by the LEA or the Secretary.

(Authority: 20 U.S.C. 7712)

[62 FR 35412, July 1, 1997]

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

§ 222.13 What overpayments are not eligible for forgiveness under section 8012 of the Act?

The Secretary does not consider as eligible for forgiveness under section 8012 of the Act any overpayment caused by an LEA's failure to expend or account for funds properly under the following laws and regulations:

(a) Section 8003(d) of the Act (implemented in subpart D of this part) for certain federally connected children with disabilities.

(b) Section 8007 of the Act for construction.

(Authority: 20 U.S.C. 7712)

[80 FR 33162, June 11, 2015]

§ 222.14 What requirements must a local educational agency meet for an eligible overpayment to be forgiven in whole or part?

The Secretary forgives an eligible overpayment, in whole or part as described in § 222.18, if—

(a) An LEA submits to the Department's Impact Aid Program office a written request for forgiveness by the later of—

(1) Thirty days from the LEA's initial receipt of a written notice of the overpayment; or

(2) September 2, 1997;

(b) The LEA submits to the Department's Impact Aid Program office the information and documentation described in § 222.16 by the deadlines described in paragraph (a) of this section,

or other time limit established in writing by the Secretary due to lack of availability of the information and documentation; and

(c) The Secretary determines under § 222.17 that—

(1) In the case either of an LEA's or the Department's error, repayment of the LEA's total eligible overpayments will result in an undue financial hardship on the LEA and seriously harm the LEA's educational program; or

(2) In the case of the Department's error, determined on a case-by-case basis, repayment would be manifestly unjust (''manifestly unjust repayment exception'').

[62 FR 35413, July 1, 1997]

§ 222.15 How are the filing deadlines affected by requests for other forms of relief?

Unless the Secretary (or the Secretary's delegatee) extends the applicable time limit in writing—

(a) A request for forgiveness of an overpayment under § 222.14 does not extend the time within which an applicant must file a request for an administrative hearing under § 222.151; and

(b) A request for an administrative hearing under § 222.151, or for reconsideration under § 222.152, does not extend the time within which an applicant must file a request for forgiveness under § 222.14.

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

§ 222.16 What information and documentation must a local educational agency submit for an eligible overpayment to be considered for forgiveness?

(a) Every LEA requesting forgiveness must submit, within the time limits established under § 222.14(b), the following information and documentation for the fiscal year immediately preceding the date of the forgiveness request (''preceding fiscal year''):

(1) A copy of the LEA's annual financial report to the State.

(2) The LEA's local real property tax rate for current expenditure purposes, as described in § 222.17(b).

(3) The average local real property tax rate of all LEAs in the State.

(4) The average per pupil expenditure (APPE) of the LEA, calculated by dividing the LEA's aggregate current expenditures by the total number of children in average daily attendance for whom the LEA provided a free public education.

(5) The APPE of the State, as defined in section 8013 of the ESEA.

(b) An LEA requesting forgiveness under § 222.14(c)(2) (manifestly unjust repayment exception), or § 222.17(a)(3) (no present or prospective ability to repay), also must submit written information and documentation in specific support of its forgiveness request under those provisions within the time limits established under § 222.14(b).

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

§ 222.17 How does the Secretary determine undue financial hardship and serious harm to a local educational agency's educational program?

(a) The Secretary determines that repayment of an eligible overpayment will result in undue financial hardship on an LEA and seriously harm its educational program if the LEA meets the requirements in paragraph (a)(1), (2), or (3) of this section.

(1) An LEA other than an LEA described in paragraphs (a)(2) and (3) of this section meets the requirements of paragraph (a) of this section if—

(i) The LEA's eligible overpayments on the date of its request total at least $10,000;

(ii) The LEA's local real property tax rate for current expenditure purposes, for the preceding fiscal year, is equal to or higher than the State average local real property tax rate for that preceding fiscal year; and

(iii) The LEA's average per pupil expenditure (APPE) (as described in § 222.16(a)(4)) for the preceding fiscal year is lower than the State APPE (as described in § 222.16(a)(5)) for that preceding fiscal year.

(2) The following LEAs qualify under paragraph (a) of this section if they meet the requirements in paragraph (a)(1)(i) of this section and their APPE (as described in § 222.16(a)(4)) for the preceding fiscal year does not exceed

125 percent of the State APPE (as described in § 222.16(a)(5)) for that preceding fiscal year:

(i) An LEA with boundaries that are the same as a Federal military installation.

(ii) Other LEAs with no local real property tax revenues, or with minimal local real property tax revenues per pupil due to substantial amounts of Federal property in the LEA as compared with the average amount of those revenues per pupil for all LEAs in the State.

(3) An LEA qualifies under paragraph (a) of this section if neither the successor nor the predecessor LEA has the present or prospective ability to repay the eligible overpayment.

(b) The Secretary uses the following methods to determine a tax rate for the purposes of paragraph (a)(1)(ii) of this section:

(1) If an LEA is fiscally independent, the Secretary uses actual tax rates if all the real property in the taxing jurisdiction of the LEA is assessed at the same percentage of true value. In the alternative, the Secretary computes a tax rate for fiscally independent LEAs by using the methods described in §§ 222.67–222.69.

(2) If an LEA is fiscally dependent, the Secretary imputes a tax rate using the method described in § 222.70(b).

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

§ 222.18 What amount does the Secretary forgive?

For an LEA that meets the requirements of § 222.14(a) (timely filed forgiveness request) and § 222.14(b) (timely filed information and documentation), the Secretary forgives an eligible overpayment as follows:

(a) *Forgiveness in whole.* The Secretary forgives the eligible overpayment in whole if the Secretary determines that the LEA meets—

(1) The requirements of § 222.17 (undue financial hardship), and the LEA's current expenditure closing balance for the LEA's fiscal year immediately preceding the date of its forgiveness request (''preceding fiscal year'') is ten percent or less of its total current expenditures (TCE) for that year; or

(2) The manifestly unjust repayment exception in § 222.14(c)(2).

(b) *Forgiveness in part.* (1) The Secretary forgives the eligible overpayment in part if the Secretary determines that the LEA meets the requirements of § 222.17 (undue financial hardship), and the LEA's preceding fiscal year's current expenditure closing balance is more than ten percent of its TCE for that year.

(2) For an eligible overpayment that is forgiven in part, the Secretary—

(i) Requires the LEA to repay the amount by which the LEA's preceding fiscal year's current expenditure closing balance exceeded ten percent of its preceding fiscal year's TCE (''calculated repayment amount''); and

(ii) Forgives the difference between the calculated repayment amount and the LEA's total overpayments.

(3) For the purposes of this section, ''current expenditure closing balance'' means an LEA's closing balance before any revocable transfers to non-current expenditure accounts, such as capital outlay or debt service accounts.

Example: An LEA that timely requests forgiveness has two overpayments of which portions remain owing on the date of its request—one of $200,000 and one of $300,000. Its preceding fiscal year's closing balance is $250,000 (before a revocable transfer to a capital outlay or debt service account); and 10 percent of its TCE for the preceding fiscal year is $150,000.

The Secretary calculates the amount that the LEA must repay by determining the amount by which the preceding fiscal year's closing balance exceeds 10 percent of the preceding year's TCE. This calculation is made by subtracting 10 percent of the LEA's TCE ($150,000) from the closing balance ($250,000), resulting in a difference of $100,000 that the LEA must repay. The Secretary then totals the eligible overpayment amounts ($200,000 + $300,000), resulting in a total amount of $500,000. The Secretary subtracts the calculated repayment amount ($100,000) from the total of the two overpayment balances ($500,000), resulting in $400,000 that the Secretary forgives.

(Authority: 20 U.S.C. 7712)

[62 FR 35414, July 1, 1997]

§ 222.19 What other statutes and regulations apply to this part?

(a) The following Federal statutes and regulations on nondiscrimination apply to assistance under this part:

(1) The provisions of title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) (prohibition of discrimination on the basis of race, color or national origin), and the implementing regulations (34 CFR part 100).

(Authority: 42 U.S.C. 2000d—2000d–4)

(2) The provisions of title IX of the Education Amendments of 1972 (Pub. L. 92–318) (prohibition of discrimination on the basis of sex), and the implementing regulations (34 CFR part 106).

(Authority: 20 U.S.C. 1681–1683)

(3) The provisions of section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112) (prohibition of discrimination on the basis of disability), and the implementing regulations (34 CFR part 104).

(Authority: 29 U.S.C. 794)

(4) The provisions of title II of the Americans with Disabilities Act of 1990 (Pub. L. 101–336) (prohibition of discrimination on basis of disability), and any implementing regulations.

(Authority: 42 U.S.C. 12101–12213)

(5) The provisions of the Age Discrimination Act of 1975 (Pub. L. 94–135) (prohibition of age discrimination), and any implementing regulations.

(Authority: 42 U.S.C. 6101)

(b) The following Education Department General Administrative Regulations (EDGAR):

(1) Subparts A, E, F, and §§ 75.900 and 75.910 of 34 CFR part 75 (Direct Grant Programs) for payments under sections 8003(d) (payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities), except for the following:

(i) Section 75.603 does not apply to payments under section 8007 (construction) or section 8008 (school facilities).

(ii) Section 75.605 does not apply to payments under section 8007 (construction).

(iii) Sections 75.600–602, 75.604, and 75.606–617 apply to payments under section 8007 (construction) only to the extent that funds received under that section are used for major renovations or to construct new school facilities.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 82 (New Restrictions on Lobbying).

(4) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(c) 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)).

(d) 2 CFR part 200, as adopted in 2 CFR part 3474 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards), for payments under sections 8003(d) (payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities).

(Authority: 20 U.S.C. 1221e–3)

[60 FR 50778, Sept. 29, 1995. Redesignated at 62 FR 35412, July 1, 1997;79 FR 76095, Dec. 19, 2014; 80 FR 33162, June 11, 2015]

Subpart B—Payments for Federal Property Under Section 8002 of the Act

§ 222.20 What definitions apply to this subpart?

In addition to the terms referenced or defined in § 222.2, the following definitions apply to this subpart:

Acquisition or *acquired by the United States*. (1) The term means—

(i) The receipt or taking by the United States of ownership in fee simple of real property by condemnation, exchange, gift, purchase, transfer, or other arrangement;

(ii) The receipt by the United States of real property as trustee for the benefit of individual Indians or Indian tribes; or

(iii) The imposition by the United States of restrictions on sale, transfer, or exchange of real property held by individual Indians or Indian tribes.

(2) The definition of ''acquisition'' in 34 CFR 77.1(c) (Definitions that Apply

to Department Regulations) of this title does not apply to this subpart.

(Authority: 20 U.S.C. 7702)

Assessed value. For the purpose of determining eligibility under section 8002(a)(1) and § 222.21, the following definition applies:

(1) The term means the value that is assigned to real property, for the purpose of generating local real property tax revenues for current expenditures (as defined in section 8013 of the Act), by a State or local official who is legally authorized to determine that assessed value.

(2) The term does not include—

(i) A value assigned to tax-exempt real property;

(ii) A value assigned to real property for the purpose of generating other types of revenues, such as payments in lieu of taxes (PILOTs);

(iii) Fair market value, or a percentage of fair market value, of real property unless that value was actually used to generate local real property tax revenues for current expenditures (as defined in section 8013); or

(iv) A value assigned to real property in a condemnation or other court proceeding, or a percentage of that value, unless that value was actually used to generate local real property tax revenues for current expenditures (as defined in section 8013).

(Authority: 20 U.S.C. 7702(a)(1))

Eligible Federal property. (1) The term means ''Federal property'' as defined in § 222.2(c) for section 8002, which meets the following additional requirements:

(i) The United States has acquired the Federal property since 1938; and

(ii) The Federal property was not acquired by exchange for other Federal property that the United States owned within the school district before 1939.

(2) In addition, for local educational agencies (LEAs) that are eligible under § 222.21(a)(2), the term also means land acquired by the United States Forest Service between 1915 and 1990.

(Authority: 20 U.S.C. 7702)

§ 222.21 What requirements must a local educational agency meet concerning Federal acquisition of real property within the local educational agency?

(a) For an LEA with an otherwise approvable application to be eligible to receive financial assistance under section 8002 of the Act, the LEA must meet the requirements in subpart A of this part and § 222.22. In addition, unless otherwise provided by statute as meeting the requirements in section 8002(a)(1)(C), the LEA must document—

(1) That the United States owns or has acquired ''eligible Federal property'' within the LEA, that has an aggregate assessed value of 10 percent or more of the assessed value of—

(i) All real property in that LEA, based upon the assessed values of the eligible Federal property and of all real property (including that Federal property) on the date or dates of acquisition of the eligible Federal property; or

(ii) All real property in the LEA as assessed in the first year preceding or succeeding acquisition, whichever is greater, only if—

(A) The assessment of all real property in the LEA is not made at the same time or times that the Federal property was so acquired and assessed; and

(B) State law requires an assessment be made of property so acquired; or

(2)(i) That, as demonstrated by written evidence from the United States Forest Service satisfactory to the Secretary, the LEA contains between 20,000 and 60,000 acres of land that has been acquired by the United States Forest Service between 1915 and 1990; and

(ii) That the LEA serves a county chartered by State law in 1875 or 1890.

(b) ''Federal property'' described in section 8002(d) (certain transferred property) is considered to be owned by the United States for the purpose of paragraph (a) of this section.

(c) If, during any fiscal year, the United States sells, transfers, is otherwise divested of ownership of, or relinquishes an interest in or restriction on, eligible Federal property, the Secretary redetermines the LEA's eligibility for the following fiscal year,

based upon the remaining eligible Federal property, in accordance with paragraph (a) of this section. This paragraph does not apply to a transfer of real property by the United States described in section 8002(d).

(d) Except as provided under paragraph (a)(2) of this section, the Secretary's determinations and redeterminations of eligibility under this section are based on the following documents:

(1) For a new section 8002 applicant or newly acquired eligible Federal property, only upon—

(i) Original records as of the time(s) of Federal acquisition of real property, prepared by a legally authorized official, documenting the assessed value of that real property;

(ii) Facsimiles, such as microfilm, or other reproductions of those records; or

(iii) If the documents specified in paragraphs (d)(1)(i) and (ii) are unavailable, other records that the Secretary determines to be appropriate and reliable for establishing eligibility under section 8002(a)(1) of the Act, such as Federal agency records or local historical records.

(2) For a redetermination of an LEA's eligibility under section 8002(a)(1), only upon—

(i) Records described in paragraph (d)(1) of this section; or

(ii) Department records.

(e) The Secretary does not base the determination or redetermination of an LEA's eligibility under this section upon secondary documentation that is in the nature of an opinion, such as estimates, certifications, or appraisals.

(Authority: 20 U.S.C. 7702(a)(1))

[60 FR 50778, Sept. 29, 1995, as amended at 73 FR 70575, Nov. 20, 2008]

§ 222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?

(a) An LEA with an otherwise approvable application is eligible to receive assistance under section 8002 for a fiscal year only if the LEA meets the requirements in subpart A of these regulations and § 222.21, and is not substantially compensated, for the loss in revenue resulting from Federal ownership of real property by increases in revenue accruing to the LEA during the previous fiscal year from Federal activities with respect to the eligible Federal property in the LEA.

(b) The Secretary considers that an LEA is substantially compensated by increases in revenue from Federal activities with respect to the eligible Federal property if—

(1) The LEA received revenue during the preceding fiscal year that is generated from activities in or on the eligible Federal property; and

(2) The revenue described in paragraph (b)(1) of this section equals or exceeds the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance.

(c) If an LEA described in paragraph (a) of this section received revenue described in paragraph (b)(1) of this section during the preceding fiscal year that, when added to the LEA's projected total section 8002 payment for the fiscal year for which the LEA seeks assistance, exceeds the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance, the Secretary reduces the LEA's projected section 8002 payment by an amount equal to that excess amount.

(d) For purposes of this section, the amount of revenue that an LEA receives during the previous fiscal year from activities conducted on Federal property includes payments received by any Federal agency due to activities on Federal property, including forestry, mining, and grazing, but does not include revenue from:

(1) Payments received by the LEA from the Secretary of Defense to support—

(i) The operation of a domestic dependent elementary or secondary school; or

(ii) The provision of a free public education to dependents of members of the Armed Forces residing on or near a military installation;

(2) Payments from the Department; or

(3) Payments in Lieu of Taxes from the Department of Interior under 31 U.S.C. 6901 *et seq*.

(Authority: 20 U.S.C. 7702(a)(2) and (b)(1)(A))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35414, July 1, 1997; 80 FR 33162, June 11, 2015; 81 FR 64741, Sept. 20, 2016]

§ 222.23 How are consolidated LEAs treated for the purposes of eligibility and payment under section 7002?

(a) *Eligibility*. An LEA formed by the consolidation of one or more LEAs is eligible for section 7002 funds, notwithstanding section 222.21(a)(1), if—

(1) The consolidation occurred prior to fiscal year 1995 or after fiscal year 2005; and

(2) At least one of the former LEAs included in the consolidation:

(i) Was eligible for section 7002 funds in the fiscal year prior to the consolidation; and

(ii) Currently contains Federal property that meets the requirements of § 222.21(a) within the boundaries of the former LEA or LEAs.

(b) *Documentation required*. In the first year of application following the consolidation, an LEA that meets the requirements of paragraph (a) of this section must submit evidence that it meets the requirements of paragraphs (a)(1) and (a)(2)(ii) of this section.

(c) *Basis for foundation payment*. (1) The foundation payment for a consolidated district is based on the total section 7002 payment for the last fiscal year for which the former LEA received payment. When more than one former LEA qualifies under paragraph (a)(2) of this section, the payments for the last fiscal year for which the former LEAs received payment are added together to calculate the foundation basis.

(2) Consolidated LEAs receive only a foundation payment and do not receive a payment from any remaining funds.

(Authority: 20 U.S.C. 7702(g))

[81 FR 64741, Sept. 20, 2016]

§ 222.24 How does a local educational agency that has multiple tax rates for real property classifications derive a single real property tax rate?

An LEA that has multiple tax rates for real property classifications derives a single tax rate for the purposes of determining its Section 7002 maximum payment by dividing the total revenues for current expenditures it received from local real property taxes by the total taxable value of real property located within the boundaries of the LEA. These data are from the fiscal year prior to the fiscal year in which the applicant seeks assistance.

(Authority: 20 U.S.C. 7702)

[81 FR 64741, Sept. 20, 2016]

§§ 222.25–222.29 [Reserved]

Subpart C—Payments for Federally Connected Children Under Section 8003(b) of the Act

§ 222.30 What is "free public education"?

In addition to the terms defined in § 222.2, the following definition applies to this part:

Free public education. (1) The term means education that is provided—

(i) At public expense;

(ii)(A) As the complete elementary or secondary educational program as determined under State law through grade 12; and

(B) Preschool education, whether or not included as elementary education by State law;

(iii) In a school of the local educational agency (LEA) or under a tuition arrangement with another LEA or other educational entity; and

(iv) Under public supervision and direction, except with respect to children with disabilities.

(2) For the purpose of paragraph (1)(i) of this definition, education is provided at public expense if—

(i) There is no tuition charge to the child or the child's parents; and

(ii) Federal funds, other than Impact Aid funds and charter school startup

funds, do not provide a substantial portion of the educational program, in relation to other LEAs in the State, as determined by the Secretary.

(3) For the purpose of paragraph (1)(ii) of this definition, the complete elementary or secondary educational program is the program recognized by the State as meeting all requirements for elementary or secondary education for the children claimed and, except for preschool education, does not include a program that provides only—

(i) Supplementary services or instruction; or

(ii) A portion of the required educational program.

(4) For the purpose of paragraph (1)(iii) of this definition, a tuition arrangement must—

(i) Satisfy all applicable legal requirements in the State; and

(ii) Genuinely reflect the applicant LEA's responsibility to provide a free public education to the children claimed under section 8003.

(5) For the purpose of paragraph (1)(iv) of this definition, education provided under public supervision and direction means education that is provided—

(i) In a school of the applicant LEA or another LEA; or

(ii) By another educational entity, over which the applicant LEA, or other public agency, exercises authority with respect to the significant aspects of the educational program for the children claimed. The Secretary considers significant aspects of the educational program to include administrative decisions relating to teachers, instruction, and curriculum.

(Authority: 20 U.S.C. 7703, 7709, 7713(6))

[60 FR 50778, Sept. 29, 1995, as amended at 81 FR 64741, Sept. 20, 2016]

§ 222.31 To which local educational agencies does the Secretary make basic support payments under section 8003(b) of the Act?

The Secretary makes payments to an LEA with an otherwise approvable application for children claimed under section 8003(b) of the Act if—

(a) The LEA meets the requirements in subpart A of these regulations and this subpart; and

(b)(1) The LEA is responsible under applicable State or Federal law for providing a free public education to those children;

(2) The LEA is providing a free public education to those children; and

(3) The State provides funds for the education of those children on the same basis as all other public school children in the State, unless permitted otherwise under section 8009 of the Act.

(Authority: 20 U.S.C. 7703 and 7709)

§ 222.32 What information does the Secretary use to determine a local educational agency's basic support payment?

(a) The Secretary determines an LEA's payment under section 8003(b) on the basis of information in the LEA's application, including information regarding the membership of federally connected children.

(b) The LEA must supply information in its timely and complete application regarding its federally connected membership on the basis of any count described in §§ 222.33 through 222.35.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703 and 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 81 FR 64741, Sept. 20, 2016]

§ 222.33 When must an applicant make its first or only membership count?

(a)(1) An applicant must select a day in the current school year as the survey date for making the first membership count, which must be no earlier than the fourth day of the regular school year and before January 31.

(2) The applicant must use the same survey date for all schools in the LEA.

(b) As of the survey date, the applicant must—

(1) Count the membership of its federally connected children; and

(2) Count the total membership of its children—both federally connected and non-federally connected.

(c) The data on the application resulting from the count in paragraph (b)

of this section must be accurate and verifiable by the application deadline.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703, 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015; 81 FR 64741, Sept. 20, 2016]

§ 222.34 If an applicant makes a second membership count, when must that count be made?

(a)(1) The applicant may, but is not required to, make a second count of membership.

(2) If the applicant chooses to make a second count of membership, the applicant must select a day after January 31, but no later than May 14, as the survey date for making the second membership count, and make that count in accordance with § 222.33(b).

(3) The applicant must use the same survey date for the second membership count for all schools in the LEA.

(b) The applicant may use the information obtained from a second membership count to amend its application for assistance as described in § 222.5(b).

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703 and 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

§ 222.35 How does a local educational agency count the membership of its federally connected children?

An applicant counts the membership of its federally connected children using one of the following methods:

(a) Parent-pupil survey. An applicant may conduct a parent-pupil survey to count the membership of its federally connected children, which must be counted as of the survey date.

(1) The applicant shall conduct a parent-pupil survey by providing a form to a parent of each pupil enrolled in the LEA to substantiate the pupil's place of residence and the parent's place of employment.

(2) A parent-pupil survey form must include the following:

(i) Pupil enrollment information (this information may also be obtained from school records), including—

(A) Name of pupil;

(B) Date of birth of the pupil; and

(C) Name of public school and grade of the pupil.

(ii) Pupil residence information, including:

(A) The complete address of the pupil's residence, or other acceptable location information for that residence, such as a complete legal description, a complete U.S. Geological Survey number, or complete property tract or parcel number, or acceptable certification by a Federal agency official with access to data or records to verify the location of the Federal property; and

(B) If the pupil's residence is on Federal property, the name of the Federal facility.

(3) If any of the following circumstances apply, the parent-pupil survey form must also include the following:

(i) If the parent is employed on Federal property, except for a parent who is a member of the uniformed services on active duty, parent employment information, including—

(A) Name (as it appears on the employer's payroll record) of the parent (mother, father, legal guardian or other person standing *in loco parentis*) who is employed on Federal property and with whom the pupil resides; and

(B) Name of employer, name and complete address of the Federal property on which the parent is employed (or other acceptable location information, such as a complete legal description or acceptable certification by a Federal agency).

(ii) If the parent is a member of the uniformed services on active duty, the name, rank, and branch of service of that parent.

(iii) If the parent is both an official of, and accredited by a foreign government, and a foreign military officer, the name, rank, and country of service.

(iv) If the parent is a civilian employed on a Federal vessel, the name of the vessel, hull number, homeport, and name of the controlling agency.

(4)(i) Every parent-pupil survey form must include the signature of the parent supplying the information, except as provided in paragraph (a)(4)(ii) of this section, and the date of such signature, which must be on or after the survey date.

(ii) An LEA may accept an unsigned parent-pupil survey form, or a parent-pupil survey form that is signed by a person other than a parent, only under unusual circumstances. In those instances, the parent-pupil survey form must show why the parent did not sign the survey form, and when, how, and from whom the residence and employment information was obtained. Unusual circumstances may include, but are not limited to:

(A) A pupil who, on the survey date, resided with a person without full legal guardianship of the child while the pupil's parent or parents were deployed for military duty. In this case, the person with whom the child is residing may sign the parent-pupil survey form.

(B) A pupil who, on the survey date, was a ward of the juvenile justice system. In this case, an administrator of the institution where the pupil was held on the survey date may sign the parent-pupil survey form.

(C) A pupil who, on the survey date, was an emancipated youth may sign his or her own parent-pupil survey form.

(D) A pupil who, on the survey date, was at least 18 years old but who was not past the 12th grade may sign his or her own parent-pupil survey form.

(iii) The Department does not accept a parent-pupil survey form signed by an employee of the school district who is not the student's mother, father, legal guardian or other person standing *in loco parentis*.

(b) Source check. A source check is a type of survey tool that groups children being claimed on the Impact Aid application by Federal property. This form is used in lieu of the parent-pupil survey form to substantiate a pupil's place of residence or parent's place of employment on the survey date.

(1) The source check must include sufficient information to determine the eligibility of the Federal property and the individual children claimed on the form.

(2) A source check may also include:

(i) Certification by a parent's employer regarding the parent's place of employment;

(ii) Certification by a military or other Federal housing official as to the residence of each pupil claimed;

(iii) Certification by a military personnel official regarding the military active duty status of the parent of each pupil claimed as active duty uniformed services; or

(iv) Certification by the Bureau of Indian Affairs (BIA) or authorized tribal official regarding the eligibility of Indian lands.

(c) Another method approved by the Secretary.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703)

[81 FR 64741, Sept. 20, 2016]

§ 222.36 How many federally connected children must a local educational agency have to receive a payment under section 8003?

(a) An LEA is eligible to receive a payment under section 8003 for a fiscal year only if the total number of eligible federally connected children for whom it provided a free public education for the preceding fiscal year was—

(1) At least 400 who were in average daily attendance (ADA); or

(2) At least 3 percent of the total number of children in ADA.

(b) An LEA is eligible to receive a payment under section 8003 for a fiscal year on behalf of federally connected children described in section 8003(a)(1)(F) or (G) only if the total number of those children for whom it provided a free public education for the preceding fiscal year was—

(1) At least 1,000 in ADA; or

(2) At least 10 percent of the total number of children in ADA.

(c) Children described in paragraph (b) of this section are counted for the purposes of paragraph (a) of this section only if the applicant LEA is eligible to receive a payment on behalf of those children under section 8003.

(Authority: 20 U.S.C. 7703(a)(3) and (b)(1)(B))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35415, July 1, 1997; 80 FR 33163, June 11, 2015]

§ 222.37 How does the Secretary calculate the average daily attendance of federally connected children?

(a) This section describes how the Secretary computes the ADA of federally connected children for each category in section 8003 to determine an applicant's payment.

(b)(1) For purposes of this section, actual ADA means raw ADA data that have not been weighted or adjusted to reflect higher costs for specific types of students for purposes of distributing State aid for education.

(2) If an LEA provides a program of free public summer school, attendance data for the summer session are included in the LEA's ADA figure in accordance with State law or practice.

(3) An LEA's ADA count includes attendance data for children who do not attend the LEA's schools, but for whom it makes tuition arrangements with other educational entities.

(4) Data are not counted for any child—

(i) Who is not physically present at school for the daily minimum time period required by the State, unless the child is—

(A) Participating via telecommunication or correspondence course programs that meet State standards; or

(B) Being served by a State-approved homebound instruction program for the daily minimum time period appropriate for the child; or

(ii) Attending the applicant's schools under a tuition arrangement with another LEA.

(c) An LEA may determine its average daily attendance calculation in one of the following ways:

(1) If an LEA is in a State that collects actual ADA data for purposes of distributing State aid for education, the Secretary calculates the ADA of that LEA's federally connected children for the current fiscal year payment as follows:

(i) By dividing the ADA of all the LEA's children for the second preceding fiscal year by the LEA's total membership on its survey date for the second preceding fiscal year (or, in the case of an LEA that conducted two membership counts in the second preceding fiscal year, by the average of the LEA's total membership on the two survey dates); and

(ii) By multiplying the figure determined in paragraph (c)(1)(i) of this section by the LEA's total membership of federally connected children in each subcategory described in section 7003 and claimed in the LEA's application for the current fiscal year payment.

(2) An LEA may submit its total preceding year ADA data. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(i) Dividing the LEA's preceding year's total ADA data by the preceding year's total membership data; and

(ii) Multiplying the figure determined in paragraph (c)(2)(i) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i) of this section.

(3) An LEA may submit attendance data based on sampling conducted during the previous fiscal year.

(i) The sampling must include attendance data for all children for at least 30 school days.

(ii) The data must be collected during at least three periods evenly distributed throughout the school year.

(iii) Each collection period must consist of at least five consecutive school days.

(iv) The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(A) Determining the ADA of all children in the sample;

(B) Dividing the figure obtained in paragraph (c)(3)(iv)(A) of this section by the LEA's total membership for the previous fiscal year; and

(C) Multiplying the figure determined in paragraph (c)(3)(iv)(B) of this section by the LEA's total membership of federally connected children for the current fiscal year, as described in paragraph (c)(1)(i) of this section.

(d) An SEA may submit data to calculate the average daily attendance calculation for the LEAs in that State in one of the following ways:

(1) If the SEA distributes State aid for education based on data similar to attendance data, the SEA may request that the Secretary use those data to

calculate the ADA of each LEA's federally connected children. If the Secretary determines that those data are, in effect, equivalent to attendance data, the Secretary allows use of the requested data and determines the method by which the ADA for all of the LEA's federally connected children will be calculated.

(2) An SEA may submit data necessary for the Secretary to calculate a State average attendance ratio for all LEAs in the State by submitting the total ADA and total membership data for the State for each of the last three most recent fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the federally connected children for each LEA in the State by—

(i)(A) Dividing the total ADA data by the total membership data for each of the three fiscal years and averaging the results; and

(B) Multiplying the average determined in paragraph (d)(2)(i)(A) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i) of this section.

(e) The Secretary may calculate a State average attendance ratio in States with LEAs that would benefit from such calculation by using the methodology in paragraph (d)(2)(i) of this section.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703, 7706, 7713)

[81 FR 64742, Sept. 20, 2016]

§ 222.38 What is the maximum basic support payment that a local educational agency may receive under section 8003(b)(1)?

(a) The maximum basic support payment that an LEA may receive under section 8003(b)(1) for any fiscal year is the sum of its total weighted student units under section 8003(a)(2) for the federally connected children eligible to be counted as the basis for payment, multiplied by the greater of the following:

(1) One-half of the State average per pupil expenditure for the third fiscal year preceding the fiscal year for which the LEA seeks assistance.

(2) One-half of the national average per pupil expenditure for the third fiscal year preceding the fiscal year for which the LEA seeks assistance.

(3) The local contribution rate (LCR) based on generally comparable LEAs determined in accordance with §§ 222.39–222.41.

(4) The State average per pupil expenditure for the third preceding fiscal year multiplied by the local contribution percentage as defined in section 8013(8) of the Act for that same year.

(b) If satisfactory data from the third preceding fiscal year are not available for the expenditures described in paragraphs (a)(1) or (2), the Secretary uses data from the most recent fiscal year for which data that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7703(a) and (b))

[80 FR 33163, June 11, 2015]

§ 222.39 How does a State educational agency identify generally comparable local educational agencies for local contribution rate purposes?

(a) To identify generally comparable LEAs within its State for LCR purposes, the State educational agency (SEA) for that State, after appropriate consultation with the applicant LEAs in the State, shall use data from the third fiscal year preceding the fiscal year for which the LCR is being computed to group all of its LEAs, including all applicant LEAs, as follows:

(1) *Grouping by grade span/legal classification alone.* Divide all LEAs into groups that serve the same grade span and then subdivide the grade span groups by legal classification, if the Secretary considers this classification relevant and sufficiently different from grade span within the State. As an alternative grade-span division, divide all LEAs into elementary, secondary, or unified grade-span groups, as appropriate, within the State.

(2) *Grouping by grade span/legal classification and size.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and legal classification, if relevant and sufficiently different from grade span and size.

(ii) List all LEAs within each group in descending order by size as measured by ADA, placing the LEA with the *largest* ADA at the top of the list. A State that does not tabulate actual annual ADA shall use the same formula for establishing ADA for the purpose of ranking LEAs by size as the Department has approved for the purpose of calculating payments under section 8003 for applicant LEAs in the State.

(iii) Divide each group into either two subgroups or three subgroups.

(iv) To determine the subgroups, divide each list at the point(s) that will result in as nearly equal numbers of LEAs in each subgroup as possible, so that no group is more than one LEA larger than any other group.

(3) *Grouping by grade span/legal classification and location.* Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span and location, legal classification; then subdivide these groups by location, as determined by placement inside or outside a metropolitan statistical area (MSA) as defined by the U.S. Bureau of the Census. The Department will supply SEAs with lists of MSA classifications for their LEAs, and only the classifications on those lists will be recognized by the Department for the purposes of these regulations.

(4) *Grouping by grade span/legal classification, size, and location.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span, size, and location, legal classification; then subdivide these groups by size (into two or three subgroups for each grade span, as described in paragraph (a)(2) of this section); and further subdivide these groups by location (inside or outside an MSA).

(ii) In using both the size and location factors, the SEA shall subdivide according to the size factor before the location factor.

(b) After applying the following restrictions, the SEA shall compute an LCR according to the provisions of § 222.41 for each group of generally comparable LEAs identified under paragraph (a) of this section, as follows:

(1) The SEA shall not, when computing an LCR, include the following ''significantly impacted'' LEAs in any group of generally comparable LEAs:

(i) Any LEA having—in the third fiscal year preceding the fiscal year for which the LCR is being computed—20 percent or more of its ADA composed of children identified under section 8003(a)(1)(A)–(C).

(ii) Any LEA having—in the third fiscal year preceding the fiscal year for which the LCR is being computed—50 percent or more of its ADA composed of children identified under section 8003(a)(1)(A)–(G) who were eligible under § 222.36 to be counted as the basis for payment under section 8003.

(2) The SEA may not compute an LCR for any group that contains fewer than 10 LEAs.

(c) The LCR for a ''significantly impacted'' LEA described in paragraph (b)(1) of this section is the LCR of any group in which that LEA would be included based on grade span/legal classification, size, location, or a combination of these factors, if the LEA were not excluded as significantly impacted.

(d) This section does not apply to applicant LEAs located in—

(1) Puerto Rico;

(2) Wake Island;

(3) Guam;

(4) American Samoa;

(5) Any outlying area; and

(6) Any State in which there is only one LEA.

Example. An LEA applies for assistance under section 8003 and wishes to recommend to the Secretary an LCR based on generally comparable LEAs within its State.

1. *Characteristics of Applicant LEA.* The grade span of an applicant LEA is kindergarten through grade 8 (K–8). In the applicant's State, legal classification of LEAs is based on grade span, and thus does not act to further subdivide groups of LEAs.

The ADA of the applicant LEA is above the median ADA of LEAs serving only K–8 in the State.

The applicant LEA is located outside an MSA.

2. *Characteristics of Other LEAs Serving Same Grade Span.* The SEA of the applicant's State groups all LEAs in its State according to the factors in § 222.39.

a. The SEA identifies the following groups:

(i) One hundred and one LEAs serve only K–8. The SEA has identified a group of 50

LEAs having an ADA above the median ADA for the group of 101, one LEA having an ADA at the median, and a group of 50 LEAs having an ADA below the median ADA; and according to §222.39(a)(2), the SEA considers 51 LEAs to have an ADA below the median ADA.

(ii) Of the 101 LEAs in the group, the SEA has identified a group of 64 LEAs as being inside an MSA and a group of 37 LEAs as being outside an MSA.

(iii) Among the group of 50 LEAs having an ADA above the median, the SEA has identified a group of 35 LEAs as being inside an MSA and a group of 15 LEAs as being outside an MSA.

(iv) Among the group of 51 LEAs having an ADA at or below the median, the SEA has identified a group of 29 LEAs as being inside an MSA and 22 LEAs as being outside an MSA.

(v) One LEA has 20 percent of its ADA composed of children identified under section 8003(a)(1)(A)–(C) and, therefore, must be excluded from any group it falls within before the SEA computes an LCR for the group. The LEA has an ADA below the median ADA and is located outside an MSA.

b. On the basis of §222.41, the SEA computes the LCR for each group of generally comparable LEAs that the SEA has identified.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

§ 222.40 What procedures does a State educational agency use for certain local educational agencies to determine generally comparable local educational agencies using additional factors, for local contribution rate purposes?

(a) To use the procedures in this section, the applicant LEA, for the year of application, must either—

(1)(i) Be located entirely on Federal land; and

(ii) Be raising either no local revenues or an amount of local revenues the Secretary determines to be minimal; or

(2)(i) Be located in a State where State aid makes up no more than 40 percent of the State average per pupil expenditure in the third fiscal year preceding the fiscal year for which the LCR is being computed;

(ii) In its application, have federally connected children identified under section 8003(a)(1)(A)–(C) equal to at least 20 percent of its total ADA; and

(iii) In its application, have federally connected children identified under section 8003(a)(1)(A)–(G) who were eligible to be counted as the basis for payment under section 8003 equal to at least 50 percent of its total ADA.

(b) If requested by an applicant LEA described in paragraph (a) of this section, the SEA follows the procedures in this section, in consultation with the LEA, to determine generally comparable LEAs using additional factors for the purpose of calculating and certifying an LCR for that LEA.

(c) The SEA identifies—

(1) The subgroup of generally comparable LEAs from the group identified under §222.39(a)(2) (grouping by grade span/legal classification and size) that includes the applicant LEA; or

(2) For an LEA described in paragraph (a) of this section that serves a different span of grades from all other LEAs in its State (and therefore cannot match any group of generally comparable LEAs under §222.39(a)(2)), for purposes of this section only, a group using only legal classification and size as measured by ADA.

(d) From the subgroup described in paragraph (c) of this section, the SEA then identifies 10 or more generally comparable LEAs that share one or more additional common factors of general comparability with the applicant LEA described in paragraph (a) of this section, as follows:

(1)(i) The SEA must consider one or more generally accepted, objectively defined factors that affect the applicant's cost of educating its children. Examples of such cost-related factors include location inside or outside an MSA, an unusually large geographical area or an economically depressed area, sparsity or density of population, and the percentage of its students who are from low-income families or who are children with disabilities, neglected or delinquent children, low-achieving children, or children with limited English proficiency.

(ii) The SEA may not consider cost-related factors that can be varied at the discretion of the applicant LEA or

its generally comparable LEAs or factors dependent on the wealth of the applicant LEA or its generally comparable LEAs. Examples of factors that may not be considered include special alternative curricular programs, pupil-teacher ratio, and per pupil expenditures.

(iii) If an SEA proposes to use one or more special additional factors to determine generally comparable LEAs, the SEA must submit, with its annual submission of generally comparable data to the Department, its rationale for selecting the additional factor or factors and describe how they affect the cost of education in the LEA.

(2) The SEA applies the factor or factors of general comparability identified under paragraph (d)(1)(i) of this section in one of the following ways in order to identify 10 or more generally comparable LEAs for the eligible applicant LEA, none of which may be significantly impacted LEAs:

(i) The SEA identifies all of the LEAs in the group to which the eligible applicant LEA belongs under § 222.39(a)(2) that share the factor or factors. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

Example 1. An eligible applicant LEA contains a designated economically depressed area, and the SEA, in consultation with the LEA, identifies ''economically depressed area'' as an additional factor of general comparability. From the group of LEAs under § 222.39(a)(2) that includes the eligible applicant LEA, the SEA identifies two subgroups, those LEAs that contain a designated economically depressed area and those that do not. The entire subgroup identified by the SEA that includes the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(ii) After the SEA identifies all of the LEAs in the group to which the eligible applicant LEA belongs under § 222.39(a)(2) that share the factor or factors, the SEA then systematically orders by ADA all of the LEAs in the group that includes the eligible applicant LEA. The SEA may further divide the ordered LEAs into subgroups by using logical division points (*e.g.*, the median, quartiles, or standard deviations) or a continuous interval of the ordered LEAs (*e.g.*, a percentage or a numerical range). If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

Example 2. An eligible applicant LEA serves an unusually high percentage of children with disabilities, and the SEA, in consultation with the LEA, identifies ''proportion of children with disabilities'' as an additional comparability factor. From the group of LEAs under § 222.39(a)(2) that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of children with disabilities enrolled in each of the LEAs. The SEA divides the list of LEAs into four groups containing equal numbers of LEAs. The group containing the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(iii) The SEA may apply more than one factor of general comparability in identifying a new group of 10 or more generally comparable LEAs for the eligible applicant LEA. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data from all of the LEAs in the subgroup except the eligible applicant LEA.

Example 3. An eligible applicant LEA is very sparsely populated and serves an unusually high percentage of children with limited English proficiency. The SEA, in consultation with the LEA, identifies ''sparsity of population'' and ''proportion of children with limited English proficiency'' as additional comparability factors. From the group of LEAs under § 222.39(a)(2) that includes the eligible applicant LEA, the SEA identifies all LEAs that are sparsely populated. The SEA further subdivides the sparsely populated

LEAs into two groups, those that serve an unusually high percentage of children with limited English proficiency and those that do not. The subgroup of at least 10 sparsely populated LEAs that serve a high percentage of children with limited English proficiency is the eligible applicant LEA's new group of generally comparable LEAs.

(e)(1) Using the new group of generally comparable LEAs selected under paragraph (d) of this section, the SEA computes the LCR for the eligible applicant LEA according to the provisions of § 222.41.

(2) The SEA certifies the resulting LCR by submitting that LCR to the Secretary and providing the Secretary a description of the additional factor or factors of general comparability and the data used to identify the new group of generally comparable LEAs.

(3) The Secretary reviews the data submitted by the SEA, and accepts the LCR for the purpose of use under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment under section 8003 if the Secretary determines that it meets the purposes and requirements of the Act and this part.

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[80 FR 33164, June 11, 2015, as amended at 81 FR 64743, Sept. 20, 2016]

§ 222.41 How does a State educational agency compute and certify local contribution rates based upon generally comparable local educational agencies?

Except as otherwise specified in the Act, the SEA, subject to the Secretary's review and approval, computes and certifies an LCR for each group of generally comparable LEAs within its State that was identified using the factors in § 222.39, and § 222.40 if appropriate, as follows:

(a)(1) The SEA shall compile the aggregate local current expenditures of the comparable LEAs in each group for the third fiscal year preceding the fiscal year for which the LCR is being computed.

(2) For purposes of this section, the SEA shall consider only those aggregate current expenditures made by the generally comparable LEAs from revenues derived from local sources. No State or Federal funds may be included.

(b) The SEA shall compile the aggregate number of children in ADA to whom the generally comparable LEAs in each group provided a free public education during the third fiscal year preceding the fiscal year for which the LCR is being computed.

(c) The SEA shall divide—

(1) The aggregate current expenditures determined under paragraph (a) of this section by;

(2) The aggregate number of children determined under paragraph (b) of this section.

(d) The SEA certifies the resulting figure for each group as the LCR for that group of generally comparable LEAs to be used by the Secretary under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment amount under section 8003.

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33165, June 11, 2015]

§ 222.42 [Reserved]

§ 222.43 What requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(b)(1)(F) due to unusual geographic features?

An LEA is eligible for financial assistance under section 8003(b)(1)(F) if the Secretary determines that the LEA meets all of the following requirements—

(a)(1) The LEA is eligible for a basic support payment under section 8003(b), including meeting the maintenance of effort requirements in section 8003(g) of the Act;

(2) The LEA timely applies for assistance under section 8003(b)(1)(F) and meets all other requirements of subparts A and C;

(3) The LEA is meeting the tax rate requirement in § 222.68(c) and the other applicable requirements of §§ 222.68 through 222.72; and

(4) The LEA is not in a State that takes the LEA's payment under section 8003(b)(1)(F) into account in an equalization program that qualifies under section 8009 of the Act.

(b)(1) As part of its section 8003 application, the LEA indicates in writing that it wishes to apply for an ''unusual

geographic'' payment and it will provide the Secretary with documentation upon request that demonstrates that the LEA is unable to provide a level of education equivalent to that provided by its generally comparable LEAs because—

(i) The applicant's current expenditures are affected by unusual geographic factors; and

(ii) As a result, those current expenditures are not reasonably comparable to the current expenditures of its generally comparable LEAs.

(2) The LEA's documentation must include—

(i) A specific description of the unusual geographic factors on which the applicant is basing its request for compensation under this section and objective data demonstrating that the applicant is more severely affected by the factors than any other LEA in its State;

(ii) Objective data demonstrating the specific ways in which the unusual geographic factors affect the applicant's current expenditures so that they are not reasonably comparable to the current expenditures of its generally comparable LEAs;

(iii) Objective data demonstrating the specific ways in which the unusual geographic factors prevent the applicant from providing a level of education equivalent to that provided by its generally comparable LEAs; and

(iv) Any other information that the Secretary may require to make an eligibility determination under this section.

(Authority: 20 U.S.C. 7703(b)(1)(F))

[80 FR 33165, June 11, 2015]

§ 222.44 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(b)(1)(F) and § 222.43?

The Secretary determines a maximum payment under section 8003(b)(1)(F) for an eligible LEA, using data from the third preceding fiscal year, as follows:

(a) Subject to paragraph (b) of this section, the Secretary increases the eligible LEA's local contribution rate (LCR) for section 8003(b) payment purposes to the amount the Secretary determines will compensate the applicant for the increase in its current expenditures necessitated by the unusual geographic factors identified under § 222.43(b)(2).

(b) The Secretary does not increase the LCR under this section to an amount that is more than—

(1) Is necessary to allow the applicant to provide a level of education equivalent to that provided by its generally comparable LEAs; or

(2) The per pupil share for all children in ADA of the increased current expenditures necessitated by the unusual geographic factors identified under § 222.43, as determined by the Secretary.

(Authority: 20 U.S.C. 7703(b)(1)(F))

[80 FR 33165, June 11, 2015]

§§ 222.45–222.49 [Reserved]

Subpart D—Payments Under Section 8003(d) of the Act for Local Educational Agencies That Serve Children With Disabilities

§ 222.50 What definitions apply to this subpart?

In addition to the terms referenced or defined in § 222.2, the following definitions apply to this subpart:

Child with a disability as defined in 34 CFR 300.8.

Early intervention services as defined in 34 CFR 303.13.

Free appropriate public education or *FAPE* as defined in 34 CFR 300.17.

Individualized education program or *IEP* as defined in 34 CFR 300.22.

Individualized family service plan or *IFSP* as defined in 34 CFR 303.20.

Infant or toddler with a disability as defined in 34 CFR 303.21.

Infants, toddlers, and children with disabilities, for these regulations, means both a ''child with a disability'' as defined in 34 CFR 300.8 and an ''infant or toddler with a disability'' as defined in 34 CFR 303.21.

Related services as defined in 34 CFR 300.34.

Special education as defined in 34 CFR 300.39.

[80 FR 33166, June 11, 2015, as amended at 82 FR 31912, July 11, 2017]

§ 222.51 Which children may a local educational agency count for payment under section 8003(d) of the Act?

(a) An LEA may count children described in sections 8003(a)(1)(A)(ii), (a)(1)(B), (a)(1)(C), and (a)(1)(D) of the Act who are eligible for services under the provisions of Part B or Part C of the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*) (IDEA), for the purpose of computing a payment under section 8003(d) in accordance with the provisions of this section.

(b)(1) An LEA may count a child with a disability described in paragraph (a) of this section who attends a private school or residential program if the LEA has placed or referred the child in accordance with the provisions of section 613 of the IDEA and 34 CFR part 300, subparts C and D.

(2) An LEA may not count a child with a disability described in paragraph (a) of this section who is placed in a private school by his or her parents, but that child may participate in public school programs that use section 8003(d) funds.

(c) An LEA may count infants and toddlers with disabilities described in paragraph (a) of this section if—

(1) The LEA provides early intervention services or FAPE to each of those children—

(i) Either directly or through an arrangement with another entity; and

(ii) The State does not charge a fee or other out-of-pocket cost to the child's parents under the State's system of payments on file with the Secretary required under 34 CFR 303.203(b)(1), 303.520, and 303.521, and there is no other cost to the child's parents (the costs of premiums do not count as out-of-pocket costs); and

(2) Each of those children has an IFSP or IEP (as appropriate).

(Authority: 20 U.S.C. 1400 *et seq.* and 7703(d))

[80 FR 33166, June 11, 2015]

§ 222.52 What requirements must a local educational agency meet to receive a payment under section 8003(d)?

To receive a payment under section 8003(d), an eligible LEA shall—

(a) State in its application the number of federally connected children with disabilities it claims for a payment under section 8003(d);

(b) Have in effect written IEPs or IFSPs for all federally connected children with disabilities it claims under section 8003(d); and

(c) Meet the requirements of subparts A and C of the regulations in this part.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 1400 *et seq.* and 7703)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§ 222.53 What restrictions and requirements apply to the use of funds provided under section 8003(d)?

(a) An LEA shall use funds provided under section 8003(d) in accordance with the provisions of section 8003(d)(2) and 34 CFR parts 300 and 303.

(b) Obligations and expenditures of section 8003(d) funds may be incurred in either of the two following ways:

(1) An LEA may obligate or expend section 8003(d) funds for the fiscal year for which the funds were appropriated.

(2) An LEA may reimburse itself for obligations or expenditures of local and general State aid funds for the fiscal year for which the section 8003(d) funds were appropriated.

(c) An LEA shall use its section 8003(d) funds for the following types of expenditures:

(1) Expenditures that are reasonably related to the conduct of programs or projects for the free appropriate public education of, or early intervention services for, federally connected children with disabilities, which may include—

(i) Program planning and evaluation; and

(ii) Construction of or alteration to existing school facilities, but only when in accordance with section 605 of the IDEA and when the Secretary authorizes in writing those uses of funds.

(2) Acquisition cost (net invoice price) of equipment required for the free appropriate public education of, and early intervention services for, federally connected children with disabilities.

(i) If section 8003(d) funds are used for the acquisition of any equipment described in this paragraph (c)(2) of this section, the fair market value of any financial advantage realized through rebates, discounts, bonuses, free pieces of equipment used in a program or project for the free appropriate public education of, or early intervention services for, federally connected children with disabilities, or other circumstances, is not an allowable expenditure and may not be credited as an expenditure of those funds.

(ii) Funds awarded under the provisions of section 8003(d) may be used to acquire equipment for the free appropriate public education of, or early intervention services for, the federally connected children with disabilities only if title to the equipment would be in the applicant agency.

(d) An LEA shall account for the use of section 8003(d) funds as follows:

(1) By recording, for each fiscal year, the receipt (or credit) of section 8003(d) funds separately from other funds received under the Act, *i.e.*, on a line item basis in the general fund account or in a separate account; and

(2) By demonstrating that, for each fiscal year, the amount of expenditures for special education and related services and for early intervention services provided to the federally connected children with disabilities is at least equal to the amount of section 8003(d) funds received or credited for that fiscal year. This is done as follows:

(i) For each fiscal year determine the amount of an LEA's expenditures for special education and related services and for early intervention services provided to all children with disabilities.

(ii) The amount determined in paragraph (d)(2)(i) of this section is divided by the average daily attendance (ADA) of the total number of children with disabilities the LEA served during that fiscal year.

(iii) The amount determined in paragraph (d)(2)(ii) of this section is then multiplied by the total ADA of the LEA's federally connected children with disabilities claimed by the LEA for that fiscal year.

(3) If the amount of section 8003(d) funds the LEA received (or was credited) for the fiscal year exceeds the amount obtained in paragraph (d)(2)(iii) of this section, an overpayment equal to the excess section 8003(d) funds is established. This overpayment may be reduced or eliminated to the extent that the LEA can demonstrate that the average per pupil expenditure for special education and related services and for early intervention services provided to federally connected children with disabilities exceeded its average per pupil expenditure for serving non-federally connected children with disabilities.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§ 222.54 What supplement-not-supplant requirement applies to this subpart?

Funds provided under section 8003(d) may not supplant any State funds that were or would have been available to the LEA for the free appropriate public education of children counted under section 8003(d).

(a) No section 8003(d) funds may be paid to an LEA whose per pupil State aid for federally connected children with disabilities, either general State aid or special education State aid, has been or would be reduced as a result of eligibility for or receipt of section 8003(d) funds, whether or not a State has a program of State aid that meets the requirements of section 8009 of the Act and subpart K of the regulations in this part.

(1) A reduction in the per pupil amount of State aid for children with disabilities, including children counted under section 8003(d), from that received in a previous year raises a presumption that supplanting has occurred.

(2) The LEA may rebut this presumption by demonstrating that the reduction was unrelated to the receipt of section 8003(d) funds.

(b) In any State in which there is only one LEA, all funds for programs, and for early intervention services, for children with disabilities other than

funds from Federal sources are considered by the Secretary to be local funds.

(Authority: 20 U.S.C. 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§ 222.55 What other statutes and regulations are applicable to this subpart?

Local educational agencies receiving funds under section 8003(d) are subject to the requirements of the Individuals with Disabilities Education Act, and related regulations (20 U.S.C. 1401 *et seq*. and 34 CFR parts 300 and 303).

(Authority: 20 U.S.C. 1401 *et seq*., 6314, and 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

§§ 222.56–222.59 [Reserved]

Subpart E—Payments for Heavily Impacted Local Educational Agencies Under Section 8003(b)(2) of the Act

SOURCE: 80 FR 33166, June 11, 2015, unless otherwise noted.

§ 222.60 What are the scope and purpose of this subpart?

The regulations in this subpart implement section 8003(b)(2) of the Act, which provides financial assistance to certain heavily impacted local educational agencies (LEAs). The specific eligibility requirements are detailed in §§ 222.62 through 222.66.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.61 What data are used to determine a local educational agency's eligibility under section 8003(b)(2) of the Act?

(a) Computations and determinations made with regard to an LEA's eligibility under section 8003(b)(2) in §§ 222.61 through 222.66 of these regulations are based on the LEA's final student, revenue, expenditure, and tax data from the third fiscal year preceding the fiscal year for which it seeks assistance.

(b) Except for an LEA described in § 222.64(a)(3)(ii), the LEAs used for meeting the applicable tax rate requirement are the comparable LEAs that are identified in § 222.74 or all LEAs in the applicant's State.

(c) As used in this subpart, the phrase ''tax rate for general fund purposes'' means ''local real property tax rates for current expenditures purposes'' as defined in § 222.2. ''Current expenditures'' is defined in section 8013(4) of the ESEA.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.62 How are local educational agencies determined eligible under section 8003(b)(2)?

(a) An applicant that wishes to be considered to receive a heavily impacted payment must submit the required information indicating tax rate eligibility under §§ 222.63 or 222.64 with the annual section 7003 Impact Aid application. Final LEA tax rate eligibility must be verified by the SEA under the process described in § 222.73.

(b) An LEA that is eligible to apply for a ''continuing'' heavily impacted payment under section 8003(b)(2)(B) is one that received a heavily impacted LEA payment for fiscal year 2000 and that meets eligibility requirements specified in § 222.63.

(c) An LEA that is eligible to apply for a ''new'' heavily impacted payment under section 8003(b)(2)(C) is one that did not receive see above and throughout the section for fiscal year 2000 and that meets eligibility requirements specified in § 222.64 for two consecutive application years.

(Authority: 20 U.S.C. 7703(b)(2))

[80 FR 33166, June 11, 2015, as amended at 81 FR 64743, Sept. 20, 2016]

§ 222.63 When is a local educational agency eligible as a continuing applicant for payment under section 8003(b)(2)(B)?

A continuing heavily impacted LEA must have—

(a) The same boundaries as those of a Federal military installation;

(b)(1) An enrollment of federally connected children described in section 8003(a)(1) equal to at least 35 percent of the total number of children in average daily attendance (ADA) in the LEA;

(2) A per pupil expenditure (PPE) that is less than the average PPE of

the State in which the LEA is located or of all the States, whichever PPE is greater (except that an LEA with a total student enrollment of less than 350 students shall be determined to have met the PPE requirement); and

(3) A tax rate for general fund purposes of at least 95 percent of the average tax rate of comparable LEAs identified under § 222.74 or all LEAs in the applicant's State;

(c)(1) An enrollment of federally connected children described in section 8003(a)(1) equal to at least 30 percent of the total number of children in ADA in the LEA; and

(2) A tax rate for general fund purposes of at least 125 percent of the average tax rate of comparable LEAs identified under §§ 222.39–40 or of all LEAs in the applicant's State; or

(d) A total enrollment of at least 25,000 students, of which at least 50 percent are children described in section 8003(a)(1) and at least 6,000 of such children are children described in section 8003(a)(1)(A) and (B).

(Authority: 20 U.S.C. 7703(b)(2)(B))

§ 222.64 When is a local educational agency eligible as a new applicant for payment under section 8003(b)(2)(C)?

A new heavily impacted LEA must have—

(a)(1)(i) Federally connected children equal to at least 50 percent of the total number of children in average daily attendance (ADA) in the LEA if children described in section 8003(a)(1)(F)–(G) are eligible to be counted for a section 8003(b)(1) payment; or

(ii) Federally connected children equal to at least 40 percent of the total number of children in ADA if children described in section 8003(a)(1)(F)–(G) are not eligible to be counted for a section 8003(b)(1) payment; and

(2)(i) If the LEA has a total ADA of more than 350 children,

(A) A per pupil expenditure (PPE) that is less than the average of the State in which the LEA is located; and

(B) A tax rate for general fund purposes equal to at least 95 percent of the average tax rate of comparable LEAs identified in § 222.74 or of all LEAs in the applicant's State; or

(ii) If the LEA has a total ADA of less than 350 children,

(A) A PPE that is less than the average PPE of one or three generally comparable LEAs identified in § 222.74(b); and

(B) A tax rate equal to at least 95 percent of the average tax rate of one or three generally comparable LEAs identified in § 222.74(b);

(b) The same boundaries as those of a Federal military installation; or

(c)(1) The same boundaries as island property held in trust by the Federal government;

(2) No taxing authority; and

(3) Received a payment under section 8003(b)(1) for fiscal year 2001.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.65 What other requirements must a local educational agency meet to be eligible for financial assistance under section 8003(b)(2)?

Subject to § 222.66, an LEA described in § 222.63 or § 222.64 is eligible for financial assistance under section 8003(b)(2) if the Secretary determines that the LEA meets the following requirements:

(a) The LEA timely applies for assistance under section 8003(b)(2) and meets all of the other application and eligibility requirements of subparts A and C of these regulations.

(b) Except for an LEA described in § 222.63(a) or (d), or § 222.64(b) or (c), the LEA meets the applicable tax rate requirement in accordance with the procedures and requirements of §§ 222.68 through 222.74.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.66 How does a local educational agency lose and resume eligibility under section 8003(b)(2)?

(a) A continuing heavily impacted LEA that fails to meet the eligibility requirements in § 222.63 in any fiscal year or a new heavily impacted LEA that received a section 8003(b)(2) payment but then fails to meet the eligibility requirements in § 222.64 will still receive a heavily impacted payment in the first year of ineligibility, based on the number of children in ADA that would be counted for that application if the LEA were eligible.

(b)(1) A continuing heavily impacted LEA may resume eligibility for a heavily impacted payment if it applies in the fiscal year preceding the year for which it seeks eligibility and it meets the eligibility requirements in § 222.63 for both fiscal years.

(2) In the first fiscal year that a continuing heavily impacted LEA qualifies to resume eligibility, it cannot receive a heavily impacted payment but instead will receive a basic support payment under section 8003(b)(1) for that year.

Example:

CONTINUING LEA

In Federal Fiscal Years (FFYs) 1 and 2, a continuing LEA is eligible for a section 8003(b)(2) payment. In FFY 3, the LEA applies but is ineligible for section 8003(b)(2). However, it will still receive a payment under section 8003(b)(2) for FFY 3 (a ''hold harmless'' payment under § 222.66(a)). For FFY 4, the LEA applies and meets the requirements. The LEA is not eligible to receive a section 8003(b)(2) payment in FFY 4 but is instead eligible for a section 8003(b)(1) payment (see § 222.66(b)). In FFY 5, the LEA applies, meets the requirements, and receives a section 8003(b)(2) payment. The LEA not only must apply one year in advance and meet the section 8003(b)(2) requirements (FFY 4) but it must apply and meet the requirements for the subsequent FFY (year 5). The effects of these requirements on a continuing applicant's status and payments are summarized in the table below.

CONTINUING LEAS

	FFY 1	FFY 2	FFY 3	FFY 4	FFY 5
8003(b)(2) Eligibility	*Yes*	*Yes*	*No*	*Yes*	*Yes*
Payment Type	(b)(2)	(b)(2)	(b)(2) Hold Harmless.	(b)(1)	(b)(2)

(c) A new heavily impacted LEA may resume eligibility for a heavily impacted payment if it meets the eligibility requirements in § 222.64 for the fiscal year for which it seeks a payment.

Example:

NEW LEA

A new LEA applies for a section 8003(b)(2) payment and meets the applicable eligibility criteria. The LEA does not receive a section 8003(b)(2) payment in FFY 1 and it must apply and meet the requirements again in FFY 2 before it can receive a (b)(2) payment (see § 222.62(b)). If that new district is then ineligible for a year, it can regain eligibility only if it meets the applicable criteria in a subsequent year. For example, if a new LEA loses its section 8003(b)(2) eligibility in FFY 3 because its tax rate dropped to 94 percent of the average tax rate of comparable districts in the State, that LEA is still entitled to receive a payment under section 8003(b)(2) in FFY 3 if it applies for such payment (a ''hold harmless'' payment under § 222.66(a)). Then if the LEA applies in FFY 4 and meets the eligibility requirement under section 8003(b)(2), it is once again eligible to receive a section 8003(b)(2) payment (see § 222.66(c)). The effects of these requirements on a new applicant's status and payments are summarized in the table below.

NEW LEAS

	FFY 1	FFY 2	FFY 3	FFY 4	FFY 5
8003(b)(2) Eligibility	*Yes*	*Yes*	*No*	*Yes*	*Yes*
Payment Type	(b)(1)	(b)(2)	(b)(2) Hold Harmless.	(b)(2)	(b)(2)

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.67 How may a State aid program affect a local educational agency's eligibility for assistance under section 8003(b)(2)?

The Secretary determines that an LEA is not eligible for financial assistance under section 8003(b)(2) if—

(a) The LEA is in a State that has an equalized program of State aid that meets the requirements of section 8009; and

(b) The State, in determining the LEA's eligibility for or amount of State aid, takes into consideration the portion of the LEA's payment under section 8003(b)(2) that exceeds what the LEA would receive under section 8003(b)(1).

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.68 How does the Secretary determine whether a fiscally independent local educational agency meets the applicable tax rate requirement?

(a) To determine whether a fiscally independent LEA, as defined in § 222.2(c), meets the applicable tax rate requirement in §§ 222.63(b)(3), 222.63(c)(2), and 222.64(a)(3), the Secretary compares the LEA's local real property tax rate for current expenditure purposes, as defined in § 222.2(c) (referred to in this part as ''tax rate'' or ''tax rates''), with the tax rates of its generally comparable LEAs.

(b) For purposes of this section, the Secretary uses—

(1) The actual tax rate if all the real property in the LEA and its generally comparable LEAs is assessed at the same percentage of true value; or

(2) Tax rates computed under §§ 222.69–222.71.

(c) The Secretary determines that an LEA described in §§ 222.63(b), 222.63(c), or 222.64(a) meets the applicable tax rate requirement if—

(1) The LEA's tax rate is equal to at least 95 percent (or 125 percent under 222.63(c)) of the average tax rate of its generally comparable LEAs;

(2) Each of the LEA's tax rates for each classification of real property is equal to at least 95 percent (or 125 percent under 222.63(c)) of each of the average tax rates of its generally comparable LEAs for the same classification of property;

(3) The LEA taxes all of its real property at the maximum rates allowed by the State, if those maximum rates apply uniformly to all LEAs in the State and the State does not permit any rates higher than the maximum; or

(4) The LEA has no taxable real property.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.69 What tax rates does the Secretary use if real property is assessed at different percentages of true value?

If the real property of an LEA and its generally comparable LEAs consists of one classification of property but the property is assessed at different percentages of true value in the different LEAs, the Secretary determines whether the LEA meets the applicable tax rate requirement under § 222.68(c)(1) by using tax rates computed by—

(a) Multiplying the LEA's actual tax rate for real property by the percentage of true value assigned to that property for tax purposes; and

(b) Performing the computation in paragraph (a) of this section for each of its generally comparable LEAs and determining the average of those computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.70 What tax rates does the Secretary use if two or more different classifications of real property are taxed at different rates?

If the real property of an LEA and its generally comparable LEAs consists of two or more classifications of real property taxed at different rates, the Secretary determines whether the LEA meets the applicable tax rate requirement under § 222.68(c)(1) or (2) by using one of the following:

(a) Actual tax rates for each of the classifications of real property.

(b) Tax rates computed in accordance with § 222.69 for each of the classifications of real property.

(c) Tax rates computed by—

(1) Determining the total true value of all real property in the LEA by dividing the assessed value of each classification of real property in the LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the LEA's total revenues derived from local real property taxes for current expenditures (as defined in section 8013);

(3) Dividing the amount determined in paragraph (c)(2) of this section by

the amount determined in paragraph (c)(1) of this section; and

(4) Performing the computations in paragraphs (c)(1), (2), and (3) of this section for each of the generally comparable LEAs and then determining the average of their computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.71 What tax rates may the Secretary use if substantial local revenues are derived from local tax sources other than real property taxes?

(a) In a State in which a substantial portion of revenues for current expenditures for educational purposes is derived from local tax sources other than real property taxes, the State educational agency (SEA) may request that the Secretary take those revenues into account in determining whether an LEA in that State meets the applicable tax rate requirement under § 222.68.

(b) If, based upon the request of an SEA, the Secretary determines that it is appropriate to take the revenues described in paragraph (a) of this section into account in determining whether an LEA in that State meets the applicable tax rate requirement under § 222.68, the Secretary uses tax rates computed by—

(1) Dividing the assessed value of each classification of real property in the LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the LEA's total revenues derived from local tax sources for current expenditures (as defined in section 8013);

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section; and

(4) Performing the computations in paragraphs (b)(1), (2), and (3) of this section for each of the generally comparable LEAs and then determining the average of those computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.72 How does the Secretary determine whether a fiscally dependent local educational agency meets the applicable tax rate requirement?

(a) If an LEA is fiscally dependent, as defined in § 222.2(c), the Secretary compares the LEA's imputed local tax rate, calculated under paragraph (b) of this section, with the average tax rate of its generally comparable LEAs, calculated under paragraph (c) of this section, to determine whether the LEA meets the applicable tax rate requirement.

(b) The Secretary imputes a local tax rate for a fiscally dependent LEA by—

(1) Dividing the assessed value of each classification of real property within the boundaries of the general government by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the amount of locally derived revenues made available by the general government for the LEA's current expenditures (as defined in section 8013); and

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section.

(c) The Secretary performs the computations in paragraph (b) of this section for each of the fiscally dependent generally comparable LEAs and the computations in §§ 222.68 through 222.71, whichever is applicable, for each of the fiscally independent generally comparable LEAs and determines the average of all those tax rates.

(d) The Secretary determines that a fiscally dependent LEA described in § 222.63(b) or § 222.64(a) meets the applicable tax rate requirement if its imputed local tax rate is equal to at least 95 percent of the average tax rate of its generally comparable LEAs.

(e) The Secretary determines that a fiscally dependent LEA described in § 222.63(c) meets the applicable tax rate requirement if its imputed local tax rate is equal to at least 125 percent of the average tax rate of its generally comparable LEAs.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.73 What information must the State educational agency provide?

The SEA of any State with an LEA applying for assistance under section

8003(b)(2) shall provide the Secretary with relevant information necessary to determine the PPE for all LEAs in the State and whether the LEA meets the applicable tax rate requirement under this subpart.

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.74 How does the Secretary identify generally comparable local educational agencies for purposes of section 8003(b)(2)?

(a) Except as otherwise provided in paragraph (b) of this section, the Secretary identifies generally comparable LEAs for purposes of this subpart in accordance with the local contribution rate procedures described in §§ 222.39 through 222.40.

(b) For applicant LEAs described in § 222.64(a)(2)(ii) and (a)(3)(ii), to identify the one or three generally comparable LEAs, the Secretary uses the following procedures:

(1) The Secretary asks the SEA of the applicant LEA to identify generally comparable LEAs in the State by first following the directions in § 222.39(a)(4), using data from the preceding fiscal year. The SEA then removes from the resulting list any LEAs that are significantly impacted, as described in § 222.39(b)(1), except the applicant LEA.

(2) If the remaining LEAs are not in rank order by total ADA, the SEA lists them in that order.

(3) The LEA may then select as its generally comparable LEAs, for purposes of section 8003(b)(2) only, one or three LEAs from the list that are closest to it in size as determined by total ADA (*i.e.*, the next one larger or the next one smaller, or the next three larger LEAs, the next three smaller, the next two larger and the next one smaller, or the next one larger and the next two smaller).

(Authority: 20 U.S.C. 7703(b)(2))

§ 222.75 How does the Secretary compute the average per pupil expenditure of generally comparable local educational agencies under this subpart?

For applicant LEAs described in § 222.64(a)(2)(ii), the Secretary computes average per pupil expenditures (APPE) by dividing the sum of the total current expenditures for the third preceding fiscal year for the identified generally comparable LEAs by the sum of the total ADA of those LEAs for the same fiscal year.

(Authority: 20 U.S.C. 7703(b)(2))

§§ 222.76–222.79 [Reserved]

Subpart F [Reserved]

Subpart G—Special Provisions for Local Educational Agencies That Claim Children Residing on Indian Lands

GENERAL

§ 222.90 What definitions apply to this subpart?

In addition to the definitions in § 222.2, the following definitions apply to this subpart:

Indian children means children residing on Indian lands who are recognized by an Indian tribe as being affiliated with that tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(Authority: 20 U.S.C. 7713, 7881, 7938, 8801)

§ 222.91 What requirements must a local educational agency meet to receive a payment under section 7003 of the Act for children residing on Indian lands?

(a) To receive a payment under section 7003 of the Act for children residing on Indian lands, an LEA must—

(1) Meet the application and eligibility requirements in section 7003 and subparts A and C of these regulations;

(2) Except as provided in paragraph (b) of this section, develop and implement policies and procedures in accordance with § 222.94; and

(3) Include in its application for payments under section 7003—

(i) An assurance that the LEA established these policies and procedures in

consultation with and based on information from tribal officials and parents of those children residing on Indian lands who are Indian children, except as provided in paragraph (b) of this section;

(ii) An assurance that the LEA has provided a written response to the comments, concerns and recommendations received through the Indian policies and procedures consultation process, except as provided in paragraph (b) of this section; and

(iii) Either a copy of the policies and procedures, or documentation that the LEA has received a waiver in accordance with the provisions of paragraph (b) of this section.

(b) An LEA is not required to comply with §222.94 with respect to students from a tribe that has provided the LEA with a waiver that meets the requirements of this paragraph.

(1) A waiver must contain a voluntary written statement from an appropriate tribal official or tribal governing body that—

(i) The LEA need not comply with §222.94 because the tribe is satisfied with the LEA's provision of educational services to the tribe's students; and

(ii) The tribe was provided a copy of the requirements in §222.91 and §222.94, and understands the requirements that are being waived.

(2) The LEA must submit the waiver at the time of application.

(3) The LEA must obtain a waiver from each tribe that has Indian children living on Indian lands claimed by the LEA on its application under section 7003 of the Act. If the LEA only obtains waivers from some, but not all, applicable tribes, the LEA must comply with the requirements of §222.94 with respect to those tribes that did not agree to waive these requirements.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(a), 7704)

[81 FR 64743, Sept. 20, 2016]

§ 222.92 What additional statutes and regulations apply to this subpart?

(a) The following statutes and regulations apply to LEAs that claim children residing on Indian lands for payments under section 8003:

(1) The General Education Provisions Act (GEPA) in 20 U.S.C. 1221 *et seq.*, unless otherwise noted.

(2) Other relevant regulations in this part.

(b) The following statutes, rules, and regulations do not apply to any hearing proceedings under this subpart:

(1) Administrative Procedure Act.

(2) Federal Rules of Civil Procedure.

(3) Federal Rules of Evidence.

(4) GEPA, part E.

(5) 34 CFR part 81.

(Authority: 20 U.S.C. 1221 *et seq.* unless otherwise noted, 7703, and 7704)

§ 222.93 [Reserved]

INDIAN POLICIES AND PROCEDURES

§ 222.94 What are the responsibilities of the LEA with regard to Indian policies and procedures?

(a) An LEA that is subject to the requirements of §222.91(a) must consult with and involve local tribal officials and parents of Indian children in the planning and development of:

(1) Its Indian policies and procedures (IPPs), and

(2) The LEA's general educational program and activities.

(b) An LEA's IPPs must include a description of the specific procedures for how the LEA will:

(1) Disseminate relevant applications, evaluations, program plans and information related to the LEA's education program and activities with sufficient advance notice to allow tribes and parents of Indian children the opportunity to review and make recommendations.

(2) Provide an opportunity for tribes and parents of Indian children to provide their views on the LEA's educational program and activities, including recommendations on the needs of their children and on how the LEA may help those children realize the benefits of the LEA's education programs and activities. As part of this requirement, the LEA will—

(i) Notify tribes and the parents of Indian children of the opportunity to

submit comments and recommendations, considering the tribe's preference for method of communication, and

(ii) Modify the method of and time for soliciting Indian views, if necessary, to ensure the maximum participation of tribes and parents of Indian children.

(3) At least annually, assess the extent to which Indian children participate on an equal basis with non-Indian children in the LEA's education program and activities. As part of this requirement, the LEA will:

(i) Share relevant information related to Indian children's participation in the LEA's education program and activities with tribes and parents of Indian children; and

(ii) Allow tribes and parents of Indian children the opportunity and time to review and comment on whether Indian children participate on an equal basis with non-Indian children.

(4) Modify the IPPs if necessary, based upon the results of any assessment or input described in paragraph (b) of this section.

(5) Respond at least annually in writing to comments and recommendations made by tribes or parents of Indian children, and disseminate the responses to the tribe and parents of Indian children prior to the submission of the IPPs by the LEA.

(6) Provide a copy of the IPPs annually to the affected tribe or tribes.

(c)(1) An LEA that is subject to the requirements of § 222.91(a) must implement the IPPs described in paragraph (b) of this section.

(2) Each LEA that has developed IPPs shall review those IPPs annually to ensure that they comply with the provisions of this section, and are implemented by the LEA in accordance with this section.

(3) If an LEA determines, after input from the tribe and parents of Indian children, that its IPPs do not meet the requirements of this section, the LEA shall amend its IPPs to conform to those requirements within 90 days of its determination.

(4) An LEA that amends its IPPs shall, within 30 days, send a copy of the amended IPPs to—

(i) The Impact Aid Program Director for approval; and

(ii) The affected tribe or tribes.

(Authority: 20 U.S.C. 7704)

[81 FR 64744, Sept. 20, 2016]

§ 222.95 How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?

(a) The Director of the Impact Aid Program (Director) periodically reviews applicant LEAs' IPPs to ensure that they comply with the provisions of section 8004(a) and § 222.94.

(b) If the Director determines either that the LEA's IPPs do not comply with the minimum standards of section 8004(a), or that the IPPs have not been implemented in accordance with § 222.94, the Director provides the LEA with written notification of the deficiencies related to its IPPs and requires that the LEA take appropriate action.

(c) An LEA shall make the necessary changes within 90 days of receipt of written notification from the Director.

(d) If the LEA fails to make the necessary adjustments or changes within the prescribed period of time, the Director may withhold all or part of the payments that the LEA is eligible to receive under section 8003.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7704 (a) and (d)(2))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35416, July 1, 1997; 81 FR 64744, Sept. 20, 2016]

§§ 222.96–222.101 [Reserved]

INDIAN POLICIES AND PROCEDURES COMPLAINT AND HEARING PROCEDURES

§ 222.102 Who may file a complaint about a local educational agency's Indian policies and procedures?

(a) Only a tribal chairman or an authorized designee for a tribe that has students attending an LEA's schools may file a written complaint with the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) regarding any action of the LEA pursuant to, or relevant to, section 8004(a) and § 222.94.

(b) If a tribe files a complaint through a designee, the tribe shall acknowledge in writing in the complaint that the designee is authorized to act on its behalf.

(Authority: 20 U.S.C. 7704(e)(1))

§ 222.103 What must be included in a complaint?

For purposes of this subpart, a complaint is a signed statement that includes—

(a) An allegation that an LEA has failed to develop and implement IPPs in accordance with section 8004(a);

(b) Information that supports the allegation;

(c) A specific request for relief; and

(d) A statement describing what steps the tribe has taken to resolve with the LEA the matters on which the complaint is based.

(Authority: 20 U.S.C. 7704(e)(1))

§ 222.104 When does the Assistant Secretary consider a complaint received?

(a) The Assistant Secretary considers a complaint to have been received only after the Assistant Secretary determines that the complaint—

(1) Satisfies the requirements in §§ 222.102 and 222.103; and

(2) Is in writing and signed by the tribal chairman or the tribe's authorized designee.

(b) If the Assistant Secretary determines that a complaint fails to meet the requirements in §§ 222.102–222.103, the Assistant Secretary notifies the tribe or its designee in writing that the complaint has been dismissed for purposes of invoking the hearing procedures in §§ 222.102–222.113.

(c) Any notification that a complaint has been dismissed includes the reasons why the Assistant Secretary determined that the complaint did not meet the requirements in §§ 222.102 and 222.103.

(d) Notification that a complaint has been dismissed does not preclude other efforts to investigate or resolve the issues raised in the complaint, including the filing of an amended complaint.

(Authority: 20 U.S.C. 7704(e)(1))

§§ 222.105–222.107 [Reserved]

§ 222.108 What actions must be taken upon receipt of a complaint?

Within 10 working days of receipt of a complaint, the Secretary or his designee—

(a) Designates a hearing examiner to conduct a hearing;

(b) Designates a time for the hearing that is no more than 30 days after the designation of a hearing examiner;

(c) Designates a place for the hearing that, to the extent possible, is—

(1) Near the LEA; or

(2) At another location convenient to the tribe and the LEA, if it is determined that there is good cause to designate another location;

(d) Notifies the tribe and the LEA of the time, place, and nature of the hearing; and

(e) Transmits copies of the complaint to the LEA and the affected tribe or tribes.

(Authority: 20 U.S.C. 7704(e))

§ 222.109 When may a local educational agency reply to a complaint?

An LEA's reply to the charges in the complaint must be filed with the hearing examiner within 15 days of the date the LEA receives a copy of the notice and complaint described in § 222.108 (d) and (e) from the hearing examiner.

(Authority: 20 U.S.C. 7704(e))

§ 222.110 What are the procedures for conducting a hearing on a local educational agency's Indian policies and procedures?

Hearings on IPP complaints filed by an Indian tribe or tribes against an LEA are conducted as follows:

(a) The hearing must be open to the public.

(b) Parties may be represented by counsel.

(c)(1) Each party may submit oral and written testimony that is relevant to the issues in the proceeding and make recommendations concerning appropriate remedial actions.

(2) A party may object to evidence it considers to be irrelevant or unduly repetitious.

(d) No party shall communicate orally or in writing with the hearing examiner or the Assistant Secretary on matters under review, except minor procedural matters, unless all parties to the complaint are given—

(1) Timely and adequate notice of the communication; and

(2) Reasonable opportunity to respond.

(e) For each document that a party submits, the party shall—

(1) File one copy for inclusion in the record of the proceeding; and

(2) Provide a copy to each of the other parties to the proceeding.

(f) Each party shall bear only its own costs in the proceeding.

(Authority: 20 U.S.C. 7704(e))

§ 222.111 What is the authority of the hearing examiner in conducting a hearing?

The hearing examiner is authorized to conduct a hearing under section 8004(e) and §§ 222.109–222.113 as follows:

(a) The hearing examiner may—

(1) Clarify, simplify, or define the issues or consider other matters that may aid in the disposition of the complaint;

(2) Direct the parties to exchange relevant documents or information; and

(3) Examine witnesses.

(b) The hearing examiner—

(1) Regulates the course of proceedings and conduct of the parties;

(2) Arranges for the preparation of a transcript of each hearing and provides one copy to each party;

(3) Schedules the submission of oral and documentary evidence;

(4) Receives, rules on, excludes, or limits evidence;

(5) Establishes and maintains a record of the proceeding, including any transcripts referenced above;

(6) Establishes reasonable rules governing public attendance at the proceeding; and

(7) Is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(Authority: 20 U.S.C. 7704(e))

§ 222.112 What procedures are followed after the hearing?

(a) Each party may submit to the hearing examiner additional evidence that is relevant to the issues raised at the hearing, within the time period and in the manner specified by the hearing examiner.

(b) Within 30 days after the hearing, the hearing examiner—

(1) Makes, on the basis of the record, written findings of fact and recommendations concerning any appropriate remedial action that should be taken;

(2) Submits those findings and recommendations, along with the hearing record, to the Assistant Secretary; and

(3) Sends a copy of those findings and recommendations to each party.

(c)(1) Each party may file with the Assistant Secretary comments on the hearing examiner's findings and recommendations.

(2) The comments must be received by the Assistant Secretary within 10 days after the party receives a copy of the hearing examiner's findings and recommendations.

(Authority: 20 U.S.C. 7704(e))

§ 222.113 What are the responsibilities of the Assistant Secretary after the hearing?

(a) Within 30 days after receiving the entire hearing record and the hearing examiner's findings and recommendations, the Assistant Secretary makes, on the basis of the record, a written determination that includes—

(1) Any appropriate remedial action that the LEA must take;

(2) A schedule for completing any remedial action; and

(3) The reasons for the Assistant Secretary's decision.

(b) After completing the final determination required by paragraph (a) of this section, the Assistant Secretary sends the parties a copy of that determination.

(c) The Assistant Secretary's final determination under paragraph (a) of this section is the final action of the Department concerning the complaint and is subject to judicial review.

(Authority: 20 U.S.C. 7704(e))

WITHHOLDING AND RELATED PROCEDURES FOR INDIAN POLICIES AND PROCEDURES

SOURCE: 62 FR 35416, July 1, 1997, unless otherwise noted.

§ 222.114 How does the Assistant Secretary implement the provisions of this subpart?

The Assistant Secretary implements section 8004 of the Act and this subpart through such actions as the Assistant Secretary determines to be appropriate, including the withholding of funds in accordance with §§ 222.115–222.122, after affording the affected LEA, parents, and Indian tribe or tribes an opportunity to present their views.

(Authority: 20 U.S.C. 7704 (d)(2), (e) (8)–(9))

§ 222.115 When does the Assistant Secretary withhold payments from a local educational agency under this subpart?

Except as provided in § 222.120, the Assistant Secretary withholds payments to an LEA if—

(a) The Assistant Secretary determines it is necessary to enforce the requirements of section 8004 of the Act or this subpart; or

(b) After a hearing has been conducted under section 8004(e) of the Act and §§ 222.102–222.113 (IPP hearing)—

(1) The LEA rejects the final determination of the Assistant Secretary; or

(2) The LEA fails to implement the required remedy within the time established and the Assistant Secretary determines that the required remedy will not be undertaken by the LEA even if the LEA is granted a reasonable extension of time.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), (e)(8)–(9))

§ 222.116 How are withholding procedures initiated under this subpart?

(a) If the Assistant Secretary decides to withhold an LEA's funds, the Assistant Secretary issues a written notice of intent to withhold the LEA's payments.

(b) In the written notice, the Assistant Secretary—

(1) Describes how the LEA failed to comply with the requirements at issue; and

(2)(i) Advises an LEA that has participated in an IPP hearing that it may request, in accordance with § 222.117(c), that its payments not be withheld; or

(ii) Advises an LEA that has not participated in an IPP hearing that it may request a withholding hearing in accordance with § 222.117(d).

(c) The Assistant Secretary sends a copy of the written notice of intent to withhold payments to the LEA and the affected Indian tribe or tribes by certified mail with return receipt requested.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), and (e) (8)–(9))

§ 222.117 What procedures are followed after the Assistant Secretary issues a notice of intent to withhold payments?

(a) The withholding of payments authorized by section 8004 of the Act is conducted in accordance with section 8004 (d)(2) or (e)(8)–(9) of the Act and the regulations in this subpart.

(b) An LEA that receives a notice of intent to withhold payments from the Assistant Secretary is not entitled to an Impact Aid hearing under the provisions of section 8011 of the Act and subpart J of this part.

(c) *After an IPP hearing.* (1) An LEA that rejects or fails to implement the final determination of the Assistant Secretary after an IPP hearing has 10 days from the date of the LEA's receipt of the written notice of intent to withhold funds to provide the Assistant Secretary with a written explanation and documentation in support of the reasons why its payments should not be withheld. The Assistant Secretary provides the affected Indian tribe or tribes with an opportunity to respond to the LEA's submission.

(2) If after reviewing an LEA's written explanation and supporting documentation, and any response from the Indian tribe or tribes, the Assistant Secretary determines to withhold an LEA's payments, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes of the withholding determination in writing by certified mail with return receipt

requested prior to withholding the payments.

(3) In the withholding determination, the Assistant Secretary states the facts supporting the determination that the LEA failed to comply with the legal requirements at issue, and why the provisions of § 222.120 (provisions governing circumstances when an LEA is exempt from the withholding of payments) are inapplicable. This determination is the final decision of the Department.

(d) *An LEA that has not participated in an IPP hearing.* (1) An LEA that has not participated in an IPP hearing has 30 days from the date of its receipt of the Assistant Secretary's notice of intent to withhold funds to file a written request for a withholding hearing with the Assistant Secretary. The written request for a withholding hearing must—

(i) Identify the issues of law and facts in dispute; and

(ii) State the LEA's position, together with the pertinent facts and reasons supporting that position.

(2) If the LEA's request for a withholding hearing is accepted, the Assistant Secretary sends written notification of acceptance to the LEA and the affected Indian tribe or tribes and forwards to the hearing examiner a copy of the Assistant Secretary's written notice, the LEA's request for a withholding hearing, and any other relevant documents.

(3) If the LEA's request for a withholding hearing is rejected, the Assistant Secretary notifies the LEA in writing that its request for a hearing has been rejected and provides the LEA with the reasons for the rejection.

(4) The Assistant Secretary rejects requests for withholding hearings that are not filed in accordance with the time for filing requirements described in paragraph (d)(1) of this section. An LEA that files a timely request for a withholding hearing, but fails to meet the other filing requirements set forth in paragraph (d)(1) of this section, has 30 days from the date of receipt of the Assistant Secretary's notification of rejection to submit an acceptable amended request for a withholding hearing.

(e) If an LEA fails to file a written explanation in accordance with paragraph (c) of this section, or a request for a withholding hearing or an amended request for a withholding hearing in accordance with paragraph (d) of this section, the Secretary proceeds to take appropriate administrative action to withhold funds without further notification to the LEA.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), and (e) (8)–(9))

§ 222.118 How are withholding hearings conducted in this subpart?

(a) *Appointment of hearing examiner.* Upon receipt of a request for a withholding hearing that meets the requirements of § 222.117(d), the Assistant Secretary requests the appointment of a hearing examiner.

(b) *Time and place of the hearing.* Withholding hearings under this subpart are held at the offices of the Department in Washington, DC, at a time fixed by the hearing examiner, unless the hearing examiner selects another place based upon the convenience of the parties.

(c) *Proceeding.* (1) The parties to the withholding hearing are the Assistant Secretary and the affected LEA. An affected Indian tribe is not a party, but, at the discretion of the hearing examiner, may participate in the hearing and present its views on the issues relevant to the withholding determination.

(2) The parties may introduce all relevant evidence on the issues stated in the LEA's request for withholding hearing or other issues determined by the hearing examiner during the proceeding. The Assistant Secretary's notice of intent to withhold, the LEA's request for a withholding hearing, and all amendments and exhibits to those documents, must be made part of the hearing record.

(3) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the hearing examiner may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

(4) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

(5) A transcript must be made of the oral evidence unless the parties agree otherwise.

(6) Each party may be represented by counsel.

(7) The hearing examiner is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(d) *Filing requirements.* (1) All written submissions must be filed with the hearing examiner by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, a party may serve a document upon the other party by facsimile transmission.

(3) The filing date for a written submission under this subpart is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was timely received by the hearing examiner.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(e) *Procedural rules.* (1) If the hearing examiner determines that no dispute exists as to a material fact or that the resolution of any disputes as to material facts would not be materially assisted by oral testimony, the hearing examiner shall afford each party an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to withholding hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing examiner shall afford to each party—

(i) Sufficient notice of the issues to be considered at the hearing;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(f) *Decision of the hearing examiner.* (1) The hearing examiner—

(i) Makes written findings and an initial withholding decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party and to the affected Indian tribe or tribes, a copy of the written findings and initial withholding decision.

(2) A hearing examiner's initial withholding decision constitutes the Secretary's final withholding decision without any further proceedings unless—

(i) Either party to the withholding hearing, within 30 days of the date of its receipt of the initial withholding decision, requests the Secretary to review the decision and that request is granted; or

(ii) The Secretary otherwise determines, within the time limits stated in paragraph (g)(2)(ii) of this section, to review the initial withholding decision.

(3) When an initial withholding decision becomes the Secretary's final decision without any further proceedings, the Department notifies the parties and the affected Indian tribe or tribes of the finality of the decision.

(g) *Administrative appeal of an initial decision.* (1)(i) Any party may request the Secretary to review an initial withholding decision.

(ii) A party must file this request for review within 30 days of the party's receipt of the initial withholding decision.

(2) The Secretary may—

(i) Grant or deny a timely request for review of an initial withholding decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision by the Secretary.

(3) The Secretary mails to each party and the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of—

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(h) *Secretary's review of an initial withholding decision.* (1) When the Secretary reviews an initial withholding decision, the Secretary notifies each party and the affected Indian tribe or tribes in writing, by certified mail with return receipt requested, that it may file a written statement or comments; and

(2) Mails to each party and to the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of the Secretary's final withholding decision.

(Authority: 20 U.S.C. 7704)

§ 222.119 What is the effect of withholding under this subpart?

(a) The withholding provisions in this subpart apply to all payments that an LEA is otherwise eligible to receive under section 8003 of the Act for any fiscal year.

(b) The Assistant Secretary withholds funds after completion of any administrative proceedings under §§ 222.116–222.118 until the LEA documents either compliance or exemption from compliance with the requirements in section 8004 of the Act and this subpart.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), (e)(8)–(9))

§ 222.120 When is a local educational agency exempt from withholding of payments?

Except as provided in paragraph (d)(2) of this section, the Assistant Secretary does not withhold payments to an LEA under the following circumstances:

(a) The LEA documents that it has received a written statement from the affected Indian tribe or tribes that the LEA need not comply with section 8004 (a) and (b) of the Act, because the affected Indian tribe or tribes is satisfied with the provision of educational services by the LEA to the children claimed on the LEA's application for assistance under section 8003 of the Act.

(b) The Assistant Secretary receives from the affected Indian tribe or tribes a written request that meets the requirements of § 222.121 not to withhold payments from an LEA.

(c) The Assistant Secretary, on the basis of documentation provided by the LEA, determines that withholding payments during the course of the school year would substantially disrupt the educational programs of the LEA.

(d)(1) The affected Indian tribe or tribes elects to have educational services provided by the Bureau of Indian Affairs under section 1101(d) of the Education Amendments of 1978.

(2) For an LEA described in paragraph (d)(1) of this section, the Secretary recalculates the section 8003 payment that the LEA is otherwise eligible to receive to reflect the number of students who remain in attendance at the LEA.

(Authority: 20 U.S.C. 7703(a), 7704(c), (d)(2) and (e)(8))

§ 222.121 How does the affected Indian tribe or tribes request that payments to a local educational agency not be withheld?

(a) The affected Indian tribe or tribes may submit to the Assistant Secretary a formal request not to withhold payments from an LEA.

(b) The formal request must be in writing and signed by the tribal chairman or authorized designee.

(Authority: 20 U.S.C. 7704 (d)(2) and (e)(8))

§ 222.122 What procedures are followed if it is determined that the local educational agency's funds will not be withheld under this subpart?

If the Secretary determines that an LEA's payments will not be withheld under this subpart, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes, in writing, by certified mail with return receipt requested, of the reasons why the payments will not be withheld.

(Authority: 20 U.S.C. 7704 (d)–(e))

§§ 222.123–222.129 [Reserved]

Subpart H [Reserved]

Subpart I—Facilities Assistance and Transfers Under Section 8008 of the Act

§ 222.140 What definitions apply to this subpart?

In addition to the terms referenced or defined in § 222.2, the following definitions apply to this subpart:

Minimum school facilities means those school facilities for which the Secretary may provide assistance under this part as follows:

(1) The Secretary, after consultation with the State educational agency and the local educational agency (LEA), considers these facilities necessary to support an educational program—

(i) For the membership of students residing on Federal property to be served at normal capacity; and

(ii) In accordance with applicable Federal and State laws and, if necessary or appropriate, common practice in the State.

(2) The term includes, but is not restricted to—

(i) Classrooms and related facilities; and

(ii) Machinery, utilities, and initial equipment, to the extent that these are necessary or appropriate for school purposes.

Providing assistance means constructing, leasing, renovating, remodeling, rehabilitating, or otherwise providing minimum school facilities.

(Authority: 20 U.S.C. 7708)

§ 222.141 For what types of projects may the Secretary provide assistance under section 8008 of the Act?

The types of projects for which the Secretary may provide assistance under section 8008 of the Act during any given year include, but are not restricted to, one or more of the following:

(a)(1) Emergency repairs to existing facilities for which the Secretary is responsible under section 8008.

(2) As used in this section, the term *emergency repairs* means those repairs necessary—

(i) For the health and safety of persons using the facilities;

(ii) For the removal of architectural barriers to the disabled; or

(iii) For the prevention of further deterioration of the facilities.

(b) Renovation of facilities for which the Secretary is responsible under section 8008 to meet the standards of minimum school facilities in exchange for an LEA or another appropriate entity accepting transfer of the Secretary's interest in them under § 222.143.

(c) Provision of temporary facilities on Federal property pending emergency repairs.

(d) Construction of replacement minimum school facilities when more cost-effective than renovation and when the replacement facilities are to be transferred to local ownership under § 222.143.

(Authority: 20 U.S.C. 7708)

§ 222.142 What terms and conditions apply to minimum school facilities operated under section 8008 by another agency?

When minimum school facilities are provided under section 8008, the Secretary may—

(a) Arrange for the operation of the facilities by an agency other than the Department;

(b) Establish terms and conditions for the operation of the facilities; and

(c) Require the operating agency to submit assurances and enter into other arrangements that the Secretary specifies.

(Authority: 20 U.S.C. 7708)

§ 222.143 What terms and conditions apply to the transfer of minimum school facilities?

When the Secretary transfers to an LEA or other appropriate entity (transferee) facilities that have been used to carry out the purposes of section 10 of Pub. L. 81–815 or section 8008, the Secretary establishes appropriate terms and conditions for the transfer including that it be—

(a) Without charge; and

(b) Consented to by the transferee.

(Authority: 20 U.S.C. 7708)

§§ 222.144–222.149 [Reserved]

Subpart J—Impact Aid Administrative Hearings and Judicial Review Under Section 8011 of the Act

§ 222.150 What is the scope of this subpart?

(a) Except as provided in paragraph (b) of this section, the regulations in this subpart govern all Impact Aid administrative hearings under section 8011(a) of the Act and requests for reconsideration.

(b) Except as otherwise indicated in this part, the regulations in this subpart do not govern the following administrative hearings:

(1) Subpart G, §§ 222.90–222.122 (Indian policies and procedures tribal complaint and withholding hearings.

(2) Subpart K, § 222.165 (hearings concerning determinations under section 8009 of the Act).

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997]

§ 222.151 When is an administrative hearing provided to a local educational agency?

(a) Any local educational agency (LEA) that is adversely affected by the Secretary's (or the Secretary's delegatee's) action or failure to act upon the LEA's application under the Act is entitled to an administrative hearing in accordance with this subpart.

(b) An applicant is entitled to an administrative hearing under this subpart only if—

(1) The applicant files a written request for an administrative hearing within 60 days of its receipt of written notice of the adverse action; and

(2) The issues of fact or law specified in the hearing request are material to the determination of the applicant's rights and are not committed wholly to the discretion of the Secretary.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997; 80 FR 33170, June 11, 2015]

§ 222.152 When may a local educational agency request reconsideration of a determination?

(a)(1) An LEA may request reconsideration of any determination made by the Secretary (or the Secretary's delegatee) under the Act, either in addition to or instead of requesting an administrative hearing under § 222.151.

(2) A request for reconsideration, or actual reconsideration by the Secretary (or the Secretary's delegatee), does not extend the time within which an applicant must file a request for an administrative hearing under § 222.151, unless the Secretary (or the Secretary's delegatee) extends that time limit in writing.

(b) The Secretary's (or the Secretary's delegatee's) consideration of a request for reconsideration is not prejudiced by a pending request for an administrative hearing on the same matter, or the fact that a matter has been scheduled for a hearing. The Secretary (or the Secretary's delegatee) may, but is not required to, postpone the administrative hearing due to a request for reconsideration.

(c) The Secretary (or the Secretary's delegatee) may reconsider any determination under the Act concerning a particular party unless the determination has been the subject of an administrative hearing under this part with respect to that party.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997;80 FR 33170, June 11, 2015]

§ 222.153 How must a local educational agency request an administrative hearing?

An applicant requesting a hearing in accordance with this subpart must—

(a)(1) If it mails the hearing request, address it to the Secretary, c/o Director, Impact Aid Program, Room 3E105, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202–6244;

(2) If it hand-delivers the hearing request, deliver it to the Director, Impact Aid Program, Room 3E105, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202–6244; or

(3) If it emails the hearing request, send it to *Impact.Aid@ed.gov*.

Note to paragraph (a): The Secretary encourages applicants requesting an Impact Aid hearing to mail or email their requests. Because of enhanced security procedures, building access for non-official staff may be limited. Applicants should be prepared to mail their hearing requests if they or their courier are unable to obtain access to the building.

(b) Clearly specify in its written hearing request the issues of fact and law to be considered; and

(c) Furnish a copy of its hearing request to its State educational agency (SEA) (unless the applicant is an SEA).

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

§ 222.154 How must written submissions under this subpart be filed?

(a) All written submissions under this subpart must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If agreed upon by the parties, a party may serve a document upon the other party or parties by facsimile transmission.

(c) The filing date for a written submission under this subpart is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(d) A party other than the Department filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department, including by the administrative law judge (ALJ).

(e) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.155 When and where is an administrative hearing held?

Administrative hearings under this subpart are held at the offices of the Department in Washington, DC, at a time fixed by the ALJ, unless the ALJ selects another place based upon the convenience of the parties.

(Authority: 20 U.S.C. 7711(a))

§ 222.156 How is an administrative hearing conducted?

Administrative hearings under this subpart are conducted as follows:

(a) The administrative hearing is conducted by an ALJ appointed under 5 U.S.C. 3105, who issues rules of procedure that are proper and not inconsistent with this subpart.

(b) The parties may introduce all relevant evidence on the issues stated in the applicant's request for hearing or on other issues determined by the ALJ during the proceeding. The application in question and all amendments and exhibits must be made part of the hearing record.

(c) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the ALJ may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

(d) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

(e) A transcript must be made of the oral evidence unless the parties agree otherwise.

(f) Each party may be represented by counsel.

(g) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(Authority: 5 U.S.C. 556 and 3105; 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.157 What procedures apply for issuing or appealing an administrative law judge's decision?

(a) *Decision.* (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) An ALJ's initial decision constitutes the Secretary's final decision without any further proceedings unless—

(i) A party, within the time limits stated in paragraph (b)(1)(ii) of this section, requests the Secretary to review the decision and that request is granted; or

(ii) The Secretary otherwise determines, within the time limits stated in paragraph (b)(2)(ii) of this section, to review the initial decision.

(3) When an initial decision becomes the Secretary's final decision without any further proceedings, the Department's Office of Hearings and Appeals notifies the parties of the finality of the decision.

(b) *Administrative appeal of an initial decision.* (1)(i) Any party may request the Secretary to review an initial decision.

(ii) A party must file such a request for review within 30 days of the party's receipt of the initial decision.

(2) The Secretary may—

(i) Grant or deny a timely request for review of an initial decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision.

(3) The Secretary mails to each party written notice of—

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.158 What procedures apply to the Secretary's review of an initial decision?

When the Secretary reviews an initial decision, the Secretary—

(a) Notifies the applicant in writing that it may file a written statement or comments; and

(b) Mails to each party written notice of the Secretary's final decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.159 When and where does a party seek judicial review?

If an LEA or a State that is aggrieved by the Secretary's final decision following an administrative hearing proceeding under this subpart wishes to seek judicial review, the LEA or State must, within 30 working days (as determined by the LEAs or State) after receiving notice of the Secretary's final decision, file with the United States Court of Appeals for the circuit in which that LEA or State is located a petition for review of the final agency action, in accordance with section 8011(b) of the Act.

(Authority: 20 U.S.C. 7711(b))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

Subpart K—Determinations Under Section 8009 of the Act

§ 222.160 What are the scope and purpose of this subpart?

(a) *Scope.* This subpart applies to determinations made by the Secretary under section 8009 of the Act.

(b) *Purpose.* The sole purpose of the regulations in this subpart is to implement the provisions of section 8009. The definitions and standards contained in this subpart apply only with respect to section 8009 and do not establish definitions and standards for any other purpose.

(Authority: 20 U.S.C. 7709)

§ 222.161 How is State aid treated under section 7009 of the Act?

(a) *General rules.* (1) A State may take into consideration payments under sections 8002 and 8003(b) of the Act (including hold harmless payments calculated under section 8003(e)) in allocating State aid if that State has a State aid program that qualifies under § 222.162, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency (LEA) only in the proportion described in § 222.163.

(ii) A State may not take into consideration—

(A) That portion of an LEA's payment that is generated by the portion of a weight in excess of one under section 8003(a)(2)(B) of the Act (children residing on Indian lands);

(B) Payments under section 8003(d) of the Act (children with disabilities); or

(C) The amount that an LEA receives under section 8003(b)(2) that exceeds the amount the LEA would receive if eligible under section 8003(b)(1) and not section 8003(b)(2) (heavily impacted LEAs).

(2) No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

(3) No State, whether or not it has an equalization program that qualifies under § 222.162, may, in allocating State aid, take into consideration an LEA's eligibility for payments under the Act if that LEA does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 8009 in allocating State aid to LEAs must reimburse any LEA for any amounts taken into consideration for any fiscal year to the extent that the LEA did not in fact receive payments in those amounts during that fiscal year.

(5) Except as provided in paragraph (a)(6), a State may not take into consideration payments under the Act in making estimated or final State aid payments before its State aid program has been certified by the Secretary.

(6)(i) If the Secretary has not made a determination under section 7009 of the Act for a fiscal year, the State may request permission from the Secretary to make estimated or preliminary State aid payments for that fiscal year, that consider a portion of Impact Aid payments as local resources in accordance with this section.

(ii) The State must include with its request an assurance that if the Secretary determines that the State does not meet the requirements of section 222.162 for that State fiscal year, the State must pay to each affected LEA, within 60 days of the Secretary's determination, the amount by which the State reduced State aid to the LEA.

(iii) In determining whether to grant permission, the Secretary may consider factors including whether—

(A) The Secretary certified the State under § 222.162 in the prior State fiscal year; and

(B) Substantially the same State aid program is in effect since the date of the last certification.

(b) *Data for determinations.* (1) Except as provided in paragraph (b)(2) of this section, determinations under this subpart requiring the submission of financial or school population data must be made on the basis of final data for the second fiscal year preceding the fiscal year for which the determination is made if substantially the same program was then in effect.

(2)(i) If the Secretary determines that the State has substantially revised its State aid program, the Secretary may certify that program for any fiscal year only if—

(A) The Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in § 222.162 for the fiscal year for which the determination is made; and

(B) The State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met that standard for the fiscal year for which the determination is made, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA.

(ii) Data projections submitted by a State must set forth the assumptions upon which the data projections are founded, be accompanied by an assurance as to their accuracy, and be adjusted by actual data for the fiscal year of determination that must be submitted to the Secretary as soon as these data are available.

(3) For a State that has not previously been certified by the Secretary under § 222.162, or if the last certification was more than two years prior, the State submits projected data showing whether it meets the disparity standard in § 222.162. The projected data must show the resulting amounts of State aid as if the State were certified to consider Impact Aid in making State aid payments.

(c) *Definitions.* The following definitions apply to this subpart:

Current expenditures is defined in section 7013(4) of the Act. Additionally, for the purposes of this section it does not include expenditures of funds received by the agency under sections 7002 and 7003(b) (including hold harmless payments calculated under section 7003(e)) that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.162.

Equalize expenditures means to meet the standard set forth in § 222.162.

Local tax revenues means compulsory charges levied by an LEA or by an intermediate school district or other local governmental entity on behalf of an LEA for current expenditures for educational services. ''Local tax revenues'' include the proceeds of ad valorem taxes, sales and use taxes, income taxes and other taxes. Where a State funding formula requires a local contribution equivalent to a specified mill tax levy on taxable real or personal property or both, ''local tax revenues'' include any revenues recognized by the State as satisfying that local contribution requirement.

Local tax revenues covered under a State equalization program means ''local tax revenues'' as defined in paragraph (c) of this section contributed to or taken into consideration in a State aid program subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

Revenue means an addition to assets that does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds. Furthermore, the term ''revenue'' includes only revenue for current expenditures.

State aid means any contribution, no repayment for which is expected, made by a State to or on behalf of LEAs within the State for current expenditures for the provision of free public education.

Total local tax revenues means all ''local tax revenues'' as defined in paragraph (c) of this section, including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 80 FR 33170, June 11, 2015; 81 FR 64744, Sept. 20, 2016; 83 FR 47070, Sept. 18, 2018]

§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of

this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses ''weighted pupil,'' ''classroom,'' ''instructional unit,'' or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made using one of the methods in paragraph (d) of this section. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Accounting for special cost differentials.* In computing per-pupil figures under paragraph (c) of this section, the State accounts for special cost differentials that meet the requirements of paragraph (c)(2) of this section in one of four ways:

(1) *The inclusion method on a revenue basis.* The State divides total revenues by a weighted pupil count that includes only those weights associated with the special cost differentials.

(2) *The inclusion method on an expenditure basis.* The State divides total current expenditures by a weighted pupil count that includes only those weights associated with the special cost differentials.

(3) *The exclusion method on a revenue basis.* The State subtracts revenues associated with the special cost differentials from total revenues, and divides this net amount by an unweighted pupil count.

(4) *The exclusion method on an expenditure basis.* The State subtracts current expenditures from revenues associated with the special cost differentials from total current expenditures, and divides this net amount by an unweighted pupil count.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 81 FR 64744, Sept. 20, 2016]

§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the

funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709(d)(1)(B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) may be applied by a State to actual receipts of those payments.

(Authority: 20 U.S.C. 7709(d)(1)(B))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

§ 222.164 What procedures does the Secretary follow in making a determination under section 7009?

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall provide either the State or all LEAs with a complete copy of the submission required in paragraph (b) of this section. Following receipt of the submission, the Secretary shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

(b) *Submission.* (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2)(i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an opportunity to present their views as follows:

(i) Upon receipt of a timely request for a predetermination hearing, the Secretary notifies all LEAs and the State of the time and place of the predetermination hearing.

(ii) Predetermination hearings are informal and any LEA and the State may participate whether or not they requested the predetermination hearing.

(iii) At the conclusion of the predetermination hearing, the Secretary holds the record open for 15 days for the submission of post-hearing comments. The Secretary may extend the period for post-hearing comments for good cause for up to an additional 15 days.

(iv) Instead of a predetermination hearing, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. In such a case, the Secretary notifies all LEAs and the State that this alternative procedure is being followed and that they have up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State may submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

(c) *Determinations.* The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7709)

NOTE TO PARAGRAPH (b)(2) OF THIS SECTION: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 81 FR 64745, Sept. 20, 2016]

§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 60 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* (1) The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(2) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(g) *Procedural rules.* (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral

testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions.* (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) Appeals to the Secretary and the finality of initial decisions under section 8009 are governed by §§222.157(b), 222.158, and 222.159 of subpart J of this part.

(Authority: 20 U.S.C. 7709)

(i) *Corrective action.* (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide satisfactory written assurances that it will undertake appropriate corrective action if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35420, July 1, 1997; 80 FR 33170, June 11, 2015]

§§222.166–222.169 [Reserved]

Appendix to Subpart K of Part 222—Determinations Under Section 8009 of the Act—Methods of Calculations for Treatment of Impact Aid Payments Under State Equalization Programs

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. *Determinations of disparity standard compliance under §222.162(b)(1).*

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9–12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000–$820 = $180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

(b) In cases under §222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the

weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(i); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

EXAMPLE

Group 1 (grades 1–6), 80,000 pupils × 18.00%=	14,400
Group 2 (grades 7–12), 100,000 pupils × 22.00%=	22,000
Group 3 (grades 1–12), 20,000 pupils × 35.00%=	7,000
Total 200,000 pupils	43,400
43,400/200,000 = 21.70% Disparity	

2. *Determinations under § 222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program.* The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

Examples

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, $700 per pupil, and the State contributes the $200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent ($700/$800). If LEA X receives $100 per pupil in payments under the Act, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

Example 3. State B has an equalization program under which each LEA is guaranteed $900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes $700 per pupil from a two mill tax levy and an additional $500 per pupil from local interest, bake sales, in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 4. State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is $500, for nine mills $550, for 10 mills $600. LEA X levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another $300 per pupil. The $300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent ($300/$600). If LEA X receives $100 per pupil in payments under the Act, $50 per pupil may be taken into consideration. LEA X may be regarded as contributing $350 per pupil under the program and State B would now contribute $250 as the difference.

Example 5. The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes $550 per pupil for each tax. As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives $150 per

pupil in payments under the Act, then up to $75 per pupil normally could be taken into consideration. However, since LEA Y would have received only $50 per pupil in State aid, only $50 of the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

Subpart L—Impact Aid Discretionary Construction Grant Program Under Section 8007(b) of the Act

SOURCE: 69 FR 12235, Mar. 15, 2004, unless otherwise noted.

GENERAL

§ 222.170 What is the purpose of the Impact Aid Discretionary Construction grant program (Section 8007(b) of the Act)?

The Impact Aid Discretionary Construction grant program provides competitive grants for emergency repairs and modernization of school facilities to certain eligible local educational agencies (LEAs) that receive formula Impact Aid funds.

(Authority: 20 U.S.C. 7707(b))

§ 222.171 What LEAs may be eligible for Discretionary Construction grants?

(a) Applications for these grants are considered in four funding priority categories. The specific requirements for each priority are detailed in §§ 222.177 through 222.182.

(b)(1) Generally, to be eligible for an emergency construction grant, an LEA must—

(i) Enroll a high proportion (at least 40 percent) of federally connected children in average daily attendance (ADA) who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services;

(ii) Have a school that enrolls a high proportion of one of these types of students;

(iii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act; or

(iv) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of the emergency.

(c)(1) Generally, to be eligible for a modernization construction grant, an LEA must—

(i) Be eligible for Impact Aid funding under either section 8002 or 8003 of the Act;

(ii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act;

(iii) Enroll a high proportion (at least 40 percent) of federally connected children in ADA who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services;

(iv) Have a school that enrolls a high proportion of one of these types of students; or

(v) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of its need for modernization funds.

(Authority: 20 U.S.C. 7707(b))

§ 222.172 What activities may an LEA conduct with funds received under this program?

(a) An LEA may use emergency grant funds received under this program only to repair, renovate, alter, and, in the limited circumstances described in paragraph (c) of this section, replace a public elementary or secondary school facility used for free public education to ensure the health and safety of students and personnel, including providing accessibility for the disabled as part of a larger project.

(b) An LEA may use modernization grant funds received under this program only to renovate, alter, retrofit, extend, and, in the limited circumstances described in paragraph (c) of this section, replace a public elementary or secondary school facility used for free public education to provide school facilities that support a contemporary educational program for

the LEA's students at normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

(c)(1) An emergency or modernization grant under this program may be used for the construction of a new school facility but only if the Secretary determines—

(i) That the LEA holds title to the existing facility for which funding is requested; and

(ii) In consultation with the grantee, that partial or complete replacement of the facility would be less expensive or more cost-effective than improving the existing facility.

(2) When construction of a new school facility is permitted, emergency and modernization funds may be used only for a new school facility that is used for free public education. These funds may be used for the—

(i) Construction of instructional, resource, food service, and general or administrative support areas, so long as they are a part of the instructional facility; and

(ii) Purchase of initial equipment or machinery, and initial utility connections.

(Authority: 20 U.S.C. 7707(b))

§ 222.173 What activities will not receive funding under a Discretionary Construction grant?

The Secretary does not fund the following activities under a Discretionary Construction grant:

(a) Improvements to facilities for which the LEA does not have full title or other interest, such as a lease-hold interest.

(b) Improvements to or repairs of school grounds, such as environmental remediation, traffic remediation, and landscaping, that do not directly involve instructional facilities.

(c) Repair, renovation, alteration, or construction for stadiums or other facilities that are primarily used for athletic contests, exhibitions, and other events for which admission is charged to the general public.

(d) Improvements to or repairs of teacher housing.

(e) Except in the limited circumstances as provided in § 222.172(c), when new construction is permissible, acquisition of any interest in real property.

(f) Maintenance costs associated with any of an LEA's school facilities.

(Authority: 20 U.S.C. 7707(b))

§ 222.174 What prohibitions apply to these funds?

Grant funds under this program may not be used to supplant or replace other available non-Federal construction money. These grant funds may be used for emergency or modernization activities only to the extent that they supplement the amount of construction funds that would, in the absence of these grant funds, be available to a grantee from non-Federal funds for these purposes.

Example 1. ''*Supplanting.*'' An LEA signs a contract for a $300,000 roof replacement and plans to use its capital expenditure fund to pay for the renovation. Since the LEA already has non-Federal funds available for the roof project, it may not now use a grant from this program to pay for the project or replace its own funds in order to conserve its capital fund.

Example 2. ''*Non-supplanting.*'' The LEA from the example of supplanting that has the $300,000 roof commitment has also received a $400,000 estimate for the replacement of its facility's heating, ventilation, and air conditioning (HVAC) system. The LEA has not made any commitments for the HVAC system because it has no remaining funds available to pay for that work. Since other funds are not available, it would not be supplanting if the LEA received an emergency grant under this program to pay for the HVAC system.

(Authority: 20 U.S.C. 7707(b))

§ 222.175 What regulations apply to recipients of funds under this program?

The following regulations apply to the Impact Aid Discretionary Construction program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 75 (Direct Grant Programs) except for 34 CFR §§ 75.600 through 75.617.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(6) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474.

(c) The regulations in 34 CFR part 222.

(Authority: 20 U.S.C. 1221e–3)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

§ 222.176 What definitions apply to this program?

(a) In addition to the terms referenced in 34 CFR 222.2, the following definitions apply to this program:

Bond limit means the cap or limit that a State may impose on an LEA's capacity for bonded indebtedness. For applicants in States that place no limit on an LEA's capacity for bonded indebtedness, the Secretary shall consider the LEA's bond limit to be 10 percent of its total assessed valuation.

Construction means

(1) Preparing drawings and specifications for school facilities;

(2) Repairing, renovating, or altering school facilities;

(3) Extending school facilities as described in § 222.172(b);

(4) Erecting or building school facilities, as described in § 222.172(c); and

(5) Inspections or supervision related to school facilities projects.

Emergency means a school facility condition that is so injurious or hazardous that it either poses an immediate threat to the health and safety of the facility's students and staff or can be reasonably expected to pose such a threat in the near future. These conditions can include deficiencies in the following building features: a roof; electrical wiring; a plumbing or sewage system; heating, ventilation, or air conditioning; the need to bring a school facility into compliance with fire and safety codes, or providing accessibility for the disabled as part of a larger project.

Level of bonded indebtedness means the amount of long-term debt issued by an LEA divided by the LEA's bonding capacity.

Minimal capacity to issue bonds means that the total assessed value of real property in an LEA that may be taxed for school purposes is at least $25,000,000 but not more than $50,000,000.

Modernization means the repair, renovation, alteration, or extension of a public elementary or secondary school facility in order to support a contemporary educational program for an LEA's students in normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

No practical capacity to issue bonds means that the total assessed value of real property in an LEA that may be taxed for school purposes is less than $25,000,000.

School facility means a building used to provide free public education, including instructional, resource, food service, and general or administrative support areas, so long as they are a part of the facility.

Total assessed value per student means the assessed valuation of real property per pupil (AVPP), unless otherwise defined by an LEA's State.

(b) The following terms used in this subpart are defined or referenced in 34 CFR 77.1:

Applicant
Application
Award
Contract
Department
EDGAR
Equipment
Fiscal year
Grant
Grantee
Project
Public
Real property
Recipient

(Authority: 20 U.S.C. 7707(b) and 1221e–3)

ELIGIBILITY

§ 222.177 What eligibility requirements must an LEA meet to apply for an emergency grant under the first priority?

An LEA is eligible to apply for an emergency grant under the first priority of section 8007(b) of the Act if it—

(a) Is eligible to receive formula construction funds for the fiscal year under section 8007(a) of the Act;

(b)(1) Has no practical capacity to issue bonds;

(2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or

(3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and

(c) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

§ 222.178 What eligibility requirements must an LEA meet to apply for an emergency grant under the second priority?

Except as provided in § 222.179, an LEA is eligible to apply for an emergency grant under the second priority of section 8007(b) of the Act if it—

(a) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act;

(b)(1) Enrolls federally connected children living on Indian lands equal to at least 40 percent of the total number of children in average daily attendance (ADA) in its schools; or

(2) Enrolls federally connected children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools;

(c) Has used at least 75 percent of its bond limit;

(d) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(e) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

§ 222.179 Under what circumstances may an ineligible LEA apply on behalf of a school for an emergency grant under the second priority?

An LEA that is eligible to receive section 8003(b) assistance for the fiscal year but that does not meet the other eligibility criteria described in § 222.178(a) or (b) may apply on behalf of a school located within its geographic boundaries for an emergency grant under the second priority of section 8007(b) of the Act if—

(a) The school—

(1) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or

(2) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

(b) The school has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel;

(c) The LEA has used at least 75 percent of its bond limit; and

(d) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average.

(Authority: 20 U.S.C. 7707(b))

§ 222.180 What eligibility requirements must an LEA meet to apply for a modernization grant under the third priority?

An LEA is eligible to apply for a modernization grant under the third priority of section 8007(b) of the Act if it—

(a) Is eligible to receive funds for the fiscal year under section 8002 or 8003(b) of the Act;

(b)(1) Has no practical capacity to issue bonds;

(2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or

(3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and

(c) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in

enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

§ 222.181 What eligibility requirements must an LEA meet to apply for a modernization grant under the fourth priority?

An LEA is eligible to apply for a modernization grant under the fourth priority of section 8007(b) of the Act if it—

(a)(1) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act; and

(i) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA in its schools; or

(ii) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools; or

(2) Is eligible to receive assistance for the fiscal year under section 8002 of the Act;

(b) Has used at least 75 percent of its bond limit;

(c) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

§ 222.182 Under what circumstances may an ineligible LEA apply on behalf of a school for a modernization grant under the fourth priority?

An LEA that is eligible to receive a payment under Title VIII for the fiscal year but that does not meet the other eligibility criteria described in § 222.181 may apply on behalf of a school located within its geographic boundaries for a modernization grant under the fourth priority of section 8007(b) of the Act if—

(a) The school—

(1) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or

(2) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

(b) The LEA has used at least 75 percent of its bond limit;

(c) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) The school has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

How To Apply for a Grant

§ 222.183 How does an LEA apply for a grant?

(a) To apply for funds under this program, an LEA may submit only one application for one educational facility for each competition.

(b) An application must—

(1) Contain the information required in §§ 222.184 through 222.186, as applicable, and in any application notice that the Secretary may publish in the Federal Register; and

(2) Be timely filed in accordance with the provisions of the Secretary's application notice.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

[60 FR 50778, Sept. 29, 1995, as amended at 76 FR 23713, Apr. 28, 2011]

§ 222.184 What information must an application contain?

An application for an emergency or modernization grant must contain the following information:

(a) The name of the school facility the LEA is proposing to repair, construct, or modernize.

(b)(1) For an applicant under section 8003(b) of the Act, the number of federally connected children described in section 8003(a)(1) enrolled in the school facility, as well as the total enrollment in the facility, for which the LEA is seeking a grant; or

(2) For an applicant under section 8002 of the Act, the total enrollment, for the preceding year, in the LEA and in the school facility for which the LEA is seeking a grant, based on the fall State count date.

(c) The identification of the LEA's interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement.

(d) The original construction date of the school facility that the LEA proposes to renovate or modernize.

(e) The dates of any major renovations of that school facility and the areas of the school covered by the renovations.

(f) The proportion of Federal acreage within the geographic boundaries of the LEA.

(g) Fiscal data including the LEA's—

(1) Maximum bonding capacity;

(2) Amount of bonded debt;

(3) Total assessed value of real property available to be taxed for school purposes;

(4) State average assessed value per pupil of real property available to be taxed for school purposes;

(5) Local real property tax levy, in mills or dollars, used to generate funds for capital expenditures; and

(6) Sources and amounts of funds available for the proposed project.

(h) A description of the need for funds and the proposed project for which a grant under this subpart L would be used, including a cost estimate for the project.

(i) Applicable assurances and certifications identified in the approved grant application package.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

§ 222.185 What additional information must be included in an emergency grant application?

In addition to the information specified in § 222.184, an application for an emergency grant must contain the following:

(a) A description of the deficiency that poses a health or safety hazard to occupants of the facility.

(b) A description of how the deficiency adversely affects the occupants and how it will be repaired.

(c) A statement signed by an appropriate local official, as defined below, that the deficiency threatens the health and safety of occupants of the facility or prevents the use of the facility. An appropriate local official may include a local building inspector, a licensed architect, or a licensed structural engineer. An appropriate local official may not include a member of the applicant LEA's staff.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

§ 222.186 What additional information must be included in a modernization grant application?

In addition to the information specified in § 222.184, an application for a modernization grant must contain a description of—

(a) The need for modernization; and

(b) How the applicant will use funds received under this program to address the need referenced in paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1810–0657)

(Authority: 20 U.S.C. 7707(b))

§ 222.187 Which year's data must an SEA or LEA provide?

(a) Except as provided in paragraph (b) of this section, the Secretary will determine eligibility under this discretionary program based on student and fiscal data for each LEA from the fiscal year preceding the fiscal year for which the applicant is applying for funds.

(b) If satisfactory fiscal data are not available from the preceding fiscal year, the Secretary will use data from the most recent fiscal year for which data that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7707(b))

HOW GRANTS ARE MADE

§ 222.188 What priorities may the Secretary establish?

In any given year, the Secretary may assign extra weight for certain facilities systems or emergency and modernization conditions by identifying the systems or conditions and their assigned weights in a notice published in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 7707(b))

§ 222.189 What funding priority does the Secretary give to applications?

(a) Except as provided in paragraph (b) of this section, the Secretary gives funding priority to applications in the following order:

(1) First priority is given to applications described under § 222.177 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the emergency.

(2) After all eligible first-priority applications are funded, second priority is given to applications described under §§ 222.178 and 222.179 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the emergency.

(3) Third priority is given to applications described under § 222.180 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the need for modernization.

(4) Fourth priority is given to applications described under §§ 222.181 and 222.182 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the need for modernization.

(b)(1) The Secretary makes awards in each priority described above until the Secretary is unable to make an approvable award in that priority.

(2) If the Secretary is unable to fund a full project or a viable portion of a project, the Secretary may continue to fund down the list of high-ranking applicants within a priority.

(3) The Secretary applies any remaining funds to awards in the next priority.

(4) If an applicant does not receive an emergency or modernization grant in a fiscal year, the Secretary will, subject to the availability of funds and to the priority and award criteria, consider that application in the following year along with the next fiscal year's pool of applications.

Example: The first five applicants in priority one have been funded. Three hundred thousand dollars remain available. Three unfunded applications remain in that priority. Application #6 requires a minimum of $500,000, application #7 requires $400,000, and application #8 requires $300,000 for a new roof and $150,000 for related wall and ceiling repairs. Applicant #8 agrees to accept the remaining $300,000 since the roof upgrade can be separated into a viable portion of applicant #8's total project. Applications #6 and #7 will be retained for consideration in the next fiscal year and will compete again with that fiscal year's pool of applicants. Applicant #8 will have to submit a new application in the next fiscal year if it wishes to be considered for the unfunded portion of the current year's application.

(Authority: 20 U.S.C. 7707(b))

§ 222.190 How does the Secretary rank and select applicants?

(a) To the extent that they are consistent with these regulations and section 8007(b) of the Act, the Secretary will follow grant selection procedures that are specified in 34 CFR 75.215 through 75.222. In general these procedures are based on the authorizing statute, the selection criteria, and any priorities or other applicable requirements that have been published in the FEDERAL REGISTER.

(b) In the event of ties in numeric ranking, the Secretary may consider as tie-breaking factors: the severity of the emergency or the need for modernization; for applicants under section 8003 of the Act, the numbers of federally connected children who will benefit from the project; or for applicants under section 8002 of the Act, the numbers of children who will benefit from the project; the AVPP compared to the

LEA's State average; and available resources or non-Federal funds available for the grant project.

(Authority: 20 U.S.C. 7707(b))

§ 222.191 What is the maximum award amount?

(a) Subject to any applicable contribution requirements as described in §§ 222.192 and 222.193, the procedures in 34 CFR 75.231 through 75.236, and the provisions in paragraph (b) of this section, the Secretary may fund up to 100 percent of the allowable costs in an approved grantee's proposed project.

(b) An award amount may not exceed the difference between—

(1) The cost of the proposed project; and

(2) The amount the grantee has available or will have available for this purpose from other sources, including local, State, and other Federal funds.

(Authority: 20 U.S.C. 7707(b))

§ 222.192 What local funds may be considered as available for this project?

To determine the amount of local funds that an LEA has available under § 222.191(b)(2) for a project under this program, the Secretary will consider as available all LEA funds that may be used for capital expenditures except $100,000 or 10 percent of the average annual capital expenditures of the applicant for the three previous fiscal years, whichever is greater. The Secretary will not consider capital funds that an LEA can demonstrate have been committed through signed contracts or other written binding agreements but have not yet been expended.

(Authority: 20 U.S.C. 7707(b))

§ 222.193 What other limitations on grant amounts apply?

(a) Except as provided in paragraph (b) of this section and § 222.191, the amount of funds provided under an emergency grant or a modernization grant awarded to an eligible LEA is subject to the following limitations:

(1) The award amount may not be more than 50 percent of the total cost of an approved project.

(2) The total amount of grant funds may not exceed four million dollars during any four-year period.

Example: An LEA that is awarded four million dollars in the first year may not receive any additional funds for the following three years.

(b) Emergency or modernization grants to LEAs with no practical capacity to issue bonds as defined in § 222.176 are not subject to the award limitations described in paragraph (a) of this section.

(Authority: 20 U.S.C. 7707(b))

§ 222.194 Are "in-kind" contributions permissible?

(a) LEAs that are subject to the applicable matching requirement described in § 222.193(a) may use allowable third party in-kind contributions as defined below to meet the requirements.

(b) Third party in-kind contributions mean property or services that benefit this grant program and are contributed by non-Federal third parties without charge to the grantee or by a cost-type contractor under the grant agreement.

(c) Subject to the limitations of 34 CFR 75.564(c)(2) regarding indirect costs, the provisions of 2 CFR 200.306 govern the allowability and valuation of in-kind contributions, except that it is permissible for a third party to contribute real property to a grantee for a project under this program, so long as no Federal funds are spent for the acquisition of real property.

(Authority: 20 U.S.C. 7707(b))

[69 FR 12235, Mar. 15, 2004, as amended at 79 FR 70695, Dec. 19, 2014]

CONDITIONS AND REQUIREMENTS GRANTEES MUST MEET

§ 222.195 How does the Secretary make funds available to grantees?

The Secretary makes funds available to a grantee during a project period using the following procedure:

(a) Upon final approval of the grant proposal, the Secretary authorizes a project period of up to 60 months based upon the nature of the grant proposal and the time needed to complete the project.

(b) The Secretary then initially makes available to the grantee 10 percent of the total award amount.

(c) After the grantee submits a copy of the emergency or modernization contract approved by the grantee's governing board, the Secretary makes available 80 percent of the total award amount to a grantee.

(d) The Secretary makes available up to the remaining 10 percent of the total award amount to the grantee after the grantee submits a statement that—

(1) Details any earnings, savings, or interest;

(2) Certifies that—

(i) The project is fully completed; and

(ii) All the awarded funds have been spent for grant purposes; and

(3) Is signed by the—

(i) Chairperson of the governing board;

(ii) Superintendent of schools; and

(iii) Architect of the project.

(Authority: 20 U.S.C. 7707(b))

§ 222.196 What additional construction and legal requirements apply?

(a) Except as provided in paragraph (b) of this section, a grantee under this program must comply with—

(1) The general construction legal requirements identified in the grant application assurances;

(2) The prevailing wage standards in the grantee's locality that are established by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*); and

(3) All relevant Federal, State, and local environmental laws and regulations.

(b) A grantee that qualifies for a grant because it enrolls a high proportion of federally connected children who reside on Indian lands is considered to receive a grant award primarily for the benefit of Indians and must therefore comply with the Indian preference requirements of section 7(b) of the Indian Self-Determination Act.

(Authority: 20 U.S.C. 7707(b) and 1221e–3)

PART 225—CREDIT ENHANCEMENT FOR CHARTER SCHOOL FACILITIES PROGRAM

Subpart A—General

Sec.

Subpart B—How Does the Secretary Award a Grant?

Subpart C—What Conditions Must Be Met by a Grantee?

AUTHORITY: 20 U.S.C. 1221e–3, 1232, and 7221c.

SOURCE: 70 FR 15003, Mar. 24, 2005, unless otherwise noted.

Subpart A—General

§ 225.1 What is the Credit Enhancement for Charter School Facilities Program?

(a) The Credit Enhancement for Charter School Facilities Program provides grants to eligible entities to assist charter schools in obtaining facilities.

(b) Grantees use these grants to do the following:

(1) Assist charter schools in obtaining loans, bonds, and other debt instruments for the purpose of obtaining, constructing, and renovating facilities.

(2) Assist charter schools in obtaining leases of facilities.

(3) Assist charter schools with the predevelopment costs required to assess sites for the purpose of acquiring

(by purchase, lease, donation, or otherwise) an interest (including an interest held by a third party for the benefit of a charter school) in improved or unimproved real property or constructing new facilities, or renovating, repairing, or altering existing facilities, and that are necessary to commence or continue the operation of a charter school.

(c) Grantees may demonstrate innovative credit enhancement initiatives while meeting the program purposes under paragraph (b) of this section.

(d) For the purposes of these regulations, the Credit Enhancement for Charter School Facilities Program includes grants made under the Charter School Facilities Financing Demonstration Grant Program.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.2 Who is eligible to receive a grant?

The following are eligible to receive a grant under this part:

(a) A public entity, such as a State or local governmental entity;

(b) A private nonprofit entity; or

(c) A consortium of entities described in paragraphs (a) and (b) of this section.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.3 What regulations apply to the Credit Enhancement for Charter School Facilities Program?

The following regulations apply to the Credit Enhancement for Charter School Facilities Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) [Reserved]

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) [Reserved]

(6) 34 CFR part 81 (General Educational Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) [Reserved]

(10) 34 CFR part 97 (Protection of Human Subjects).

(11) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(12) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 225.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

[70 FR 15003, Mar. 24, 2005, as amended at 79 FR 76095, Dec. 19, 2014; 84 FR 25998, June 5, 2019]

§ 225.4 What definitions apply to the Credit Enhancement for Charter School Facilities Program?

(a) *Definitions in the Act.* The following term used in this part is defined in section 4310(2) of the Elementary andSecondary Education Act of 1965, as amended by the EveryStudent Succeeds Act:

Charter school

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Acquisition
Applicant
Application
Award
Department
EDGAR
Facilities
Grant
Grantee
Nonprofit
Private
Project
Public
Secretary

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

Subpart B—How Does the Secretary Award a Grant?

§ 225.10 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 225.11.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.11 What selection criteria does the Secretary use in evaluating an application for a Credit Enhancement for Charter School Facilities grant?

The Secretary uses the following criteria to evaluate an application for a Credit Enhancement for Charter School Facilities grant:

(a) *Quality of project design and significance.* (35 points) In determining the quality of project design and significance, the Secretary considers—

(1) The extent to which the grant proposal would provide financing to charter schools at better rates and terms than they can receive absent assistance through the program;

(2) The extent to which the project goals, objectives, and timeline are clearly specified, measurable, and appropriate for the purpose of the program;

(3) The extent to which the project implementation plan and activities, including the partnerships established, are likely to achieve measurable objectives that further the purposes of the program;

(4) The extent to which the project is likely to produce results that are replicable;

(5) The extent to which the project will use appropriate criteria for selecting charter schools for assistance and for determining the type and amount of assistance to be given;

(6) The extent to which the proposed activities will leverage private or public-sector funding and increase the number and variety of charter schools assisted in meeting their facilities needs more than would be accomplished absent the program;

(7) The extent to which the project will serve charter schools in States with strong charter laws, consistent with the criteria for such laws in section 4303(g)(2) of the Elementary and Secondary Education Act of 1965; and

(8) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the project.

(b) *Quality of project services.* (15 points) In determining the quality of the project services, the Secretary considers—

(1) The extent to which the services to be provided by the project reflect the identified needs of the charter schools to be served;

(2) The extent to which charter schools and chartering agencies were involved in the design of, and demonstrate support for, the project;

(3) The extent to which the technical assistance and other services to be provided by the proposed grant project involve the use of cost-effective strategies for increasing charter schools' access to facilities financing, including the reasonableness of fees and lending terms; and

(4) The extent to which the services to be provided by the proposed grant project are focused on assisting charter schools with a likelihood of success and the greatest demonstrated need for assistance under the program.

(c) *Capacity.* (35 points) In determining an applicant's business and organizational capacity to carry out the project, the Secretary considers—

(1) The amount and quality of experience of the applicant in carrying out the activities it proposes to undertake in its application, such as enhancing the credit on debt issuances, guaranteeing leases, and facilitating financing;

(2) The applicant's financial stability;

(3) The ability of the applicant to protect against unwarranted risk in its loan underwriting, portfolio monitoring, and financial management;

(4) The applicant's expertise in education to evaluate the likelihood of success of a charter school;

(5) The ability of the applicant to prevent conflicts of interest, including conflicts of interest by employees and members of the board of directors in a decision-making role;

(6) If the applicant has co-applicants (consortium members), partners, or other grant project participants, the specific resources to be contributed by each co-applicant (consortium member), partner, or other grant project participant to the implementation and success of the grant project;

(7) For State governmental entities, the extent to which steps have been or will be taken to ensure that charter schools within the State receive the funding needed to obtain adequate facilities; and

(8) For previous grantees under the charter school facilities programs, their performance in implementing these grants.

(d) *Quality of project personnel.* (15 points) In determining the quality of project personnel, the Secretary considers—

(1) The qualifications of project personnel, including relevant training and experience, of the project manager and other members of the project team, including consultants or subcontractors; and

(2) The staffing plan for the grant project.

(Approved by the Office of Management and Budget under control number 1855–0007)

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.12 What funding priority may the Secretary use in making a grant award?

(a) The Secretary may award up to 15 additional points under a competitive priority related to the capacity of charter schools to offer public school choice in those communities with the greatest need for this choice based on—

(1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for comprehensive support and improvement or targeted support and improvement under the ESEA, as amended by the Every Student Succeeds Act;

(2) The extent to which the applicant would target services to geographic areas in which a large proportion of students perform below proficient on State academic assessments; and

(3) The extent to which the applicant would target services to communities with large proportions of students from low-income families.

(b) The Secretary may elect to—

(1) Use this competitive priority only in certain years; and

(2) Consider the points awarded under this priority only for proposals that exhibit sufficient quality to warrant funding under the selection criteria in § 225.11.

(Approved by the Office of Management and Budget under control number 1855–0007)

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

Subpart C—What Conditions Must Be Met by a Grantee?

§ 225.20 When may a grantee draw down funds?

(a) A grantee may draw down funds after it has signed a performance agreement acceptable to the Department of Education and the grantee.

(b) A grantee may draw down and spend a limited amount of funds prior to reaching an acceptable performance agreement provided that the grantee requests to draw down and spend a specific amount of funds and the Department of Education approves the request in writing.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

§ 225.21 What are some examples of impermissible uses of reserve account funds?

(a) Grantees must not use reserve account funds to—

(1) Directly pay for a charter school's construction, renovation, repair, or acquisition; or

(2) Provide a down payment on facilities in order to secure loans for charter schools. A grantee may, however, use funds to guarantee a loan for the portion of the loan that would otherwise have to be funded with a down payment.

(b) In the event of a default of payment to lenders or contractors by a charter school whose loan or lease is guaranteed by reserve account funds, a grantee may use these funds to cover defaulted payments that are referenced under paragraph (a)(1) of this section.

[70 FR 15003, Mar. 24, 2005, as amended at 84 FR 25998, June 5, 2019]

PART 226—STATE CHARTER SCHOOL FACILITIES INCENTIVE PROGRAM

Subpart A—General

Sec.

Subpart B—How Does the Secretary Award a Grant?

Subpart C—What Conditions Must Be Met by a Grantee?

AUTHORITY: 20 U.S.C. 1221e–3; 7221d(b), unless otherwise noted.

SOURCE: 70 FR 75909, Dec. 21, 2005, unless otherwise noted.

Subpart A—General

§ 226.1 What is the State Charter School Facilities Incentive program?

(a) The State Charter School Facilities Incentive program provides grants to States to help charter schools pay for facilities.

(b) Grantees must use these grants to—

(1) Establish new per-pupil facilities aid programs for charter schools;

(2) Enhance existing per-pupil facilities aid programs for charter schools; or

(3) Administer programs described under paragraphs (b)(1) and (2) of this section.

(Authority: 20 U.S.C. 7221d(b))

§ 226.2 Who is eligible to receive a grant?

States are eligible to receive grants under this program.

(Authority: 20 U.S.C. 7221(b))

§ 226.3 What regulations apply to the State Charter School Facilities Incentive program?

The following regulations apply to the State Charter School Facilities Incentive program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1)[Reserved]

(2) 34 CFR part 75 (Direct Grant Programs).

(3) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) [Reserved]

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 82 (New Restrictions on Lobbying).

(8) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(9) [Reserved]

(10) 34 CFR part 97 (Protection of Human Subjects).

(11) 34 CFR part 98 (Student Rights in Research, Experimental Programs, and Testing).

(12) 34 CFR part 99 (Family Educational Rights and Privacy).

(b) The regulations in this part 226.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

(Authority: 20 U.S.C. 1221e–3; 7221d(b))

[70 FR 75909, Dec. 21, 2005, as amended at 79 FR 76096, Dec. 19, 2014]

§ 226.4 What definitions apply to the State Charter School Facilities Incentive program?

(a) *Definitions in the statute.* The following term used in this part is defined in section 5210 of the Elementary and Secondary Education Act of 1965, as amended (ESEA):

Charter school

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Facilities
Grant
Grantee
Project
Public
Secretary

(c) *Other definition.* The following definition also applies to this part:

Construction means—

(1) Preparing drawings and specifications for school facilities projects;

(2) Repairing, renovating, or altering school facilities;

(3) Extending school facilities;

(4) Erecting or building school facilities; and

(5) Inspections or supervision related to school facilities.

(Authority: 20 U.S.C. 7221d(b); 7221i(1))

Subpart B—How Does the Secretary Award a Grant?

§ 226.11 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 226.12 and the competitive preference priorities in § 226.13 and § 226.14.

(b) The Secretary informs applicants of the maximum possible score for each criterion and competitive preference priority in the application package or in a notice published in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 7221d(b))

§ 226.12 What selection criteria does the Secretary use in evaluating an application for a State Charter School Facilities Incentive program grant?

The selection criteria for this program are as follows:

(a) *Need for facility funding.* (1) The need for per-pupil charter school facility funding in the State.

(2) The extent to which the proposal meets the need to fund charter school facilities on a per-pupil basis.

(b) *Quality of plan.* (1) The likelihood that the proposed grant project will result in the State either retaining a new per-pupil facilities aid program or continuing to enhance such a program without the total amount of assistance (State and Federal) declining over a five-year period.

(2) The flexibility charter schools have in their use of facility funds for the various authorized purposes.

(3) The quality of the plan for identifying charter schools and determining their eligibility to receive funds.

(4) The per-pupil facilities aid formula's ability to target resources to charter schools with the greatest need and the highest proportions of students in poverty.

(5) For projects that plan to reserve funds for evaluation, the quality of the applicant's plan to use grant funds for this purpose.

(6) For projects that plan to reserve funds for technical assistance, dissemination, or personnel, the quality of the applicant's plan to use grant funds for these purposes.

(c) *The grant project team.* (1) The qualifications, including relevant training and experience, of the project manager and other members of the grant project team, including employees not paid with grant funds, consultants, and subcontractors.

(2) The adequacy and appropriateness of the applicant's staffing plan for the grant project.

(d) *The budget.* (1) The extent to which the requested grant amount and the project costs are reasonable in relation to the objectives, design, and potential significance of the proposed grant project.

(2) The extent to which the costs are reasonable in relation to the number of students served and to the anticipated results and benefits.

(3) The extent to which the non-Federal share exceeds the minimum percentages (which are based on the percentages under section 5205(b)(2)(C) of the ESEA), particularly in the initial years of the program.

(e) *State experience.* The experience of the State in addressing the facility needs of charter schools through various means, including providing per-pupil aid, access to State loan or bonding pools, and the use of Qualified Zone Academy Bonds.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221d(b))

§ 226.13 What statutory funding priority does the Secretary use in making a grant award?

The Secretary shall award additional points under a competitive preference priority regarding:

(a) *Periodic Review and Evaluation.* The State provides for periodic review and evaluation by the authorized public chartering agency of each charter school at least once every five years unless required more frequently by State law, to determine whether the charter school is meeting the terms of the school's charter and is meeting or exceeding the student academic performance requirements and goals for charter schools as set forth under State law or the school's charter.

(b) *Number of High-Quality Charter Schools.* The State has demonstrated progress in increasing the number of high-quality charter schools that are held accountable in the terms of the schools' charters for meeting clear and measurable objectives for the educational progress of the students attending the schools, in the period prior to the period for which the State applies for a grant under this competition.

(c) *One Authorized Public Chartering Agency Other than an LEA, or an Appeals Process.* The State—

(1) Provides for one authorized public chartering agency that is not a local educational agency (LEA), such as a State chartering board, for each individual or entity seeking to operate a charter school pursuant to State law; or

(2) In the case of a State in which LEAs are the only authorized public chartering agencies, allows for an appeals process for the denial of an application for a charter school.

(d) *High Degree of Autonomy.* The State ensures that each charter school has a high degree of autonomy over the charter school's budgets and expenditures.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221b; 7221d(b))

§ 226.14 What other funding priorities may the Secretary use in making a grant award?

(a) The Secretary may award points to an application under a competitive preference priority regarding the capacity of charter schools to offer public school choice in those communities with the greatest need for this choice based on—

(1) The extent to which the applicant would target services to geographic areas in which a large proportion or number of public schools have been identified for improvement, corrective action, or restructuring under title I of the ESEA;

(2) The extent to which the applicant would target services to geographic areas in which a large proportion of students perform poorly on State academic assessments; and

(3) The extent to which the applicant would target services to communities with large proportions of low-income students.

(b) The Secretary may award points to an application under a competitive preference priority for applicants that have not previously received a grant under the program.

(c) The Secretary may elect to consider the points awarded under these priorities only for proposals that exhibit sufficient quality to warrant funding under the selection criteria in § 226.12 of this part.

(Approved by the Office of Management and Budget under control number 1855–0012)

(Authority: 20 U.S.C. 7221d(b))

Subpart C—What Conditions Must Be Met by a Grantee?

§ 226.21 How may charter schools use these funds?

(a) Charter schools that receive grant funds through their State must use the funds for facilities. Except as provided in paragraph (b) of this section, allowable expenditures include:

(1) Rent.

(2) Purchase of building or land.

(3) Construction.

(4) Renovation of an existing school facility.

(5) Leasehold improvements.

(6) Debt service on a school facility.

(b) Charter schools may not use these grant funds for purchasing land when they have no immediate plans to construct a building on that land.

(Authority: 20 U.S.C. 7221d(b))

§ 226.22 May grantees use grant funds for administrative costs?

State grantees may use up to five percent of their grant award for administrative expenses that include: indirect costs, evaluation, technical assistance, dissemination, personnel costs, and any other costs involved in administering the State's per-pupil facilities aid program.

(Authority: 20 U.S.C. 7221d(b))

§ 226.23 May charter schools use grant funds for administrative costs?

(a) Except as provided in paragraph (b) of this section, charter school subgrantees may use grant funds for administrative costs that are necessary and reasonable for the proper and efficient performance and administration of this Federal grant. This use of funds, as well as indirect costs and rates, must comply with EDGAR and the Office of Management and Budget Circular A–87 (Cost Principles for State, Local, and Indian Tribal Governments).

(b) Consistent with the requirements in 34 CFR 75.564(c)(2), any charter school subgrantees that use grant funds for construction activities may not be reimbursed for indirect costs for those activities.

(Authority: 20 U.S.C. 1221e–3; 7221d(b))

PART 237 [RESERVED]

PART 263—INDIAN EDUCATION DISCRETIONARY GRANT PROGRAMS

Subpart A—Professional Development Program

Sec.

Subpart B—Demonstration Grants for Indian Children Program

AUTHORITY: 20 U.S.C. 7441, unless otherwise noted.

SOURCE: 80 FR 22412, Apr. 22, 2015, unless otherwise noted.

Subpart A—Professional Development Program

AUTHORITY: 20 U.S.C. 7442, unless otherwise noted.

§ 263.1 What is the Professional Development program?

(a) The Professional Development program provides grants to eligible entities to—

(1) Increase the number of qualified Indian individuals in professions that serve Indian people;

(2) Provide training to qualified Indian individuals to become teachers, administrators, teacher aides, social workers, and ancillary educational personnel; and

(3) Improve the skills of qualified Indian individuals who serve in the education field.

(b) The Professional Development program requires individuals who receive training to—

(1) Perform work related to the training received under the program and that benefits Indian people, or to repay all or a prorated part of the assistance received under the program; and

(2) Periodically report to the Secretary on the individual's compliance with the work requirement until work-related payback is complete or the individual has been referred for cash payback.

§ 263.2 Who is eligible to apply under the Professional Development program?

(a) In order to be eligible for either pre-service or in-service training programs, an applicant must be an eligible entity which means—

(1) An institution of higher education, including an Indian institution of higher education;

(2) A State educational agency in consortium with an institution of higher education;

(3) A local educational agency (LEA) in consortium with an institution of higher education;

(4) An Indian tribe or Indian organization in consortium with an institution of higher education; or

(5) A Bureau of Indian Education (Bureau)-funded school.

(b) Bureau-funded schools are eligible applicants for—

(1) An in-service training program; and

(2) A pre-service training program when the Bureau-funded school applies in consortium with an institution of higher education that is accredited to provide the coursework and level of degree required by the project.

(c) Eligibility of an applicant requiring a consortium with any institution of higher education, including Indian institutions of higher education, requires that the institution of higher education be accredited to provide the coursework and level of degree required by the project.

§ 263.3 What definitions apply to the Professional Development program?

The following definitions apply to the Professional Development program:

Bureau-funded school means a Bureau of Indian Education school, a contract or grant school, or a school for which assistance is provided under the Tribally Controlled Schools Act of 1988.

Department means the U.S. Department of Education.

Dependent allowance means costs for the care of minor children under the age of 18 who reside with the training participant and for whom the participant has responsibility. The term does not include financial obligations for payment of child support required of the participant.

Full course load means the number of credit hours that the institution requires of a full-time student.

Full-time student means a student who—

(1) Is a degree candidate for a baccalaureate or graduate degree;

(2) Carries a full course load; and

(3) Is not employed for more than 20 hours a week.

Good standing means a cumulative grade point average of at least 2.0 on a 4.0 grade point scale in which failing

grades are computed as part of the average, or another appropriate standard established by the institution.

Graduate degree means a post-baccalaureate degree awarded by an institution of higher education.

Indian means an individual who is—

(1) A member of an Indian tribe or band, as membership is defined by the Indian tribe or band, including any tribe or band terminated since 1940, and any tribe or band recognized by the State in which the tribe or band resides;

(2) A descendant of a parent or grandparent who meets the requirements of paragraph (1) of this definition;

(3) Considered by the Secretary of the Interior to be an Indian for any purpose;

(4) An Eskimo, Aleut, or other Alaska Native; or

(5) A member of an organized Indian group that received a grant under the Indian Education Act of 1988 as it was in effect on October 19, 1994.

Indian institution of higher education means an accredited college or university within the United States cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994, any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978, and the Navajo Community College, authorized in the Navajo Community College Assistance Act of 1978.

Indian organization means an organization that—

(1) Is legally established—

(i) By tribal or inter-tribal charter or in accordance with State or tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(2) Includes in its purposes the promotion of the education of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education; and

(6) Is not an agency of State or local government.

Induction services means services provided after participants complete their training program and during their first year of teaching. Induction services support and improve participants' professional performance and promote their retention in the field of education and teaching. They include, at a minimum, these activities:

(1) High-quality mentoring, coaching, and consultation services for the participant to improve performance;

(2) Access to research materials and information on teaching and learning;

(3) Assisting new teachers with use of technology in the classroom and use of data, particularly student achievement data, for classroom instruction;

(4) Clear, timely and useful feedback on performance, provided in coordination with the participant's supervisor; and

(5) Periodic meetings or seminars for participants to enhance collaboration, feedback, and peer networking and support.

In-service training means activities and opportunities designed to enhance the skills and abilities of individuals in their current areas of employment.

Institution of higher education means an accredited college or university within the United States that awards a baccalaureate or post-baccalaureate degree.

Participant means an Indian individual who is being trained under the Professional Development program.

Payback means work-related service or cash reimbursement to the Department of Education for the training received under the Professional Development program.

Pre-service training means training to Indian individuals to prepare them to meet the requirements for licensing or certification in a professional field requiring at least a baccalaureate degree.

Professional development activities means pre-service or in-service training offered to enhance the skills and abilities of individual participants.

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

Stipend means that portion of an award that is used for room, board, and

personal living expenses for full-time participants who are living at or near the institution providing the training.

(Authority: 20 U.S.C. 7442 and 7491)

§ 263.4 What costs may a Professional Development program include?

(a) A Professional Development program may include, as training costs, assistance to—

(1) Fully finance a student's educational expenses including tuition, books, and required fees; health insurance required by the institution of higher education; stipend; dependent allowance; technology costs; program required travel; and instructional supplies; or

(2) Supplement other financial aid, including Federal funding other than loans, for meeting a student's educational expenses.

(b) The Secretary announces the expected maximum amounts for stipends and dependent allowance in the annual notice inviting applications published in the FEDERAL REGISTER.

(c) Other costs that a Professional Development program may include, but that must not be included as training costs, include costs for—

(1) Collaborating with prospective employers within the grantees' local service area to create a pool of potentially available qualifying employment opportunities;

(2) In-service training activities such as providing mentorships linking experienced teachers at job placement sites with program participants; and

(3) Assisting participants in identifying and securing qualifying employment opportunities in their field of study following completion of the program.

§ 263.5 What priority is given to certain projects and applicants?

(a) The Secretary gives competitive preference priority to—

(1) An application submitted by an Indian tribe, Indian organization, or an Indian institution of higher education that is eligible to participate in the Professional Development program. A consortium application of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 and includes an Indian tribe, Indian organization, or Indian institution of higher education will be considered eligible to receive preference under this priority only if the lead applicant for the consortium is the Indian tribe, Indian organization, or Indian institution of higher education. In order to be considered a consortium application, the application must include the consortium agreement, signed by all parties; or

(2) A consortium application of eligible entities that—

(i) Meets the requirements of 34 CFR 75.127 through 75.129 and includes an Indian tribe, Indian organization, or Indian institution of higher education; and

(ii) Is not eligible to receive a preference under paragraph (a)(1) of this section.

(b) The Secretary may annually establish as a priority any of the priorities listed in this paragraph. When inviting applications for a competition under the Professional Development program, the Secretary designates the type of each priority as absolute, competitive preference, or invitational through a notice in the FEDERAL REGISTER. The effect of each type of priority is described in 34 CFR 75.105.

(1) *Pre-Service training for teachers.* The Secretary establishes a priority for projects that—

(i) Provide support and training to Indian individuals to complete a preservice education program before the end of the award period that enables the individuals to meet the requirements for full State certification or licensure as a teacher through—

(A) Training that leads to a degree in education;

(B) For States allowing a degree in a specific subject area, training that leads to a degree in the subject area; or

(C) Training in a current or new specialized teaching assignment that requires a degree and in which a documented teacher shortage exists;

(ii) Provide one year of induction services, during the award period, to participants after graduation, certification, or licensure, while they are completing their first year of work in schools with significant Indian student populations; and

(iii) Include goals for the—

(A) Number of participants to be recruited each year;

(B) Number of participants to continue in the project each year;

(C) Number of participants to graduate each year; and

(D) Number of participants to find qualifying jobs within twelve months of completion.

(2) *Pre-service administrator training.* The Secretary establishes a priority for projects that—

(i) Provide support and training to Indian individuals to complete a graduate degree in education administration that is provided before the end of the award period and that allows participants to meet the requirements for State certification or licensure as an education administrator;

(ii) Provide one year of induction services, during the award period, to participants after graduation, certification, or licensure, while they are completing their first year of work as administrators in schools with significant Indian student populations; and

(iii) Include goals for the—

(A) Number of participants to be recruited each year;

(B) Number of participants to continue in the project each year;

(C) Number of participants to graduate each year; and

(D) Number of participants to find qualifying jobs within twelve months of completion.

(3) *Letter of support.* The Secretary establishes a priority for applicants that include a letter of support signed by the authorized representative of an LEA or Department of the Interior Bureau of Indian Education (BIE)-funded school or other entity in the applicant's service area that agrees to consider program graduates for qualifying employment.

(Authority: 20 U.S.C. 7442 and 7473)

§ 263.6 How does the Secretary evaluate applications for the Professional Development program?

The Secretary uses the procedures for establishing selection criteria and factors in 34 CFR 75.200 through 75.210 to establish the criteria and factors used to evaluate applications submitted in a grant competition for the Professional Development program. The Secretary may also consider one or more of the criteria and factors listed in paragraphs (a) through (e) of this section to evaluate applications.

(a) *Need for project.* In determining the need for the proposed project, the Secretary considers one or more of the following:

(1) The extent to which the proposed project will prepare personnel in specific fields in which shortages have been demonstrated through a job market analysis.

(2) The extent to which employment opportunities exist in the project's service area, as demonstrated through a job market analysis.

(b) *Significance.* In determining the significance of the proposed project, the Secretary considers one or more of the following:

(1) The potential of the proposed project to develop effective strategies for teaching Indian students and improving Indian student achievement, as demonstrated by a plan to share findings gained from the proposed project with parties who could benefit from such findings, such as other institutions of higher education who are training teachers and administrators who will be serving Indian students.

(2) The likelihood that the proposed project will build local capacity to provide, improve, or expand services that address the specific needs of Indian students.

(c) *Quality of the project design.* The Secretary considers one or more of the following factors in determining the quality of the design of the proposed project:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are ambitious but also attainable and address—

(i) The number of participants expected to be recruited in the project each year;

(ii) The number of participants expected to continue in the project each year;

(iii) The number of participants expected to graduate; and

(iv) The number of participants expected to find qualifying jobs within twelve months of completion.

(2) The extent to which the proposed project has a plan for recruiting and selecting participants that ensures that program participants are likely to complete the program.

(3) The extent to which the proposed project will incorporate the needs of potential employers, as identified by a job market analysis, by establishing partnerships and relationships with appropriate entities (*e.g.*, Bureau-funded schools, organizations providing educational services to Indian students, and LEAs) and developing programs that meet their employment needs.

(d) *Quality of project services.* The Secretary considers one or more of the following factors in determining the quality of project services:

(1) The likelihood that the proposed project will provide participants with learning experiences that develop needed skills for successful teaching and/or administration in schools with significant Indian populations.

(2) The extent to which the proposed project prepares participants to adapt teaching and/or administrative practices to meet the breadth of Indian student needs.

(3) The extent to which the applicant will provide job placement activities that reflect the findings of a job market analysis and needs of potential employers.

(4) The extent to which the applicant will offer induction services that reflect the latest research on effective delivery of such services.

(e) *Quality of project personnel.* The Secretary considers one or more of the following factors when determining the quality of the personnel who will carry out the proposed project:

(1) The qualifications, including relevant training, experience, and cultural competence, of the project director and the amount of time this individual will spend directly involved in the project.

(2) The qualifications, including relevant training, experience, and cultural competence, of key project personnel and the amount of time to be spent on the project and direct interactions with participants.

(3) The qualifications, including relevant training, experience, and cultural competence (as necessary), of project consultants or subcontractors, if any.

(Approved by the Office of Management and Budget under control number 1810–0580)

§ 263.7 What are the requirements for a leave of absence?

(a) A participant must submit a written request for a leave of absence to the project director not less than 30 days prior to withdrawal or completion of a grading period, unless an emergency situation has occurred and the project director chooses to waive the prior notification requirement.

(b) The project director may approve a leave of absence, for a period not longer than twelve months, provided the participant has completed at least twelve months of training in the project and is in good standing at the time of request.

(c) The project director permits a leave of absence only if the institution of higher education certifies that the training participant is eligible to resume his or her course of study at the end of the leave of absence.

(d) A participant who is granted a leave of absence and does not return to his or her course of study by the end of the grant project period will be considered not to have completed the course of study for the purpose of project performance reporting.

§ 263.8 What are the payback requirements?

(a) *General.* All participants must—

(1) Either perform work-related payback or provide cash reimbursement to the Department for the training received. It is the preference of the Department for participants to complete a work-related payback;

(2) Sign an agreement, at the time of selection for training, that sets forth the payback requirements; and

(3) Report employment verification in a manner specified by the Department or its designee.

(b) *Work-related payback.* (1) Participants qualify for work-related payback if the work they are performing is in their field of study under the Professional Development program and benefits Indian people. Employment in a school that has a significant Indian

student population qualifies as work that benefits Indian people.

(2) The period of time required for a work-related payback is equivalent to the total period of time for which preservice or in-service training was actually received on a month-for-month basis under the Professional Development program.

(3) Work-related payback is credited for the actual time the participant works, not for how the participant is paid (*e.g.*, for work completed over 9 months but paid over 12 months, the payback credit is 9 months).

(4) For participants that initiate, but cannot complete, a work-related payback, the payback converts to a cash payback that is prorated based upon the amount of work-related payback completed.

(c) *Cash payback.* (1) Participants who do not submit employment verification within twelve months of program exit or completion, or have not submitted employment verification for a twelve-month period during a work-related payback, will automatically be referred for a cash payback unless the participant qualifies for a deferral as described in § 263.9.

(2) The cash payback required shall be equivalent to the total amount of funds received and expended for training received under this program and may be prorated based on any approved work-related service the participant performs.

(3) Participants who are referred to cash payback may incur non-refundable penalty and administrative fees in addition to their total training costs and will incur interest charges starting the day of referral.

(4) The cash payback obligation may only be discharged through bankruptcy if repaying the loan would cause the participant undue hardship as defined in 11 U.S.C. 523(a)(8).

(5) Notwithstanding paragraph (c)(1) of this section, participants who exit or complete a grant-funded training program in Federal fiscal year 2020 (October 1, 2019–September 30, 2020) who do not submit employment verification within 24 months of program exit or completion, and participants with qualifying employment during Federal fiscal year 2020 who do not submit employment verification for a 24-month period, will automatically be referred for a cash payback unless the participant qualifies for a deferral as described in § 263.9.

[80 FR 22412, Apr. 22, 2015, as amended at 85 FR 38079, June 25, 2020]

§ 263.9 What are the requirements for payback deferral?

(a) *Education deferral.* If a participant completes or exits the Professional Development program, but plans to continue his or her education as a full-time student without interruption, in a program leading to a degree at an accredited institution of higher education, the Secretary may defer the payback requirement until the participant has completed his or her educational program.

(1) A request for a deferral must be submitted to the Secretary within 30 days of completing or exiting the Professional Development program and must provide the following information—

(i) The name of the accredited institution the student will be attending;

(ii) A copy of the letter of admission from the institution;

(iii) The degree being sought; and

(iv) The projected date of completion.

(2) If the Secretary approves the deferral of the payback requirement on the basis that a participant is continuing as a full-time student, the participant must submit to the Secretary a status report from an academic advisor or other authorized representative of the institution of higher education, showing verification of enrollment and status, after every grading period.

(b) *Military deferral.* If a participant exits the Professional Development program because he or she is called or ordered to active duty status in connection with a war, military operation, or national emergency for more than 30 days as a member of a reserve component of the Armed Forces named in 10 U.S.C. 10101, or as a member of the National Guard on full-time National Guard duty, as defined in 10 U.S.C. 101(d)(5), the Secretary may defer the payback requirement until the participant has completed his or her military service, for a period not to exceed 36 months. Requests for deferral must be

submitted to the Secretary within 30 days of the earlier of receiving the call to military service or completing or exiting the Professional Development program, and must provide—

(1) A written statement from the participant's commanding or personnel officer certifying—

(i) That the participant is on active duty in the Armed Forces of the United States;

(ii) The date on which the participant's service began; and

(iii) The date on which the participant's service is expected to end; or

(2)(i) A true certified copy of the participant's official military orders; and

(ii) A copy of the participant's military identification.

§ 263.10 What are the participant payback reporting requirements?

(a) *Notice of intent.* Participants must submit to the Secretary, within 30 days of completion of, or exit from, as applicable, their training program, a notice of intent to complete a work-related or cash payback, or to continue in a degree program as a full-time student.

(b) *Work-related payback.* (1) Starting within six months after exit from or completion of the program, participants must submit to the Secretary employment information, which includes information explaining how the employment is related to the training received and benefits Indian people.

(2) Participants must submit an employment status report every six months beginning from the date the work-related service is to begin until the payback obligation has been fulfilled.

(c) *Cash payback.* If a cash payback is to be made, the Department contacts the participant to establish an appropriate schedule for payments.

(Approved by the Office of Management and Budget under control number 1810–0698)

§ 263.11 What are the grantee post-award requirements?

(a) Prior to providing funds or services to a participant, the grantee must conduct a payback meeting with the participant to explain the costs of training and payback responsibilities following training.

(b) The grantee must report to the Secretary all participant training and payback information in a manner specified by the Department or its designee.

(c)(1) Grantees must obtain a signed payback agreement from each participant before the participant begins training. The agreement must include—

(i) The estimated total training costs;

(ii) The estimated length of training; and

(iii) Information documenting that the grantee held a payback meeting with the participant that meets the requirements of this section.

(2) Grantees must submit a signed payback agreement to the Department within seven days of signing the payback agreement.

(d) Grantees must conduct activities to assist participants in identifying and securing qualifying employment opportunities following completion of the program.

(e)(1) Awards that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638). That section requires that, to the greatest extent feasible, a grantee—

(i) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(ii) Give to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant.

(2) For the purposes of paragraph (e), an Indian is a member of any federally recognized Indian tribe.

(Authority: 25 U.S.C. 450b, 450e(b))

(Approved by the Office of Management and Budget under control number 1810–0698)

§ 263.12 What are the program-specific requirements for continuation awards?

(a) In making continuation awards, in addition to applying the criteria in 34 CFR 75.253, the Secretary considers the extent to which a grantee has

achieved its project goals to recruit, retain, graduate, and place in qualifying employment program participants.

(b) The Secretary may reduce continuation awards, including the portion of awards that may be used for administrative costs, as well as student training costs, based on a grantee's failure to achieve its project goals specified in paragraph (a) of this section.

Subpart B—Demonstration Grants for Indian Children Program

AUTHORITY: 20 U.S.C. 7441, unless otherwise noted.

§ 263.20 What definitions apply to the Demonstration Grants for Indian Children program?

The following definitions apply to the Demonstration Grants for Indian Children program:

Federally supported elementary or secondary school for Indian students means an elementary or secondary school that is operated or funded, through a contract or grant, by the Bureau of Indian Education.

Indian means an individual who is—

(1) A member of an Indian tribe or band, as membership is defined by the Indian tribe or band, including any tribe or band terminated since 1940, and any tribe or band recognized by the State in which the tribe or band resides;

(2) A descendant of a parent or grandparent who meets the requirements described in paragraph (1) of this definition;

(3) Considered by the Secretary of the Interior to be an Indian for any purpose;

(4) An Eskimo, Aleut, or other Alaska Native; or

(5) A member of an organized Indian group that received a grant under the Indian Education Act of 1988 as it was in effect on October 19, 1994.

Indian institution of higher education means an accredited college or university within the United States cited in section 532 of the Equity in Educational Land-Grant Status Act of 1994, any other institution that qualifies for funding under the Tribally Controlled College or University Assistance Act of 1978, and the Navajo Community College, authorized in the Navajo Community College Assistance Act of 1978.

Indian organization means an organization that—

(1) Is legally established—

(i) By tribal or inter-tribal charter or in accordance with State or tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(2) Includes in its purposes the promotion of the education of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction of or by charter from the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education; and

(6) Is not an agency of State or local government.

Native youth community project means a project that is—

(1) Focused on a defined local geographic area;

(2) Centered on the goal of ensuring that Indian students are prepared for college and careers;

(3) Informed by evidence, which could be either a needs assessment conducted within the last three years or other data analysis, on—

(i) The greatest barriers, both in and out of school, to the readiness of local Indian students for college and careers;

(ii) Opportunities in the local community to support Indian students; and

(iii) Existing local policies, programs, practices, service providers, and funding sources;

(4) Focused on one or more barriers or opportunities with a community-based strategy or strategies and measurable objectives;

(5) Designed and implemented through a partnership of various entities, which—

(i) Must include—

(A) One or more tribes or their tribal education agencies; and

(B) One or more BIE-funded schools, one or more local educational agencies, or both; and

(ii) May include other optional entities, including community-based organizations, national nonprofit organizations, and Alaska regional corporations; and

(6) Led by an entity that—

(i) Is eligible for a grant under the Demonstration Grants for Indian Children program; and

(ii) Demonstrates, or partners with an entity that demonstrates, the capacity to improve outcomes that are relevant to the project focus through experience with programs funded through other sources.

Professional development activities means in-service training offered to enhance the skills and abilities of individuals that may be part of, but not exclusively, the activities provided in a Demonstration Grants for Indian Children program.

§ 263.21 What priority is given to certain projects and applicants?

(a) The Secretary gives priority to an application that presents a plan for combining two or more of the activities described in section 7121(c) of the Elementary and Secondary Education Act of 1965, as amended, over a period of more than one year.

(b) The Secretary gives a competitive preference priority to—

(1) An application submitted by an Indian tribe, Indian organization, or Indian institution of higher education that is eligible to participate in the Demonstration Grants for Indian Children program. A group application submitted by a consortium that meets the requirements of 34 CFR 75.127 through 75.129 or submitted by a partnership is eligible to receive the preference only if the lead applicant is an Indian tribe, Indian organization, or Indian institution of higher education; or

(2) A group application submitted by a consortium of eligible entities that meets the requirements of 34 CFR 75.127 through 75.129 or submitted by a partnership if the consortium or partnership—

(i) Includes an Indian tribe, Indian organization, or Indian institution of higher education; and

(ii) Is not eligible to receive the preference in paragraph (b)(1) of this section.

(c) The Secretary may give priority to an application that meets any of the priorities listed in this paragraph. When inviting applications for a competition under the Demonstration Grants program, the Secretary designates the type of each priority as absolute, competitive preference, or invitational through a notice inviting applications published in the FEDERAL REGISTER. The effect of each type of priority is described in 34 CFR 75.105.

(1) Native youth community projects.

(2) Projects in which the applicant or one of its partners has received a grant in the last four years under a federal program selected by the Secretary and announced in a notice inviting applications published in the FEDERAL REGISTER.

(3) Projects in which the applicant has Department approval to consolidate funding through a plan that complies with section 7116 of the ESEA or other authority designated by the Secretary.

(4) Projects that focus on a specific activity authorized in section 7121(c) of the ESEA as designated by the Secretary in the notice inviting applications.

(5) Projects that include either—

(i) An LEA that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under title VI, part B of the ESEA; or

(ii) A BIE-funded school that is located in an area designated with locale code of either 42 or 43 as designated by the U.S. Census Bureau.

(Authority: 20 U.S.C. 7426, 7441, and 7473)

§ 263.22 What are the application requirements for these grants?

(a) Each application must contain—

(1) A description of how Indian tribes and parents of Indian children have been, and will be, involved in developing and implementing the proposed activities;

(2) Assurances that the applicant will participate, at the request of the Secretary, in any national evaluation of this program;

(3) Information demonstrating that the proposed project is based on scientific research, where applicable, or

an existing program that has been modified to be culturally appropriate for Indian students;

(4) A description of how the applicant will continue the proposed activities once the grant period is over; and

(5) Other assurances and information as the Secretary may reasonably require.

(b) The Secretary may require an applicant to satisfy any of the requirements in this paragraph. When inviting applications for a competition under the Demonstration Grants program, the Secretary establishes the application requirements through a notice inviting applications published in the FEDERAL REGISTER. If specified in the notice inviting applications, an applicant must submit—

(1) Evidence, which could be either a needs assessment conducted within the last three years or other data analysis, of—

(i) The greatest barriers, both in and out of school, to the readiness of local Indian students for college and careers;

(ii) Opportunities in the local community to support Indian students; and

(iii) Existing local policies, programs, practices, service providers, and funding sources.

(2) A copy of an agreement signed by the partners in the proposed project, identifying the responsibilities of each partner in the project. The agreement can be either—

(i) A consortium agreement that meets the requirements of 34 CFR 75.128, if each of the entities are eligible entities under this program; or

(ii) Another form of partnership agreement, such as a memorandum of understanding or a memorandum of agreement, if not all the partners are eligible entities under this program.

(3) A plan, which includes measurable objectives, to evaluate reaching the project goal or goals.

§ 263.23 What is the Federal requirement for Indian hiring preference that applies to these grants?

(a) Awards that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638). That section requires that, to the greatest extent feasible, a grantee—

(1) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(2) Give to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant.

(b) For purposes of this section, an Indian is a member of any federally recognized Indian tribe.

(Authority: 25 U.S.C. 450b, 450e(b)).

PART 270—EQUITY ASSISTANCE CENTER PROGRAM

Subpart A—General

Sec.

Subpart B [Reserved]

Subpart C—How Does the Secretary Award a Grant?

Subpart D—What Conditions Must I Meet after I Receive a Grant?

AUTHORITY: 42 U.S.C. 2000c—2000c–2, 2000c–5, unless otherwise noted.

SOURCE: 81 FR 46815, July 18, 2016 unless otherwise noted.

Subpart A—General

§ 270.1 What is the Equity Assistance Center Program?

This program provides financial assistance to operate regional Equity Assistance Centers (EACs), to enable them to provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools, and in the development of effective methods of coping with special educational problems occasioned by desegregation.

§ 270.2 Who is eligible to receive a grant under this program?

A public agency (other than a State educational agency or a school board) or private, nonprofit organization is eligible to receive a grant under this program.

§ 270.3 Who may receive assistance under this program?

(a) The recipient of a grant under this part may provide assistance only if requested by school boards or other responsible governmental agencies located in its geographic region.

(b) The recipient may provide assistance only to the following persons:

(1) Public school personnel.

(2) Students enrolled in public schools, parents of those students, community organizations and other community members.

§ 270.4 What types of projects are authorized under this program?

(a) The Secretary may award funds to EACs for projects offering technical assistance (including training) to school boards and other responsible governmental agencies, at their request, for assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools.

(b) A project must provide technical assistance in all four of the desegregation assistance areas, as defined in 34 CFR 270.7.

(c) Desegregation assistance may include, among other activities:

(1) Dissemination of information regarding effective methods of coping with special educational problems occasioned by desegregation;

(2) Assistance and advice in coping with these problems; and

(3) Training designed to improve the ability of teachers, supervisors, counselors, parents, community members, community organizations, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation.

§ 270.5 What geographic regions do the EACs serve?

(a) The Secretary awards a grant to provide race, sex, national origin, and religion desegregation assistance under this program to regional EACs serving designated geographic regions.

(b) The Secretary announces in the FEDERAL REGISTER the number of centers and geographic regions for each competition.

(c) The Secretary determines the number and boundaries of each geographic region for each competition on the basis of one or more of the following:

(1) Size and diversity of the student population;

(2) The number of LEAs;

(3) The composition of urban, city, and rural LEAs;

(4) The history and frequency of the EAC and other Department technical assistance activities;

(5) Geographic proximity of the States within each region; and

(6) The amount of funding available for the competition.

§ 270.6 What regulations apply to this program?

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 75 (Direct Grant Programs), part 77 (Definitions That Apply to Department Regulations), part 79 (Intergovernmental Review of Department of Education Programs and Activities), and part 81 (General Education Provisions Act—

Enforcement), except that 34 CFR 75.232 (relating to the cost analysis) does not apply to grants under this program.

(b) The regulations in this part.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in 2 CFR part 3485.

§ 270.7 What definitions apply to this program?

In addition to the definitions in 34 CFR 77.1, the following definitions apply to the regulations in this part:

Desegregation assistance means the provision of technical assistance (including training) in the areas of race, sex, national origin, and religion desegregation of public elementary and secondary schools.

Desegregation assistance areas means the areas of race, sex, national origin, and religion desegregation.

English learner has the same meaning under this part as the same term defined in section 8101(20) of the Elementary and Secondary Education Act, as amended.

(Authority: Section 8101(20) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Pub. L. 114–95 (2015) (ESSA))

Equity Assistance Center means a regional desegregation technical assistance and training center funded under this part.

National origin desegregation means the assignment of students to public schools and within those schools without regard to their national origin, including providing students such as those who are English learners with a full opportunity for participation in all educational programs regardless of their national origin.

Public school means any elementary or secondary educational institution operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from governmental sources.

Public school personnel means school board members and persons who are employed by or who work in the schools of a responsible governmental agency, as that term is defined in this section.

Race desegregation means the assignment of students to public schools and within those schools without regard to their race, including providing students with a full opportunity for participation in all educational programs regardless of their race. ''Race desegregation'' does not mean the assignment of students to public schools to correct conditions of racial separation that are not the result of State or local law or official action.

Religion desegregation means the assignment of students to public schools and within those schools without regard to their religion, including providing students with a full opportunity for participation in all educational programs regardless of their religion.

Responsible governmental agency means any school board, State, municipality, LEA, or other governmental unit legally responsible for operating a public school or schools.

School board means any agency or agencies that administer a system of one or more public schools and any other agency that is responsible for the assignment of students to or within that system.

Sex desegregation means the assignment of students to public schools and within those schools without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; and pregnancy and related conditions), including providing students with a full opportunity for participation in all educational programs regardless of their sex.

Special educational problems occasioned by desegregation means those issues that arise in classrooms, schools, and communities in the course of desegregation efforts based on race, national origin, sex, or religion. The phrase does not refer to the provision of special

education and related services for students with disabilities as defined under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*)

Subpart B [Reserved]

Subpart C—How Does the Secretary Award a Grant?

§ 270.20 How does the Secretary evaluate an application for a grant?

(a) The Secretary evaluates the application on the basis of the criteria in 34 CFR 75.210.

(b) The Secretary selects the highest ranking application for each geographic region to receive a grant.

§ 270.21 How does the Secretary determine the amount of a grant?

The Secretary determines the amount of a grant on the basis of:

(a) The amount of funds available for all grants under this part;

(b) A cost analysis of the project (that shows whether the applicant will achieve the objectives of the project with reasonable efficiency and economy under the budget in the application), by which the Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations;

(c) Evidence supporting the magnitude of the need of the responsible governmental agencies for desegregation assistance in the geographic region and the cost of providing that assistance to meet those needs, as compared with the evidence supporting the magnitude of the needs for desegregation assistance, and the cost of providing it, in all geographic regions for which applications are approved for funding;

(d) The size and the racial, ethnic, or religious diversity of the student population of the geographic region for which the EAC will provide services; and

(e) Any other information concerning desegregation problems and proposed activities that the Secretary finds relevant in the applicant's geographic region.

Subpart D—What Conditions Must I Meet after I Receive a Grant?

§ 270.30 What conditions must be met by a recipient of a grant?

(a) A recipient of a grant under this part must:

(1) Operate an EAC in the geographic region to be served; and

(2) Have a full-time project director.

(b) A recipient of a grant under this part must coordinate assistance in its geographic region with appropriate SEAs, Comprehensive Centers, Regional Educational Laboratories, and other Federal technical assistance centers. As part of this coordination, the recipient shall seek to prevent duplication of assistance where an SEA, Comprehensive Center, Regional Educational Laboratory, or other Federal technical assistance center may have already provided assistance to the responsible governmental agency.

(c) A recipient of a grant under this part must communicate and coordinate with the most recent EAC grant recipient(s) in its region, as needed, to ensure a smooth transition for ongoing technical assistance under the EAC program.

§ 270.31 What stipends and related reimbursements are authorized under this program?

(a) The recipient of an award under this program may pay:

(1) Stipends to public school personnel who participate in technical assistance or training activities funded under this part for the period of their attendance, if the person to whom the stipend is paid receives no other compensation for that period; or

(2) Reimbursement to a responsible governmental agency that pays substitutes for public school personnel who:

(i) Participate in technical assistance or training activities funded under this part; and

(ii) Are being compensated by that responsible governmental agency for the period of their attendance.

(b) A recipient may pay the stipends and reimbursements described in this

section only if it demonstrates that the payment of these costs is necessary to the success of the technical assistance or training activity, and will not exceed 20 percent of the total award.

(c) If a recipient is authorized by the Secretary to pay stipends or reimbursements (or any combination of these payments), the recipient shall determine the conditions and rates for these payments in accordance with appropriate State policies, or in the absence of State policies, in accordance with local policies.

(d) A recipient of a grant under this part may pay a travel allowance only to a person who participates in a technical assistance or training activity under this part.

(e) If the participant does not complete the entire scheduled activity, the recipient may pay the participant's transportation to his or her residence or place of employment only if the participant left the training activity because of circumstances not reasonably within his or her control.

§ 270.32 What limitation is imposed on providing Equity Assistance under this program?

A recipient of a grant under this program may not use funds to assist in the development or implementation of activities or the development of curriculum materials for the direct instruction of students to improve their academic and vocational achievement levels.

PARTS 271–272 [RESERVED]

PART 280—MAGNET SCHOOLS ASSISTANCE PROGRAM

Subpart A—General

Sec.

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

Subpart C—How Does One Apply for a Grant?

Subpart D—How Does the Secretary Make a Grant?

Subpart E—What Conditions Must Be Met by a Grantee?

AUTHORITY: 20 U.S.C. 7231–7231j, unless otherwise noted.

Subpart A—General

§ 280.1 What is the Magnet Schools Assistance Program?

The Magnet Schools Assistance Program provides grants to eligible local educational agencies (LEAs) or consortia of LEAs for use in magnet schools that are part of an approved desegregation plan and that are designed to bring students from different social, economic, ethnic and racial backgrounds together. The purposes of the program are to support, through financial assistance to eligible LEAs or consortia of LEAs—

(a) The elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial portions of minority students, which shall include assisting in the efforts of the United States to achieve voluntary desegregation in public schools;

(b) The development and implementation of magnet school projects that will assist LEAs in achieving systemic reforms and providing all students the opportunity to meet challenging State academic content standards and student academic achievement standards;

(c) The development and design of innovative educational methods and practices that promote diversity and increase choices in public elementary

schools and public secondary schools and public educational programs;

(d) Courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the attainment of tangible and marketable vocational, technological, and professional skills of students attending such schools;

(e) Improvement of the capacity of LEAs, including through professional development, to continue operating magnet schools at a high performance level after Federal funding for the magnet schools is terminated; and

(f) Ensuring that all students enrolled in the magnet school programs have equitable access to high quality education that will enable the students to succeed academically and continue with postsecondary education or productive employment.

(Authority: 20 U.S.C. 7231)

[51 FR 20414, June 4, 1986, as amended at 60 FR 14865, Mar. 20, 1995; 69 FR 4996, Feb. 2, 2004]

§ 280.2 Who is eligible to apply for a grant?

(a) An LEA or consortia of LEAs is eligible to receive assistance under this part if the LEA or consortia of LEAs meets any of the following requirements:

(1) The LEA or consortia of LEAs is implementing a plan undertaken pursuant to a final order of a court of the United States, or a court of any State, or any other State agency or official of competent jurisdiction, and the order requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of that agency or those agencies.

(2) The LEA or consortia of LEAs adopted and is implementing on either a voluntary basis or as required under title VI of the Civil Rights Act of 1964—or will adopt and implement if assistance is made available under this part—a plan that has been approved by the Secretary as adequate under title VI.

(b) The Secretary approves a voluntary plan under paragraph (a)(2) of this section only if he determines that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent minority group isolation within the period of the grant award, either in the magnet school or in a feeder school, as appropriate.

(Authority: 20 U.S.C. 7231c)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989; 57 FR 61508, Dec. 24, 1992; 60 FR 14865, Mar. 20, 1995; 69 FR 4996, Feb. 2, 2004; 75 FR 9780, Mar. 4, 2010]

§ 280.3 What regulations apply to this program?

The following regulations apply to the Magnet Schools Assistance Program:

(a) The Education Department General Administrative Regulations (EDGAR), 34 CFR parts 75 (Direct Grant Programs), 77 (Definitions that Apply to Department Regulations), 79 (Intergovernmental Review of Department of Education Programs and Activities) and 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(b) The regulations in this part.

(c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted in 2 CFR part 3474 and OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted in part 3485.

(Authority: 20 U.S.C. 7231–7231j)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989; 69 FR 4996, Feb. 2, 2004; 79 FR 76096, Dec. 19, 2014]

§ 280.4 What definitions apply to this program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR part 77:

Applicant
Application
Budget
EDGAR
Elementary school
Equipment
Facilities
Fiscal year
Local educational agency
Project
Secondary school
Secretary
State

(b) *Definitions that apply to this program.* The following definitions also apply to this part:

Act means the Elementary and Secondary Education Act of 1965 as amended by title V, Part C of the No Child Left Behind Act of 2001, Pub. L. 107–110 (20 U.S.C. 7231–7231j).

Desegregation, in reference to a plan, means a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an LEA or a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an LEA.

Feeder school means a school from which students are drawn to attend a magnet school.

Magnet school means a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.

Minority group means the following:

(1) *American Indian or Alaskan Native.* A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(2) *Asian of Pacific Islander.* A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

(3) *Black (Not of Hispanic Origin).* A person having origins in any of the black racial groups of Africa.

(4) *Hispanic.* A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

Special curriculum means a course of study embracing subject matter or a teaching methodology that is not generally offered to students of the same age or grade level in the same LEA or consortium of LEAs, as the students to whom the special curriculum is offered in the magnet schools. This term does not include:

(1) A course of study or a part of a course of study designed solely to provide basic educational services to handicapped students or to students of limited English-speaking ability;

(2) A course of study or a part of a course of study in which any student is unable to participate because of his or her limited English-speaking ability;

(3) A course of study or a part of a course of study in which any student is unable to participate because of his or her limited financial resources; or

(4) A course of study or a part of a course of study that fails to provide for a participating student's meeting the requirements for completion of elementary or secondary education in the same period as other students enrolled in the applicant's schools.

(Authority: 20 U.S.C. 7231–7231j)

[50 FR 21191, May 22, 1985, as amended at 51 FR 20414, June 4, 1986; 54 FR 19508, 19509, May 5, 1989; 57 FR 61509, Dec. 24, 1992; 60 FR 14865, Mar. 20, 1995; 69 FR 4996, Feb. 2, 2004; 75 FR 9780, Mar. 4, 2010]

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

§ 280.10 What types of projects does the Secretary assist?

(a) The Secretary funds applications proposing projects in magnet schools that are part of an approved desegregation plan and that are designed to bring students from different social, economic, ethnic, and racial backgrounds together.

(b) For the purposes of this part, an approved desegregation plan is a desegregation plan described in § 280.2 (a) or (b).

(c) In the case of a desegregation plan described in § 280.2(a)(1), any modification to that plan must be approved by the court, agency, or official that approved the plan.

(Authority: 20 U.S.C. 7203)

[50 FR 21191, May 22, 1985, as amended at 51 FR 20414, June 4, 1986; 54 FR 19508, 19509, May 5, 1989]

Subpart C—How Does One Apply for a Grant?

§ 280.20 How does one apply for a grant?

(a) Each eligible LEA or consortium of LEAs that desires to receive assistance under this part shall submit an annual application to the Secretary.

(b) In its application, the LEA or consortium of LEAs shall provide assurances that it—

(1) Will use funds made available under this part for the purposes specified in section 5301(b) of the Act;

(2) Will employ highly qualified teachers in the courses of instruction assisted under this part;

(3) Will not engage in discrimination based upon race, religion, color, national origin, sex, or disability in the hiring, promotion, or assignment of employees of the agency or other personnel for whom the agency has any administrative responsibility;

(4) Will not engage in discrimination based upon race, religion, color, national origin, sex, or disability in the assignment of students to schools or to courses of instruction within schools of the agency, except to carry out the approved desegregation plan;

(5) Will not engage in discrimination based upon race, religion, color, national origin, sex, or disability in designing or operating extracurricular activities for students;

(6) Will carry out a high-quality education program that will encourage greater parental decisionmaking and involvement; and

(7) Will give students residing in the local attendance area of the proposed magnet school program equitable consideration for placement in the program, consistent with desegregation guidelines and the capacity of the applicant to accommodate students.

(c) In addition to the assurances listed in paragraph (b) of this section, the LEA or consortium of LEAs shall provide such other assurances as the Secretary determines necessary to carry out the provisions of this part.

(d) Upon request, the LEA or consortium of LEAs shall submit any information that is necessary for the Assistant Secretary for Civil Rights to determine whether the assurances required in paragraphs (b) (3), (4), and (5) of this section will be met.

(e) An LEA or consortium of LEAs that has an approved desegregation plan shall submit each of the following with its application:

(1) A copy of the plan.

(2) An assurance that the plan is being implemented as approved.

(f) An LEA or consortium of LEAs that does not have an approved desegregation plan shall submit each of the following with its application:

(1) A copy of the plan the LEA or consortium of LEAs is submitting for approval.

(2) A copy of a school board resolution or other evidence of final official action adopting and implementing the plan, or agreeing to adopt and implement it upon the award of assistance under this part.

(3) Evidence that the plan is a desegregation plan as defined in § 280.4(b).

(4) For an LEA or consortium of LEAs that seeks assistance for existing magnet schools—

(i) Enrollment numbers and percentages, for minority and non-minority group students, for each magnet school for which funding is sought and each feeder school—

(A) For the school year prior to the creation of each magnet school;

(B) For the school year in which the application is submitted; and

(C) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures); and

(ii) Districtwide enrollment numbers and percentages for minority group students in the LEA's or consortium of LEAs' schools, for grade levels involved in the applicant's magnet schools (e.g., K–6, 7–9, 10–12)—

(A) For the school year prior to the creation of each magnet school;

(B) For the school year in which the application is submitted; and

(C) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures).

(5) For an LEA or consortium of LEAs that seeks assistance for new magnet schools—

(i) Enrollment numbers and percentages, for minority and non-minority group students, for each magnet school

for which funding is sought and for each feeder school—

(A) For the school year in which the application is submitted; and

(B) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures); and

(ii) Districtwide numbers and percentages of minority group students in the LEA's or consortium of LEAs' schools, for the grade levels involved in the applicant's magnet schools (e.g., K–6, 7–9, 10–12)—

(A) For the school year in which the application is submitted; and

(B) For each of the school years of the proposed grant cycle (i.e., projected enrollment figures).

(g) An applicant that does not have an approved desegregation plan, and demonstrates that it cannot provide some portion of the information requested under paragraphs (f)(4) and (5) of this section, may provide other information (in lieu of that portion of the information not provided in response to paragraphs (f)(4) and (5) of this section) to demonstrate that the creation or operation of its proposed magnet school would reduce, eliminate, or prevent minority group isolation in the applicant's schools.

(h) After reviewing the information provided in response to paragraph (f)(4) or (5) of this section, or as provided under paragraph (g) of this section, the Secretary may request other information, if necessary (e.g., demographic data concerning the attendance areas in which the magnet schools are or will be located), to determine whether to approve an LEA's or consortium of LEAs' plan.

(i) In addition to including the assurances required by this section, an LEA or consortium of LEAs shall describe in its application—

(1) How the applicant will use assistance made available under this part to promote desegregation, including how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds;

(2) How and to what extent the assistance will increase student academic achievement in instructional areas offered;

(3) How the LEA or consortium of LEAs will continue the magnet schools program after assistance under this part is no longer available, including, if applicable, why magnet schools previously established or supported with Magnet Schools Assistance Program grant funds cannot be continued without the use of funds under this part;

(4) How assistance will be used to—

(i) Improve student academic achievement for all students attending the magnet school programs; and

(ii) Implement services and activities that are consistent with other programs under the Act and other statutes, as appropriate; and

(5) What criteria will be used in selecting students to attend the proposed magnet schools program.

(Approved by the Office of Management and Budget under control number 1855–0011)

(Authority: 20 U.S.C. 7231d)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989; 57 FR 61509, Dec. 24, 1992; 60 FR 14865, Mar. 20, 1995; 69 FR 4997, Feb. 2, 2004; 75 FR 9780, Mar. 4, 2010]

Subpart D—How Does the Secretary Make a Grant?

§ 280.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application under the procedures in 34 CFR part 75 and this part.

(b) To evaluate an application for a new grant the Secretary may use—

(1) Selection criteria established under 34 CFR 75.209;

(2) Selection criteria in § 280.31;

(3) Selection criteria established under 34 CFR 75.210; or

(4) Any combination of criteria from paragraphs (b)(1), (b)(2), and (b)(3) of this section.

(c) The Secretary indicates in the application notice published in the FEDERAL REGISTER the specific criteria that the Secretary will use and how points for the selection criteria will be distributed.

(d) The Secretary evaluates an application submitted under this part on the basis of criteria described in paragraph (c) of this section and the priority factors in § 280.32.

(e) The Secretary awards up to 100 points for the extent to which an application meets the criteria described in paragraph (c) of this section.

(f) The Secretary then awards up to 30 additional points based upon the priority factors in § 280.32.

(Approved by the Office of Management and Budget under control number 1855–0011)

(Authority: 20 U.S.C. 7231–7231j)

[72 FR 10607, Mar. 9, 2007]

§ 280.31 What selection criteria does the Secretary use?

The Secretary may use the following selection criteria in evaluating each application:

(a) *Plan of operation.* (1) The Secretary reviews each application to determine the quality of the plan of operation for the project.

(2) The Secretary determines the extent to which the applicant demonstrates—

(i) The effectiveness of its management plan to ensure proper and efficient administration of the project;

(ii) The effectiveness of its plan to attain specific outcomes that—

(A) Will accomplish the purposes of the program;

(B) Are attainable within the project period;

(C) Are measurable and quantifiable; and

(D) For multi-year projects, can be used to determine the project's progress in meeting its intended outcomes;

(iii) The effectiveness of its plan for utilizing its resources and personnel to achieve the objectives of the project, including how well it utilizes key personnel to complete tasks and achieve the objectives of the project;

(iv) How it will ensure equal access and treatment for eligible project participants who have been traditionally underrepresented in courses or activities offered as part of the magnet school, e.g., women and girls in mathematics, science or technology courses, and disabled students; and

(v) The effectiveness of its plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet schools.

(b) *Quality of personnel.* (1) The Secretary reviews each application to determine the qualifications of the personnel the applicant plans to use on the project.

(2) The Secretary determines the extent to which—

(i) The project director (if one is used) is qualified to manage the project;

(ii) Other key personnel are qualified to manage the project;

(iii) Teachers who will provide instruction in participating magnet schools are qualified to implement the special curriculum of the magnet schools; and

(iv) The applicant, as part of its nondiscriminatory employment practices will ensure that its personnel are selected for employment without regard to race, religion, color, national origin, sex, age, or disability.

(3) To determine personnel qualifications the Secretary considers experience and training in fields related to the objectives of the project, including the key personnel's knowledge of and experience in curriculum development and desegregation strategies.

(c) *Quality of project design.* (1) The Secretary reviews each application to determine the quality of the project design.

(2) The Secretary determines the extent to which each magnet school for which funding is sought will—

(i) Foster interaction among students of different social, economic, ethnic, and racial backgrounds in classroom activities, extracurricular activities, or other activities in the magnet schools (or, if appropriate, in the schools in which the magnet school programs operate);

(ii) Address the educational needs of the students who will be enrolled in the magnet schools;

(iii) Carry out a high quality educational program that will substantially strengthen students' reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, music, or vocational, technological, and professional skills;

(iv) Encourage greater parental decisionmaking and involvement; and

(v) Improve the racial balance of students in the applicant's schools by reducing, eliminating, or preventing minority group isolation in its schools.

(d) *Budget and resources.* The Secretary reviews each application to determine the adequacy of the resources and the cost-effectiveness of the budget for the project, including—

(1) The adequacy of the facilities that the applicant plans to use;

(2) The adequacy of the equipment and supplies that the applicant plans to use; and

(3) The adequacy and reasonableness of the budget for the project in relation to the objectives of the project.

(e) *Evaluation plan.* The Secretary determines the extent to which the evaluation plan for the project—

(1) Includes methods that are appropriate for the project;

(2) Will determine how successful the project is in meeting its intended outcomes, including its goals for desegregating its students and increasing student achievement; and

(3) Includes methods that are objective and that will produce data that are quantifiable.

(f) *Commitment and capacity.* (1) The Secretary reviews each application to determine whether the applicant is likely to continue the magnet school activities after assistance under this part is no longer available.

(2) The Secretary determines the extent to which the applicant—

(i) Is committed to the magnet schools project; and

(ii) Has identified other resources to continue support for the magnet school activities when assistance under this program is no longer available.

(Approved by the Office of Management and Budget under control number 1855–0011)

(Authority: 20 U.S.C. 7231–7231j)

[57 FR 61509, Dec. 24, 1992, as amended at 60 FR 14866, Mar. 20, 1995; 69 FR 4997, Feb. 2, 2004; 72 FR 10607, Mar. 9, 2007]

§ 280.32 How is priority given to applicants?

(a) *How priority is given.* In addition to the points awarded under § 280.31, the Secretary gives priority to the factors listed in paragraphs (b) through (d) of this section by awarding additional points for these factors. The Secretary indicates in the application notice published in the FEDERAL REGISTER how these additional points will be distributed.

(b) *Need for assistance.* The Secretary evaluates the applicant's need for assistance under this part, by considering—

(1) The costs of fully implementing the magnet schools project as proposed;

(2) The resources available to the applicant to carry out the project if funds under the program were not provided;

(3) The extent to which the costs of the project exceed the applicant's resources; and

(4) The difficulty of effectively carrying out the approved plan and the project for which assistance is sought, including consideration of how the design of the magnet school project—e.g., the type of program proposed, the location of the magnet school within the LEA—impacts on the applicant's ability to successfully carry out the approved plan.

(c) *New or revised magnet schools projects.* The Secretary determines the extent to which the applicant proposes to carry out new magnet schools projects or significantly revise existing magnet schools projects.

(d) *Selection of students.* The Secretary determines the extent to which the applicant proposes to select students to attend magnet schools by methods such as lottery, rather than through academic examination.

(Authority: 20 U.S.C. 7231e))

[57 FR 61510, Dec. 24, 1992, as amended at 60 FR 14866, Mar. 20, 1995; 63 FR 8020, Feb. 17, 1998; 69 FR 4997, Feb. 2, 2004]

§ 280.33 How does the Secretary select applications for new grants with funds appropriated in excess of $75 million?

(a) In selecting among applicants for funds appropriated for this program in excess of $75 million, the Secretary first identifies those remaining applicants that did not receive funds under this program in the last fiscal year of the previous funding cycle.

(b) The Secretary then awards ten additional points to each applicant

identified under paragraph (a) of this section.

(Authority: 20 U.S.C. 7231j)

[54 FR 19509, May 5, 1989, as amended at 69 FR 4997, Feb. 2, 2004]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 280.40 What costs are allowable?

An LEA or consortium of LEAs may use funds received under this part for the following activities:

(a) Planning and promotional activities directly related to the development, expansion, continuation, or enhancement of academic programs and services offered at magnet schools, though planning activities are subject to the restrictions in § 280.41(a) and do not include activities described under paragraph (f) of this section.

(b) The acquisition of books, materials, and equipment (including computers) and the maintenance and operation of materials, equipment and computers. Any books, materials or equipment purchased with grant funds must be:

(1) Necessary for the conduct of programs in magnet schools; and

(2) Directly related to improving student academic achievement based on the State's challenging academic content standards and student academic achievement standards or directly related to improving student reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, or music, or to improving vocational, technological, or professional skills.

(c) The payment or subsidization of the compensation of elementary and secondary school teachers:

(1) Who are highly qualified;

(2) Who are necessary to conduct programs in magnet schools; and

(3) Whose employment is directly related to improving student academic achievement based on the State's challenging academic content standards and student academic achievement standards or directly related to improving student reading skills or knowledge of mathematics, science, history, geography, English, foreign languages, art, or music, or to improving vocational, technological, or professional skills.

(d) The payment or subsidization of the compensation of instructional staff, where applicable, who satisfy the requirements of paragraphs (c)(2) and (3) of this section.

(e) With respect to a magnet school program offered to less than the entire school population, for instructional activities that—

(1) Are designed to make available the special curriculum of the magnet school program to students enrolled in the school, but not in the magnet school program; and

(2) Further the purposes of the program.

(f) Activities, which may include professional development, that will build the recipient's capacity to operate magnet school programs once the grant period has ended.

(g) Activities to enable the LEA or consortium of LEAs to have more flexibility in the administration of a magnet school program in order to serve students attending a school who are not enrolled in a magnet school program.

(h) Activities to enable the LEA or consortium of LEAs to have flexibility in designing magnet schools for students in all grades.

(Authority: 20 U.S.C. 7231f)

[51 FR 20414, June 4, 1986, as amended at 54 FR 19509, May 5, 1989; 60 FR 14866, Mar. 20, 1995; 69 FR 4997, Feb. 2, 2004]

§ 280.41 What are the limitations on allowable costs?

An LEA or consortium of LEAs that receives assistance under this part may not—

(a) Expend for planning more than 50 percent of the funds received for the first fiscal year, and 15 percent of the funds received for the second or the third fiscal year;

(b) Use funds for transportation; or

(c) Use funds for any activity that does not augment academic improvement.

(Authority: 20 U.S.C. 7231g, 7231h(b))

[60 FR 14866, Mar. 20, 1995, as amended at 69 FR 4997, Feb. 2, 2004]

PART 299—GENERAL PROVISIONS

Subpart A—Purpose and Applicability

Subpart B [Reserved]

Subpart C—Consolidation of State and Local Administrative Funds

Subpart D—Fiscal Requirements

Subpart E—Services to Private School Students and Teachers

Subpart F—Complaint Procedures

AUTHORITY: 20 U.S.C. 1221e–3, unless otherwise noted.

Section 299.1 also issued under 20 U.S.C. 1221e–3.

Section 299.2 also issued under 20 U.S.C. 1221e–3.

Section 299.4 also issued under 20 U.S.C. 7821 and 7823.

Section 299.5 also issued under 20 U.S.C. 7428(c), 7801(11), 7901.

Section 299.6 also issued under 20 U.S.C. 7881.

Section 299.7 also issued under 20 U.S.C. 7881.

Section 299.8 also issued under 20 U.S.C. 7881.

Section 299.9 also issued under 20 U.S.C. 7881.

Section 299.10 also issued under 20 U.S.C. 7881(a)(3)(B).

Section 299.11 also issued under 20 U.S.C. 1221e–3, 7844(a)(3)(C), 7883.

Section 299.12 also issued under 20 U.S.C. 1221e–3, 7844(a)(3)(C), 7883.

Section 299.13 also issued under 20 U.S.C. 1221e–3, 7844(a)(3)(C), 7883.

SOURCE: 62 FR 28252, May 22, 1997, unless otherwise noted.

Subpart A—Purpose and Applicability

§ 299.1 What are the purpose and scope of the regulations in this part?

(a) This part establishes uniform administrative rules for programs in titles I through VII of the Elementary and Secondary Education Act of 1965, as amended (ESEA). As indicated in particular sections of this part, certain provisions apply only to a specific group of programs.

(b) If an ESEA program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent applicable, title VIII of the ESEA, the General Education Provisions Act, the regulations in this part, EDGAR (34 CFR parts 75 through 99), and 2 CFR parts 180, as adopted at 2 CFR part 3485, and 200, as adopted at 2 CFR part 3474, that are not inconsistent with specific statutory provisions of the ESEA.

[84 FR 31678, July 2, 2019]

§ 299.2 What general administrative regulations apply to ESEA programs?

Title 2 of the CFR, part 200, as adopted at 2 CFR part 3474, applies to all ESEA programs except for title VII programs (Impact Aid) (in addition to any other specific implementing regulations).

NOTE 1 TO § 299.2: 34 CFR 222.19 indicates which EDGAR provisions apply to title VII programs (Impact Aid).

[84 FR 31678, July 2, 2019]

Subpart B [Reserved]

Subpart C—Consolidation of State and Local Administrative Funds

§ 299.4 What requirements apply to the consolidation of State and local administrative funds?

An SEA may adopt and use its own reasonable standards in determining whether—

(a) The majority of its resources for administrative purposes comes from non-Federal sources to permit the consolidation of State administrative funds in accordance with section 8201 of the ESEA; and

(b) To approve an LEA's consolidation of its administrative funds in accordance with section 8203 of the ESEA.

[84 FR 31678, July 2, 2019]

Subpart D—Fiscal Requirements

§ 299.5 What maintenance of effort requirements apply to ESEA programs?

(a) *General.* An LEA receiving funds under an applicable program listed in paragraph (b) of this section may receive its full allocation of funds only if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State and local funds with respect to the provision of free public education in the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part A of title I (Improving Basic Programs Operated by Local Educational Agencies).

(2) Part D of title I (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At Risk).

(3) Part A of title II (Supporting Effective Instruction).

(4) Part A, subpart 1 of title III (English Language Acquisition, Language Enhancement, and Academic Achievement), except for section 3112.

(5) Part A of title IV (Student Support and Academic Enrichment Grants).

(6) Part B of title IV (21st Century Community Learning Centers).

(7) Part B, subpart 2 of title V (Rural and Low-Income School Program).

(8) Part A, subpart 1 of title VI (Indian Education Formula Grants to Local Educational Agencies).

(c) *Meaning of ''preceding fiscal year''.* For purposes of determining if the requirement of paragraph (a) of this section is met, the ''preceding fiscal year'' means the Federal fiscal year, or the 12-month fiscal period most commonly used in a State for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available for obligation by the Department.

(1) *Example.* For fiscal year 2018 funds that are first made available on July 1, 2018, if a State is using the Federal fiscal year, the ''preceding fiscal year'' is Federal fiscal year 2017 (which began on October 1, 2016 and ended September 30, 2017) and the ''second preceding fiscal year'' is Federal fiscal year 2016 (which began on October 1, 2015). If a State is using a fiscal year that begins on July 1, 2018, the ''preceding fiscal year'' is the 12-month period ending on June 30, 2017, and the ''second preceding fiscal year'' is the period ending on June 30, 2016.

(2) [Reserved]

(d) *Expenditures.* (1) In determining an LEA's compliance with paragraph (a) of this section, the SEA shall consider only the LEA's expenditures from State and local funds for free public education. These include expenditures for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(2) The SEA may not consider the following expenditures in determining an LEA's compliance with the requirements in paragraph (a) of this section:

(i) Any expenditures for community services, capital outlay, debt service or supplemental expenses made as a result of a Presidentially declared disaster.

(ii) Any expenditures made from funds provided by the Federal Government.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31678, July 2, 2019]

Subpart E—Services to Private School Students and Teachers

§ 299.6 What are the responsibilities of a recipient of funds for providing services to children and teachers in private schools?

(a) *General.* An agency, consortium, or entity receiving funds under an applicable program listed in paragraph (b) of this section, after timely and meaningful consultation with appropriate private school officials (in accordance with the statute), shall provide special educational services or other benefits under this subpart on an equitable basis to eligible children who are enrolled in private elementary and secondary schools, and to their teachers and other educational personnel.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part C of title I (Migrant Education).

(2) Part A of title II (Supporting Effective Instruction).

(3) Part A of title III (English Acquisition, Language Enhancement, and Academic Achievement).

(4) Part A of title IV (Student Support and Academic Enrichment Grants).

(5) Part B of title IV (21st Century Community Learning Centers).

(6) Section 4631 (Project SERV).

(c) *Provisions not applicable.* Sections 75.650 and 76.650 through 76.662 of title 34 of the Code of Federal Regulations (participation of students enrolled in private schools) do not apply to programs listed in paragraph (b) of this section.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

§ 299.7 What are the factors for determining equitable participation of children and teachers in private schools?

(a) *Equal expenditures.* (1) Expenditures of funds made by an agency, consortium, or entity under a program listed in § 299.6 (b) for services for eligible private school children and their teachers and other educational personnel must be equal on a per-pupil basis to the amount of funds expended for participating public school children and their teachers and other educational personnel, taking into account the number and educational needs of those children and their teachers and other educational personnel.

(2) Before determining equal expenditures under paragraph (a)(1) of this section, an agency, consortium, or entity shall pay for the reasonable and necessary administrative costs of providing services to public and private school children and their teachers and other educational personnel from the agency's, consortium's, or entity's total allocation of funds under the applicable ESEA program.

(3) An agency, consortium, or entity must obligate funds allocated for educational services and other benefits for eligible private school children in the fiscal year for which the funds are received by the agency, consortium, or entity.

(4) An SEA must provide notice in a timely manner to appropriate private school officials in the State of the allocation of funds for educational services and other benefits that an agency, consortium, or entity has determined are available for eligible private school children and their teachers and other educational personnel.

(b) *Services on an equitable basis.* (1) The services that an agency, consortium, or entity provides to eligible private school children and their teachers and other educational personnel must also be equitable in comparison to the services and other benefits provided to public school children and their teachers or other educational personnel participating in a program under this subpart.

(2) Services are equitable if the agency's, consortium's, or entity's—

(i) Addresses and assesses the specific needs and educational progress of eligible private school children and their teachers and other educational personnel on a comparable basis to public school children and their teachers and other educational personnel;

(ii) Determines the number of students and their teachers and other educational personnel to be served on an equitable basis;

(iii) Meets the equal expenditure requirements under paragraph (a) of this section; and

(iv) Provides private school children and their teachers and other educational personnel with an opportunity to participate that is equitable to the opportunity and benefits provided to public school children and their teachers and other educational personnel.

(3) The agency, consortium, or entity shall make the final decisions with respect to the services to be provided to eligible private school children and their teachers and the other educational personnel.

(c) If the needs of private school children, their teachers and other educational personnel are different from the needs of children, teachers and other educational personnel in the public schools, the agency, consortium, or entity shall provide program benefits for the private school children, teachers, and other educational personnel that are different from the benefits it provides for the public school children and their teachers and other educational personnel.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

§ 299.8 What are the requirements to ensure that funds do not benefit a private school?

(a) An agency, consortium, or entity shall use funds under a program listed in § 299.6(b) to provide services that supplement, and in no case supplant, the level of services that would, in the absence of services provided under that program, be available to participating children and their teachers and other educational personnel in private schools.

(b) An agency, consortium, or entity shall use funds under a program listed in § 299.6(b) to meet the special educational needs of participating children who attend a private school and their teachers and other educational personnel, but may not use those funds for—

(1) The needs of the private school; or

(2) The general needs of children and their teachers and other educational personnel in the private school.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

§ 299.9 What are the requirements concerning property, equipment, and supplies for the benefit of private school children and teachers?

(a) A agency, consortium, or entity must keep title to, and exercise continuing administrative control of, all property, equipment, and supplies that the agency, consortium, or entity acquires with funds under a program listed in § 299.6(b) for the benefit of eligible private school children and their teachers and other educational personnel.

(b) The agency, consortium, or entity may place equipment and supplies in a private school for the period of time needed for the program.

(c) The agency, consortium, or entity shall ensure that the equipment and supplies placed in a private school—

(1) Are used only for proper purposes of the program; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The agency, consortium, or entity must remove equipment and supplies from a private school if—

(1) The equipment and supplies are no longer needed for the purposes of the program; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than the purposes of the program.

(e) No funds may be used for repairs, minor remodeling, or construction of private school facilities.

[62 FR 28252, May 22, 1997, as amended at 84 FR 31679, July 2, 2019]

Subpart F—Complaint Procedures

§ 299.10 Ombudsman.

To help ensure equity for eligible private school children, teachers, and other educational personnel, an SEA must direct the ombudsman designated under section 1117 of the ESEA and § 200.68 to monitor and enforce the requirements in §§ 299.5 through 299.9.

[84 FR 31679, July 2, 2019]

§ 299.11 What complaint procedures shall an SEA adopt?

(a) *General.* An SEA shall adopt written procedures, consistent with State law, for—

(1) Receiving and resolving any complaint from an organization or individual that the SEA or an agency or consortium of agencies is violating a Federal statute or regulation that applies to an applicable program listed in paragraph (b) of this section;

(2) Reviewing an appeal from a decision of an agency or consortium of agencies with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(b) *Applicable programs.* This subpart is applicable to the following programs:

(1) Part A of title I (Improving Basic Programs Operated by Local Educational Agencies).

(2) Part C of title I (Education of Migratory Children).

(3) Part D of title I (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At Risk).

(4) Part A of title II (Supporting Effective Instruction).

(5) Part A, subpart 1 of title III (English Language Acquisition, Language Enhancement, and Academic Achievement), except for section 3112.

(6) Part A of title IV (Student Support and Academic Enrichment Grants).

(7) Part B of title IV (21st Century Community Learning Centers).

(8) Part B, subpart 2 of title V (Rural and Low-Income School Program).

(9) Subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, Education for Homeless Children and Youth Program.

(Approved by the Office of Management and Budget under OMB control number 1810–0591)

[62 FR 28252, May 22, 1997. Redesignated and amended at 84 FR 31679, July 2, 2019]

§ 299.12 What items are included in the complaint procedures?

An SEA shall include the following in its complaint procedures:

(a)(1) Except as provided in paragraph (a)(2) of this section, a reasonable time limit after the SEA receives a complaint for resolving the complaint in writing, including a provision for carrying out an independent on-site investigation, if necessary.

(2) In matters involving violations of section 1117 or 8501 of the ESEA (participation of private school children), an SEA must resolve, in writing, a complaint within 45 days after receiving the complaint.

(b) An extension of the time limit under paragraph (a)(1) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c)(1) The right for the complainant to request the Secretary to review the final decision of the SEA, at the Secretary's discretion.

(2) In matters involving violations of section 1117 or 8501 of the ESEA (participation of private school children), the Secretary will follow the procedures in section 8503(b) of the ESEA.

(d) A requirement for LEAs to disseminate, free of charge, adequate information about the complaint procedures to parents of students, and appropriate private school officials or representatives.

(Approved by the Office of Management and Budget under OMB control number 1810–0591)

[62 FR 28252, May 22, 1997. Redesignated and amended at 84 FR 31679, July 2, 2019]

§ 299.13 How does an organization or individual file a complaint?

An organization or individual may file a written signed complaint with an SEA. The complaint must be in writing and signed by the complainant, and include—

(a) A statement that the SEA or an agency or consortium of agencies has violated a requirement of a Federal statute or regulation that applies to an applicable program; and

(b) The facts on which the statement is based and the specific requirement allegedly violated.

(Approved by the Office of Management and Budget under OMB control number 1810–0591))

[62 FR 28252, May 22, 1997. Redesignated and amended at 84 FR 31679, July 2, 2019]