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Regulations

**34 CFR Parts 74,  
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## FOREWORD

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The Code of Federal Regulations (CFR) is a codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal government. The code is divided into 50 titles that represent broad areas subject to federal regulation. Title 34 of the CFR, which pertains to the U.S. Department of Education and related Federal entities, is composed of several hundred parts printed in three volumes. Parts 74-99 of that title are collectively known as the Education Department General Administrative Regulations (EDGAR). These parts contain regulations for administering discretionary and formula grants awarded by the Department. For many years the Department has printed the parts that comprise EDGAR as a publication separate from the main body of material in Title 34 and distributed it to ED grantees for their convenience.

This year marks a major milestone in this process of issuing EDGAR.

For the first time, the Department is publishing EDGAR as an all-electronic version on CD, which presents several advantages---portability, ease of copying and broad redistribution within grantee entities, the availability of the electronic text for copying and citation in other documents, and the ability to search the text electronically for words and phrases. The listing of sections at the beginning of each part also indicates the sections that contain charts, which ED grantees have come to rely on for important information. In addition, each listing for a section at the beginning of any part is hyper-linked to that section in the main body of the part.

This new version of EDGAR contains updates made to the various parts since the previous version was issued by the Department. These updates include the changes made to Part 75 by final regulations published on December 7, 2007. [72 FR 69145] Nonetheless, the full text of that particular regulatory publication, which includes the preamble discussion, is included at Appendix A for the reader's benefit.

Shortly after this compilation was completed, the Department issued final regulations on December 9, 2008, which modified certain sections of Part 99. Since these regulatory updates were published by the *Federal Register* too late to be incorporated into the compilation, the complete *Federal Register* notice is included at Appendix B.

Please note that the content of these documents is taken from the e-CFR version of Title 34 of the Code of Federal Regulations (CFR), as published by the Office of the Federal Register at the Government Printing Office web site, GPO ACCESS. The e-CFR is not an official version of the CFR.

While the Department has made an effort to ensure the accuracy of the regulations contained in these electronic texts, this CD-ROM is intended for information and educational purposes only. The official version of these regulations are those published by the Office of the Federal Register (OFR). Individuals relying on this CD-ROM for legal research should verify their results against the official editions of the CFR, Federal Register, and List of CFR Sections Affected (LSA). Those publications are available for reading at Federal depository libraries or online at:

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They can also be ordered in printed volumes directly from the GPO-online at <http://bookstore.gpo.gov>, by phone at 866-512-1800, or by mail from:

Superintendent of Documents  
P.O. Box 37954  
Pittsburgh, PA 15250-7954.

The Department hopes that this new electronic version will make EDGAR a much more user-friendly publication. We welcome your comments on the CD or on any other aspect of EDGAR. Please send them to:

[rmscommunications@ed.gov](mailto:rmscommunications@ed.gov)

December 2008

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[www.gpoaccess.gov](http://www.gpoaccess.gov)

## 34 CFR PART 74—ADMINISTRATION OF GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

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**Authority:** 20 U.S.C. 1221e–3 and 3474; OMB Circular A–110, unless otherwise noted.

**Source:** 59 FR 34724, July 6, 1994, unless otherwise noted.

## Subpart A—General

### § 74.1 Purpose.

- (a) This part establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations.
- (b) The Secretary does not impose additional or inconsistent requirements, except as provided in §§74.4 and 74.14 or unless specifically required by Federal statute or executive order.
- (c) This part applies to all recipients other than State and local governments and Indian tribal organizations. Uniform requirements for State and local governments and tribal organizations are in 34 CFR Part 80—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.
- (d) Non-profit organizations that implement Federal programs for the States are also subject to State requirements.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### § 74.2 Definitions.

The following definitions apply to this part:

*Accrued expenditures* means the charges incurred by the recipient during a given period requiring the provision of funds for—

- (1) Goods and other tangible property received;
- (2) Services performed by employees, contractors, subrecipients, and other payees; and
- (3) Other amounts becoming owed under programs for which no current services or performance is required.

*Accrued income* means the sum of—

- (1) Earnings during a given period from—
  - (i) Services performed by the recipient; and
  - (ii) Goods and other tangible property delivered to purchasers; and
- (2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

*Acquisition cost of equipment* means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property

usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

*Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

*Award* means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property, in lieu of money, by the Federal Government to an eligible recipient. The term does not include—

- (1) Technical assistance, which provides services instead of money;
- (2) Other assistance in the form of loans, loan guarantees, interest subsidies, or insurance;
- (3) Direct payments of any kind to individuals; and
- (4) Contracts which are required to be entered into and administered under procurement laws and regulations.

*Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

*Closeout* means the process by which the Secretary determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Department of Education (ED).

*Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

*Cost sharing or matching* means that portion of project or program costs not borne by the Federal Government.

*Date of completion* means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

*Disallowed costs* means those charges to an award that the Secretary determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

*Equipment* means tangible nonexpendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. However, consistent with recipient policy, lower limits may be established.

*Excess property* means property under the control of ED that is no longer required for its needs or the discharge of its responsibilities.

*Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where the Secretary has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306) for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

*Federal awarding agency* means the Federal agency that provides an award to the recipient.

*Federal funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by ED regulations or ED implementing instructions.

*Federal share* of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

*Funding period* means the period of time when Federal funding is available for obligation by the recipient.

*Intangible property and debt instruments* means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock, and other instruments of property ownership, whether considered tangible or intangible.

*Obligations* means the amounts of orders placed, contracts and grants awarded, services received, and similar transactions during a given period that require payment by the recipient during the same or a future period.

*Outlays or expenditures* means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied, and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees, and other amounts becoming owed under programs for which no current services or performance are required.

*Personal property* means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

*Prior approval* means written approval by an authorized official evidencing prior consent.

*Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §74.24(e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in ED regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

*Project costs* means all allowable costs, as established in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

*Project period* means the period established in the award document during which Federal sponsorship begins and ends.

*Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

*Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

*Recipient* means an organization receiving financial assistance directly from ED to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies

of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Secretary. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

*Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions. “Research” is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. “Development” is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term “research” also includes activities involving the training of individuals in research techniques where these activities utilize the same facilities as other research and development activities and where these activities are not included in the instruction function.

*Small awards* means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently \$25,000).

*Subaward* means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of “award” as defined in this section.

*Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Secretary.

*Supplies* means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (“subject inventions”), as defined in 37 CFR Part 401—Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements.

*Suspension* means an action by the Secretary that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Secretary. Suspension of an award is a separate action from suspension under 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

*Termination* means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

*Third party in-kind contributions* means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

*Unliquidated obligations*, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Secretary that has not been

obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

*Unrecovered indirect cost* means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

*Working capital advance* means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.3 Effect on other issuances.**

For awards subject to this part, all administrative requirements of codified program regulations, program manuals, handbooks, and other nonregulatory materials which are inconsistent with the requirements of this part are superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in §74.4.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.4 Deviations.**

The Secretary, after consultation with the Office of Management and Budget (OMB), may grant exceptions for classes of grants or recipients subject to the requirements of this part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this part are permitted only in unusual circumstances. The Secretary may apply more restrictive requirements to a class of recipients when approved by OMB. The Secretary may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by the Secretary.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.5 Subawards.**

Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards if the subrecipients are institutions of higher education, hospitals, or other non-profit organizations. State and local government subrecipients are subject to the provisions of 34 CFR Part 80—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

## **Subpart B—Pre-Award Requirements**

### **§ 74.10 Purpose.**

Sections 74.11 through 74.17 prescribes forms and instructions and other pre-award matters to be used in applying for awards.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

#### **§ 74.11 Pre-award policies.**

(a) *Use of grants and cooperative agreements, and contracts.* In each instance, the Secretary decides on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements, and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, substantial involvement is expected between ED and the recipient when carrying out the activity contemplated in the agreement. Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public notice and priority setting.* The Secretary notifies the public of intended funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

#### **§ 74.12 Forms for applying for Federal assistance.**

(a) The Secretary complies with the applicable report clearance requirements of 5 CFR Part 1320—Controlling Paperwork Burdens on the Public—with regard to all forms used by ED in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by the Secretary.

(c) For Federal programs covered by E.O. 12372—Intergovernmental Review of Federal Programs (implemented by the Secretary in 34 CFR Part 79—Intergovernmental Review of Department of Education Programs and Activities)—the applicant shall complete the appropriate sections of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Secretary or the *Catalog of Federal Domestic Assistance* (available from the Superintendent of Documents, Government Printing Office). The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) If ED does not use the SF–424 form, the Secretary may indicate whether the application is subject to review by the State under E.O. 12372.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

**§ 74.13 Debarment and suspension.**

The Secretary and recipients shall comply with the nonprocurement debarment and suspension common rule (implemented by the Secretary in 34 CFR part 85). This common rule restricts subawards and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.14 Special award conditions.**

(a) The Secretary may impose special award conditions, if an applicant or recipient—

- (1) Has a history of poor performance;
- (2) Is not financially stable;
- (3) Has a management system that does not meet the standards prescribed in this part;
- (4) Has not conformed to the terms and conditions of a previous award; or
- (5) Is not otherwise responsible.

(b) If special award conditions are established under paragraph (a) of this section, the Secretary notifies the applicant or recipient of—

- (1) The nature of the additional requirements;
- (2) The reason why the additional requirements are being imposed;
- (3) The nature of the corrective action needed;
- (4) The time allowed for completing the corrective actions; and
- (5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions are promptly removed once the conditions that prompted them have been corrected.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.15 Metric system of measurement.**

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. The Secretary follows the provisions of E.O. 12770—Metric Usage in Federal Government Programs.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.16 Resource Conservation and Recovery Act.**

Under the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 codified at 42 U.S.C.

6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section 6002 of the RCRA. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, recipients that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.17 Certifications and representations.**

Unless prohibited by statute or codified regulation, the Secretary allows recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with ED. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

## **Subpart C—Post-Award Requirements**

### **Financial and Program Management**

#### **§ 74.20 Purpose of financial and program management.**

Sections 74.21 through 74.28 prescribe standards for financial management systems, methods for making payments and rules for—

- (a) Satisfying cost sharing and matching requirements;
- (b) Accounting for program income;
- (c) Approving budget revisions;
- (d) Making audits;
- (e) Determining allowability of cost; and
- (f) Establishing fund availability.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

#### **§ 74.21 Standards for financial management systems.**

- (a) Recipients shall relate financial data to performance data and develop unit cost information whenever practical.
- (b) Recipients' financial management systems shall provide for the following:
  - (1) Accurate, current, and complete disclosure of the financial results of each federally-sponsored project in accordance with the reporting requirements established in §74.52. If the Secretary requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual

basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to awards, authorizations, obligations, unobligated balances, assets, outlays, income, and interest.

(3) Effective control over and accountability for all funds, property, and other assets. Recipients shall adequately safeguard all assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101-453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR Part 205—Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs.

(6) Written procedures for determining the reasonableness, allocability, and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Secretary may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Secretary may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required under paragraphs (a) and (b) of this section, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR Part 223—Surety Companies Doing Business with the United States.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

## **§ 74.22 Payment.**

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b)(1) Recipients are paid in advance, provided they maintain or demonstrate the willingness to maintain—

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient; and

- (ii) Financial management systems that meet the standards for fund control and accountability as established in §74.21.
- (2) Cash advances to a recipient organization are limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project.
- (3) The timing and amount of cash advances are as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.
- (c) Whenever possible, advances are consolidated to cover anticipated cash needs for all awards made by the Secretary.
- (1) Advance payment mechanisms include, but are not limited to, Treasury check, and electronic funds transfer.
- (2) Advance payment mechanisms are subject to 31 CFR part 205.
- (3) Recipients are authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.
- (d) Requests for Treasury check advance payment shall be submitted on SF-270—Request for Advance or Reimbursement—or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by ED instructions for electronic funds transfer.
- (e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. The Secretary may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.
- (1) When the reimbursement method is used, the Secretary makes payment within 30 days after receipt of the billing, unless the billing is improper.
- (2) Recipients are authorized to submit request for reimbursement at least monthly when electronic funds transfers are not used.
- (f) If a recipient cannot meet the criteria for advance payments and the Secretary has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Secretary may provide cash on a working capital advance basis. Under this procedure, the Secretary advances cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Secretary reimburses the recipient for its actual cash disbursements. The working capital advance method of payment is not used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.
- (g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on these funds before requesting additional cash payments.
- (h) Unless otherwise required by statute, the Secretary does not withhold payments for proper charges made by recipients at any time during the project period unless—
- (1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or
- (2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A-129—Managing Federal Credit Programs. Under these conditions, the Secretary may, upon reasonable notice, inform the recipient that ED does not make payments for obligations

incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) The standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2) of this section, the Secretary does not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation, and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless—

(1) The recipient receives less than \$120,000 in Federal awards per year;

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on Federal cash balances; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, Rockville, MD 20852. Interest amounts up to \$250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Secretary, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this part, only the following forms are authorized for the recipients in requesting advances and reimbursements. The Secretary does not require more than an original and two copies of the following:

(1) SF-270—Request for Advance or Reimbursement. The Secretary adopts the SF-270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. The Secretary may, however, use this form for construction programs in lieu of the SF-271—Outlay Report and Request for Reimbursement for Construction Programs.

(2) SF-271—Outlay Report and Request for Reimbursement for Construction Programs. The Secretary adopts the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, the Secretary may substitute the SF-270 when the Secretary determines that it provides adequate information to meet Federal needs.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

### **§ 74.23 Cost sharing or matching.**

(a) All contributions, including cash and third party in-kind, are accepted as part of the recipient's cost sharing or matching when contributions meet the following criteria:

(1) Are verifiable from the recipient's records.

- (2) Are not included as contributions for any other federally-assisted project or program.
  - (3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.
  - (4) Are allowable under the applicable cost principles.
  - (5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.
  - (6) Are provided for in the approved budget when required by the Secretary.
  - (7) Conform to other provisions of this part, as applicable.
- (b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Secretary.
- (c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If the Secretary authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of—
- (1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or
  - (2) The current fair market value. However, if there is sufficient justification, the Secretary may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.
- (d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services must be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates must be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.
- (e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.
- (f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies, or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.
- (g) The method used for determining cost sharing or matching for donated equipment, buildings, and land for which title passes to the recipient may differ according to the purpose of the award.
- (1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.
  - (2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Secretary has approved the charges.
- (h) The value of donated property must be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:
- (1) The value of donated land and buildings may not exceed its fair market value at the time of

donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment may not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space may not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services must be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings, and land must be documented.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

#### **§ 74.24 Program income.**

(a) The Secretary applies the standards contained in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period must be retained by the recipient and, in accordance with ED regulations or the terms and conditions of the award, must be used in one or more of the following ways:

(1) Added to funds committed to the project by the Secretary and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When the Secretary authorizes the disposition of program income as described in paragraphs (b) (1) or (b)(2) of this section, program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3) of this section.

(d) In the event that the Secretary does not specify in program regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section applies automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section applies automatically unless the Secretary indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in §74.14.

(e) Unless ED regulations or the terms and conditions of the award provide otherwise, recipients have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by ED or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the

Property Standards (See §§74.30 through 74.37).

(h) Unless ED regulations or the terms and condition of the award provide otherwise, recipients have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

#### **§ 74.25 Revision of budget and program plans.**

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon ED requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from ED for one or more of the following program or budget related reasons:

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Secretary.

(6) The inclusion, unless waived by the Secretary, of costs that require prior approval in accordance with OMB Circular A–21—Cost Principles for Institutions of Higher Education, OMB Circular A–122—Cost Principles for Non-Profit Organizations, or 45 CFR part 74, appendix E—Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals, or 48 CFR part 31—Contract Cost Principles and Procedures, as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment, or general support services.

(d) No other prior approval requirements for specific items are imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, the Secretary may waive cost-related and administrative prior written approvals required by this part and OMB Circulars A–21 and A–122. These waivers may authorize recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Secretary. All pre-award costs are incurred at the recipient's risk (i.e., the Secretary is under no obligation to reimburse these costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover these costs).

(2)(i) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one

or more of the following conditions apply:

- (A) The terms and conditions of award prohibit the extension.
- (B) The extension requires additional Federal funds.
- (C) The extension involves any change in the approved objectives or scope of the project.
- (ii) For one-time extensions, the recipient shall notify the Secretary in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances.
- (3) Carry forward unobligated balances to subsequent funding periods.
- (4) For awards that support research, unless the Secretary provides otherwise in the award or in ED's regulations, the prior approval requirements described in paragraph (e) of this section are automatically waived (i.e., recipients need not obtain prior approvals) unless one of the conditions included in paragraph (e)(2)(i) of this section applies.
- (f) The Secretary may restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of the transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Secretary. The Secretary does not permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.
- (g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section, do not require prior approval.
- (h) For construction awards, recipients shall request prior written approval promptly from the Secretary for budget revisions whenever—
  - (1) The revision results from changes in the scope or the objective of the project or program;
  - (2) The need arises for additional Federal funds to complete the project; or
  - (3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in §74.27.
- (i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.
- (j) When the Secretary makes an award that provides support for both construction and nonconstruction work, the Secretary may require the recipient to request prior approval from the Secretary before making any fund or budget transfers between the two types of work supported.
- (k) For both construction and nonconstruction awards, recipients shall notify the Secretary in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5,000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.
- (l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Secretary indicates a letter of request suffices.
- (m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Secretary shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Secretary informs the recipient in writing of the date when the recipient may expect the decision.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)  
 [59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.26 Non-Federal audits.

- (a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, “Audits of States, Local Governments, and Non-Profit Organizations.”
- (b) State and local governments shall be subject to the audit requirements contained in the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, “Audits of States, Local Governments, and Non-Profit Organizations.”
- (c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A–133 shall be subject to the audit requirements of the Federal awarding agencies.
- (d) Commercial organizations are subject to the audit requirements established by the Secretary or the prime recipient as incorporated into the award document.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)  
 [59 FR 34724, July 6, 1994, as amended at 62 FR 45939, 45943, Aug. 29, 1997]

### § 74.27 Allowable costs.

- (a) For each kind of recipient, there is a set of cost principles for determining allowable costs. Allowability of costs are determined in accordance with the cost principles applicable to the entity incurring the costs, as specified in the following chart.

Note: OMB circulars are available from the Office of Management and Budget, Publication Office, Room 2200, New Executive Office Building, Washington, DC 20503 (202) 395–7332.)

For the cost of a—	Use the principles in—
Private nonprofit organization other than (1) An institution of higher education; (2) a hospital; or (3) an organization named in OMB Circular A–122 as not subject to that circular	OMB Circular A–122.
Educational institution	OMB Circular A–21.
Hospital	Appendix E to 45 CFR part 74.
Commercial for-profit organization other than a hospital and an educational institution	48 CFR part 31 Contract Cost Principles and Procedures or uniform cost accounting standards that comply with cost principles acceptable to ED.

(b) The cost principles applicable to a State, a local government, or Federally recognized Indian tribal government are specified at 34 CFR §80.22.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.28 Period of availability of funds.**

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Secretary.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

## **Property Standards**

### **§ 74.30 Purpose of property standards.**

Sections 74.31 through 74.37 establish uniform standards governing management and disposition of property furnished by ED whose cost was charged to a project supported by a Federal award. Recipients shall observe these standards under awards. The Secretary does not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of §§74.31 through 74.37.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.31 Insurance coverage.**

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.32 Real property.**

The Secretary prescribes requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, the minimum requirements provide the following:

(a) Title to real property must vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Secretary.

(b) The recipient shall obtain written approval by the Secretary for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for

the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) that have purposes consistent with those authorized for support by the Secretary.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from ED or its successor Federal awarding agency. The Secretary observes one or more of the following disposition instructions:

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Secretary and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures must be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party. The recipient is entitled to compensation for its attributable percentage of the current fair market value of the property.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.33 Federally-owned and exempt property.**

(a) *Federally-owned property.* (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to the Secretary. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Secretary for further ED utilization.

(2) If ED has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Secretary has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821—Improving Mathematics and Science Education in Support of the National Education Goals. Appropriate instructions shall be issued to the recipient by the Secretary.

(b) *Exempt property.* When statutory authority exists, the Secretary may vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Secretary considers appropriate. This property is “exempt property.” Should the Secretary not establish conditions, title to exempt property upon acquisition vests in the recipient without further obligation to the Federal Government.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.34 Equipment.**

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient may not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and may not encumber the property without approval of the Secretary. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

- (1) Activities sponsored by the Federal awarding agency which funded the original project; and then
- (2) Activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Secretary.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following:

(1) Equipment records shall be maintained accurately and shall include the following information:

- (i) A description of the equipment.
- (ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.
- (iii) Source of the equipment, including the award number.
- (iv) Whether title vests in the recipient or the Federal Government.
- (v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.
- (vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).
- (vii) Location and condition of the equipment and the date the information was reported.
- (viii) Unit acquisition cost.
- (ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates ED for its share.

(2) Equipment owned by the Federal Government must be identified to indicate Federal ownership.

(3) A physical inventory of equipment must be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records must be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully

documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Secretary.

(5) Adequate maintenance procedures must be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures must be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards:

(1) For equipment with a current per unit fair market value of \$5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to ED or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment.

(2) If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Secretary. The Secretary shall determine whether the equipment can be used to meet ED requirements. If no requirement exists within ED, the availability of the equipment shall be reported to the General Services Administration by the Secretary to determine whether a requirement for the equipment exists in other Federal agencies. The Secretary issues instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures govern:

(i) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse ED an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share \$500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(ii) If the recipient is instructed to ship the equipment elsewhere, the recipient is reimbursed by ED by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(iii) If the recipient is instructed to otherwise dispose of the equipment, the recipient is reimbursed by ED for costs incurred in its disposition.

(iv) The Secretary may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when the third party is otherwise eligible under existing statutes. This transfer shall be subject to the following standards:

(A) The equipment must be appropriately identified in the award or otherwise made known to the recipient in writing.

(B) The Secretary issues disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory must list all equipment acquired with grant funds and federally-owned equipment. If the Secretary does not issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(C) When the Secretary exercises the right to take title, the equipment is subject to the provisions for federally-owned equipment.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### § 74.35 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient may not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### § 74.36 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. ED and any other Federal awarding agency reserve a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR Part 401—Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.

(c) The Federal Government has the right to:

- (1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and
- (2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d)(1) In addition, in response to a Freedom of Information Act (FOIA) request for research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law, ED shall request, and the recipient shall provide, within a reasonable time, the research data so that they can be made available to the public through the procedures established under the FOIA. If ED obtains the research data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the research data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

(2) The following definitions apply for purposes of this paragraph (d):

(i) *Research data* is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This “recorded” material excludes physical objects (e.g., laboratory samples). *Research data* also do not include:

(A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and  
 (B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

(ii) *Published* is defined as either when:

(A) Research findings are published in a peer-reviewed scientific or technical journal; or  
 (B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(iii) *Used by the Federal Government in developing an agency action that has the force and effect of law* is defined as when an agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

(e) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Secretary. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of §74.34(g).

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 65 FR 14407, 14416, Mar. 16, 2000]

### **§ 74.37 Property trust relationship.**

Real property, equipment, intangible property, and debt instruments that are acquired or improved with Federal funds must be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Secretary may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

## **Procurement Standards**

### **§ 74.40 Purpose of procurement standards.**

Sections 74.41 through 74.48 contain standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property, and other services with Federal funds. These standards are designed to ensure that these materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. The Secretary does not impose additional procurement standards or requirements upon recipients, unless specifically required by Federal statute or executive order or as authorized in §74.4 or §74.14.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.41 Recipient responsibilities.**

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Secretary, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of statute are to be referred to Federal, State or local authority that may have proper jurisdiction.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.42 Codes of conduct.**

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. A conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of these standards by officers, employees, or agents of the recipient.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.43 Competition.**

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids or requests for proposals shall be excluded from competing for procurements. Awards must be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly establish all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.44 Procurement procedures.**

(a) All recipients shall establish written procurement procedures. These procedures must provide for, at a minimum, that—

- (1) Recipients avoid purchasing unnecessary items;
- (2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government; or
- (3) Solicitations for goods and services provide for all of the following:
  - (i) A clear and accurate description of the technical requirements for the material, product, or service to be procured. In competitive procurements, a description shall not contain features which unduly restrict competition.
  - (ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.
  - (iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.
  - (iv) The specific features of brand name or equal descriptions that bidders are required to meet when these items are included in the solicitation.
  - (v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.
  - (vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment, and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal:

- (1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.
- (2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.
- (3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.
- (4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.
- (5) Use the services and assistance, as appropriate, of organizations such as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but must be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting must not be used.

(d) Contracts are made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration is given to

matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by E.O. 12549 (implemented by the Secretary in 34 CFR Part 85) and E.O. 12689—Debarment and Suspension.

(e) Recipients shall, on request, make available for the Secretary, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply:

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently \$25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a “brand name” product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

(f)(1)(i) A faith-based organization is eligible to contract with recipients on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, recipients shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a recipient, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a recipient, and participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a recipient may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a recipient shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination

on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization contracts with a recipient.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995; 69 FR 31710, June 4, 2004]

#### **§ 74.45 Cost and price analysis.**

Some form of cost or price analysis must be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

#### **§ 74.46 Procurement records.**

Procurement records and files for purchases in excess of the small purchase threshold must include the following at a minimum—

- (a) Basis for contractor selection;
- (b) Justification for lack of competition when competitive bids or offers are not obtained;
- (c) Basis for award cost or price.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

#### **§ 74.47 Contract administration.**

A system for contract administration must be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract, and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions, and specifications of the contract.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

**§ 74.48 Contract provisions.**

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following provisions must also be applied to subcontracts:

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, contracts must describe conditions under which the contract may be terminated for default, as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements must provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, the Secretary may accept the bonding policy and requirements of the recipient, provided the Secretary has made a determination that the Federal Government's interest is adequately protected. If a determination has not been made, the minimum requirements are as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under a contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required, the bonds must be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223—Surety Companies Doing Business with the United States.

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients must include a provision to the effect that the recipient, ED, the Comptroller General of the United States, or any of their duly authorized representatives, must have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors must contain the procurement provisions of appendix A to this part, as applicable.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

**Reports and Records**

**§ 74.50 Purpose of reports and records.**

Sections 74.51 through 74.53 establish the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also establish record retention requirements.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.51 Monitoring and reporting program performance.**

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function, or activity supported by the award. Recipients shall monitor subawards to ensure subrecipients have met the audit requirements in §74.26.

(b) The Secretary prescribes the frequency with which the performance reports shall be submitted. Except as provided in §74.51(f), performance reports are not required more frequently than quarterly or, less frequently than annually. Annual reports are due 90 calendar days after the grant year; quarterly or semi-annual reports are due 30 days after the reporting period. The Secretary may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report is not required after completion of the project.

(d) When required, performance reports must generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, this quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis, and explanation of cost overruns or high unit costs.

(e) Recipients are not required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Secretary of developments that have a significant impact on the award-supported activities. Also, notification must be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification must include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) The Secretary may make site visits, as needed.

(h) The Secretary complies with the clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)  
 [59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

## § 74.52 Financial reporting.

(a) The following forms or other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) *SF–269 or SF–269A—Financial Status Report.* (i) Recipients are required to use the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs. The Secretary may not require the SF–269 or SF–269A when, the Secretary determines that SF–270—Request for Advance or Reimbursement, or SF–272—Report of Federal Cash Transactions—provides adequate information to meet the Department's needs, except that a final SF–269 or SF–269A is required at the completion of the project when the SF–270 is used only for advances.

(ii) The Secretary prescribes whether the report is on a cash or accrual basis. If the Secretary requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient is not required to convert its accounting system, but shall develop accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Secretary determines the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report is not required more frequently than quarterly or less frequently than annually. A final report is required at the completion of the agreement.

(iv) The Secretary requires recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Secretary upon request of the recipient.

(2) *SF–272—Report of Federal Cash Transactions.* (i) When funds are advanced to recipients the Secretary requires each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272a. The Secretary uses this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) The Secretary may require forecasts of Federal cash requirements in the “Remarks” section of the report.

(iii) When practical and deemed necessary, the Secretary may require recipients to report in the “Remarks” section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. The Secretary may require a monthly report from those recipients receiving advances totaling \$1 million or more per year.

(v) The Secretary may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed \$25,000 per recipient, provided that advances are monitored through other forms contained in this section;

(B) If, in the Secretary's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Secretary needs additional information or more frequent reports, the following shall be observed:

- (1) When additional information is needed to comply with legislative requirements, the Secretary shall issue instructions to require recipients to submit information under the "Remarks" section of the reports.
- (2) When the Secretary determines that a recipient's accounting system does not meet the standards in §74.21, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until the system is brought up to standard. The Secretary, in obtaining this information, complies with the report clearance requirements of 5 CFR part 1320.
- (3) The Secretary may shade out any line item on any report if not necessary.
- (4) The Secretary may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.
- (5) The Secretary may provide computer or electronic outputs to recipients when these outputs expedite or contribute to the accuracy of reporting.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### **§ 74.53 Retention and access requirements for records.**

- (a) This section establishes requirements for record retention and access to records for awards to recipients. The Secretary does not impose any other record retention or access requirements upon recipients.
- (b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Secretary. The only exceptions are the following:
  - (1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken.
  - (2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.
  - (3) When records are transferred to or maintained by the Secretary, the 3-year retention requirement is not applicable to the recipient.
  - (4) Indirect cost rate proposals, cost allocations plans, etc. as specified in §74.53(g).
- (c) Copies of original records may be substituted for the original records if authorized by the Secretary.
- (d) The Secretary requests transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, the Secretary may make arrangements for recipients to retain any records that are continuously needed for joint use.
- (e) The Secretary, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts, and copies of documents. This right also includes timely

and reasonable access to a recipient's personnel for the purpose of interview and discussion related to these documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, the Secretary does not place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Secretary can demonstrate that the records must be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to ED.

(g) The starting date for retention of the following types of documents (including supporting records) is specified in paragraphs (g)(1) and (2) of this section: indirect cost rate computations or proposals; cost allocation plans; and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) *If submitted for negotiation.* If the recipient submits to the Secretary or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of submission.

(2) *If not submitted for negotiation.* If the recipient is not required to submit to the Secretary or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995; 60 FR 46493, Sept. 6, 1995]

## Termination and Enforcement

### § 74.60 Purpose of termination and enforcement.

Sections 74.61 and 74.62 establish uniform suspension, termination, and enforcement procedures.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### § 74.61 Termination.

(a) Awards may be terminated in whole or in part only—

(1) By the Secretary, if a recipient materially fails to comply with the terms and conditions of an award;

(2) By the Secretary with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient, upon sending to the Secretary written notification containing the reasons for the termination, the effective date, and, in the case of partial termination, the portion to be terminated.

However, if the Secretary determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate

the grant in its entirety under either paragraph (a)(1) or (2) of this section.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in §74.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **§ 74.62 Enforcement.**

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Secretary may, in addition to imposing any of the special conditions outlined in §74.14, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Secretary.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the Secretary provides the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the Secretary expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if—

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude ED from initiating a debarment or suspension action against a recipient under 34 CFR part 85 (see §74.13).

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

## **Subpart D—After-the-Award Requirements**

### **§ 74.70 Purpose.**

Sections 74.71 through 74.73 contain closeout procedures and other procedures for subsequent

disallowances and adjustments.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

**§ 74.71 Closeout procedures.**

- (a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Secretary may approve extensions when requested by the recipient.
- (b) Unless the Secretary authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in ED implementing instructions.
- (c) The Secretary makes prompt payments to a recipient for allowable reimbursable costs under the award being closed out.
- (d) The recipient shall promptly refund any balances of unobligated cash that the Secretary has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.
- (e) When authorized by the terms and conditions of the award, the Secretary makes a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.
- (f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §§74.31 through 74.37.
- (g) In the event a final audit has not been performed prior to the closeout of an award, the Secretary shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

**§ 74.72 Subsequent adjustments and continuing responsibilities.**

- (a) The closeout of an award does not affect any of the following:
  - (1) The right of the Secretary to disallow costs and recover funds on the basis of a later audit or other review.
  - (2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.
  - (3) Audit requirements in §74.26.
  - (4) Property management requirements in §§74.31 through 74.37.
  - (5) Records retention as required in §74.53.
- (b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Secretary and the recipient, provided the responsibilities of the recipient referred to in §74.73(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)  
[59 FR 34724, July 6, 1994, as amended at 60 FR 6660, Feb. 3, 1995]

### **§ 74.73 Collection of amounts due.**

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Secretary may reduce the debt by—

- (1) Making an administrative offset against other requests for reimbursements;
- (2) Withholding advance payments otherwise due to the recipient; or
- (3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Secretary charges interest on an overdue debt in accordance with 4 CFR Chapter II—Federal Claims Collection Standards.

(Authority: 20 U.S.C. 1221e–3, 3474; OMB Circular A–110)

### **Appendix A to Part 74—Contract Provisions**

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity* —All contracts must contain a provision requiring compliance with E.O. 11246—Equal Employment Opportunity, as amended by E.O. 11375—Amending Executive Order 11246 Relating to Equal Employment Opportunity, and as supplemented by regulations at 41 CFR Part 60—Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.
2. *Copeland “Anti-Kickback” Act (18 U.S.C. 874 and 40 U.S.C. 276c)* —All contracts and subgrants in excess of \$2,000 for construction or repair awarded by recipients and subrecipients must include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR Part 3—Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.
3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)* —When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than \$2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR Part 5—Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition,

contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)* —Where applicable, all contracts awarded by recipients in excess of \$2,000 for construction contracts and in excess of \$2500 for other contracts that involve the employment of mechanics or laborers must include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR Part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1 1/2 times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement* —Contracts or agreements for the performance of experimental, developmental, or research work must provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR Part 401 —Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements, and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)*, as amended —Contracts and subgrants of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to ED and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)* —Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. The disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O. 12549 and E.O. 12689)* —No contract may be made to parties listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O. 12549 and E.O. 12689—Debarment and Suspension. This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549.

Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principal employees.

(Authority: 20 U.S.C. 1221e-3, 3474; OMB Circular A-110)

**NOTE TO READER:** The content of this document is taken from the e-CFR version of Title 34 of the Code of Federal Regulations (CFR), as published by the Office of the Federal Register at the Government Printing Office web site, GPO ACCESS. The e-CFR is not an official version of the CFR. While the Department has made an effort to ensure the accuracy of the regulations contained in this electronic text, this CD-ROM is intended for information and educational purposes only. The official version of these regulations are those published by the Office of the Federal Register (OFR). Individuals relying on this CD-ROM for legal research should verify their results against the official editions of the CFR, Federal Register, and List of CFR Sections Affected (LSA), all available online at:

[www.gpoaccess.gov](http://www.gpoaccess.gov)

## 34 CFR PART 75—DIRECT GRANT PROGRAMS

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**Authority:** 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

**Source:** 45 FR 22497, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

## Subpart A—General

### Regulations That Apply to Direct Grant Programs

#### § 75.1 Programs to which part 75 applies.

- (a) The regulations in part 75 apply to each direct grant program of the Department of Education.
- (b) If a direct grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term “direct grant program” includes any grant program of the Department other than a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States. With respect to Public Law 81–874 (the Impact Aid Program), the term “direct grant program” includes only the entitlement increase for children with disabilities under section 3(d)(2)(C) of Public Law 81–874 (20 U.S.C. 238(d)(2)(C) and disaster assistance under section 7 of that law (20 U.S.C. 241–1).

Note: See part 76 for the general regulations that apply to programs that allocate funds among eligible States. For a description of the two kinds of direct grant programs see §75.200. Paragraph (b) of that section describes discretionary grant programs. Paragraph (c) of that section describes formula grant programs. Also see §§75.201, 75.209, and 75.210 for the selection criteria for discretionary grant programs that do not have implementing regulations or whose implementing regulations do not include selection criteria.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 45 FR 28669, Apr. 29, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980, 50 FR 29330, July 18, 1985; 52 FR 27803, July 24, 1987; 57 FR 30336, July 8, 1992; 60 FR 63873, Dec. 12, 1995]

#### § 75.2 Exceptions in program regulations to part 75.

If a program has regulations that are not consistent with part 75, the implementing regulations for that

program identify the sections of part 75 that do not apply.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 75.4 Department contracts.**

(a) A Federal contract made by the Department is governed by—

(1) Chapters 1 and 34 of title 48 of the Code of Federal Regulations (Federal Acquisition Regulation and Education Department Acquisition Regulation).

(2) Any applicable program regulations; and

(3) The request for proposals for the procurement, if any, referenced in *Commerce Business Daily*.

(b) The regulations in part 75 do not apply to a contract of the Department unless regulations in part 75 or a program's regulations specifically provide otherwise.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30336, July 8, 1992]

### **Eligibility for a Grant**

#### **§ 75.50 How to find out whether you are eligible.**

Eligibility to apply for a grant under a program of the Department is governed by the authorizing statute and implementing regulations for that program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987]

#### **§ 75.51 How to prove nonprofit status.**

(a) Under some programs, an applicant must show that it is a nonprofit organization. (See the definition of *nonprofit* in 34 CFR 77.1.)

(b) An applicant may show that it is a nonprofit organization by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State attorney general certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b) (1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.52 Eligibility of faith-based organizations for a grant.**

- (a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible.
- (2) In the selection of grantees, the Department shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.
- (b) The provisions of §75.532 apply to a faith-based organization that receives a grant under a program of the Department.
- (c) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a grant from the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the grant must be voluntary.
- (d)(1) A faith-based organization that applies for or receives a grant under a program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.
- (2) A faith-based organization may, among other things—
- (i) Retain religious terms in its name;
  - (ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;
  - (iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;
  - (iv) Select its board members and otherwise govern itself on a religious basis; and
  - (v) Include religious references in its mission statement and other chartering or governing documents.
- (e) A private organization that receives a grant under a program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.
- (f) If a grantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement federally funded activities, the grantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the commingled funds.
- (g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[69 FR 31710, June 4, 2004]

### **Ineligibility of Certain Individuals To Receive Assistance**

**Source:** Sections 75.60 through 75.62 appear at 57 FR 30337, July 8, 1992, unless otherwise noted.

**§ 75.60 Individuals ineligible to receive assistance.**

(a) An individual is ineligible to receive a fellowship, scholarship, or discretionary grant funded by the Department if the individual—

(1) Is not current in repaying a debt or is in default, as that term is used in 34 CFR part 668, on a debt—

(i) Under a program listed in paragraph (b) of this section; or

(ii) To the Federal Government under a nonprocurement transaction; and

(2) Has not made satisfactory arrangements to repay the debt.

(b) An individual who is not current in repaying a debt, or is in default, as that term is used in 34 CFR part 668, on a debt under a fellowship, scholarship, discretionary grant, or loan program, as included in the following list, and who has not made satisfactory arrangements to repay the debt, is ineligible under paragraph (a) of this section:

(1) A grant awarded under the Pell Grant (20 U.S.C. 1070a, *et seq.* ), National Early Intervention Scholarship and Partnership (NEISP) Program (20 U.S.C. 1070a–21, *et seq.* ), Supplemental Educational Opportunity Grant (SEOG) (20 U.S.C. 1070b, *et seq.* ), or State Student Incentive Grant (SSIG) (20 U.S.C. 1070c, *et seq.* ) program, or a scholarship awarded under the Robert C. Byrd Honors Scholarship Program (20 U.S.C. 1070d–31, *et seq.* ), a fellowship awarded under the Jacob K. Javits Fellows Program (20 U.S.C. 1134h–1134k), or a fellowship awarded under the Patricia Roberts Harris Fellowship Program (20 U.S.C. 1134d–1134f).

(2) A fellowship awarded under the Christa McAuliffe Fellowship Program (20 U.S.C. 1113–1113e), the Bilingual Education Fellowship Program (20 U.S.C. 3221–3262), or the Rehabilitation Long-Term Training Program (29 U.S.C. 774(b)).

(3) A loan made under the Perkins Loan Program (20 U.S.C. 1087aa, *et seq.* ), the Income Contingent Direct Loan Demonstration Project (20 U.S.C. 1087a, *et seq.* ), the Stafford Loan Program, Supplemental Loans for Students (SLS), PLUS, or Consolidation Loan Program (20 U.S.C. 1071, *et seq.* ), or the Cuban Student Loan Program (22 U.S.C. 2601, *et seq.* ).

(4) A scholarship or repayment obligation incurred under the Paul Douglas Teacher Scholarship Program (20 U.S.C. 1111, *et seq.* ).

(5) A grant, or a loan, made under the Law Enforcement Education Program (42 U.S.C. 3775).

(6) A stipend awarded under the Indian Fellowship Program (29 U.S.C. 774(b)).

(7) A scholarship awarded under the Teacher Quality Enhancement Grants Program (20 U.S.C. 1021 *et seq.* ).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30337, July 8, 1992, as amended at 59 FR 24870, May 12, 1994; 65 FR 19609, Apr. 11, 2000]

**§ 75.61 Certification of eligibility; effect of ineligibility.**

(a) An individual who applies for a fellowship, scholarship, or discretionary grant from the Department shall provide with his or her application a certification under the penalty of perjury—

(1) That the individual is eligible under §75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 853a).

(b) The Secretary specifies the form of the certification required under paragraph (a) of this section.

(c) The Secretary does not award a fellowship, scholarship, or discretionary grant to an individual who—

(1) Fails to provide the certification required under paragraph (a) of this section; or

(2) Is ineligible, based on information available to the Secretary at the time the award is made.

(d) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.62 Requirements applicable to entities making certain awards.**

(a) An entity that provides a fellowship, scholarship, or discretionary grant to an individual under a grant from, or an agreement with, the Secretary shall require the individual who applies for such an award to provide with his or her application a certification under the penalty of perjury—

(1) That the individual is eligible under §75.60; and

(2) That the individual has not been debarred or suspended by a judge under section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 853a).

(b) An entity subject to this section may not award a fellowship, scholarship, or discretionary grant to an individual if—

(1) The individual fails to provide the certification required under paragraph (a) of this section; or

(2) The Secretary informs the entity that the individual is ineligible under §75.60.

(c) If a fellowship, scholarship, or discretionary grant is made to an individual who provided a false certification under paragraph (a) of this section, the individual is liable for recovery of the funds made available under the certification, for civil damages or penalties imposed for false representation, and for criminal prosecution under 18 U.S.C. 1001.

(d) The Secretary may require an entity subject to this section to provide a list of the individuals to whom fellowship, scholarship, or discretionary grant awards have been made or are proposed to be made by the entity.

(Authority: 20 U.S.C. 1221e–3 and 3474)

## **Subpart B [Reserved]**

## **Subpart C—How To Apply for a Grant**

### **The Application Notice**

#### **§ 75.100 Publication of an application notice; content of the notice.**

(a) Each fiscal year the Secretary publishes application notices in the Federal Register that explain what kind of assistance is available for new grants under the programs that the Secretary administers.

(b) The application notice for a program explains one or more of the following:

(1) How to apply for a new grant.

(2) If preapplications are used under the program, how to preapply for a new grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 51 FR 20824, June 9, 1986; 59 FR 30261, June 10, 1994]

### **§ 75.101 Information in the application notice that helps an applicant apply.**

(a) The Secretary may include such information as the following in an application notice:

(1) How an applicant can get an application package that contains:

(i) Information about the program; and

(ii) The application form that the applicant must use.

(2) The amount of funds available for grants, the estimated number of those grants, the estimated amounts of those grants and, if appropriate, the maximum award amounts of those grants.

(3) If the Secretary plans to approve multi-year projects, the project period that will be approved.

(4) Any priorities established by the Secretary for the program for that year and the method the Secretary will use to implement the priorities. (See §75.105 *Annual priorities* .)

(5) Where to find the regulations that apply to the program.

(6) The statutory authority for the program.

(7) The deadlines established under §75.102 (Deadline date for applications.) and 34 CFR 79.8 (How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?)

(b) If the Secretary either requires or permits preapplications under a program, an application notice for the program explains how an applicant can get the preapplication form.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980; 46 FR 3205, Jan. 14, 1981; 51 FR 20824, June 9, 1986; 51 FR 21164, June 11, 1986; 60 FR 63873, Dec. 12, 1995; 61 FR 8455, Mar. 4, 1996]

Cross reference: See 34 CFR 77.1—definitions of “budget period” and “project period.”

### **§ 75.102 Deadline date for applications.**

(a) The application notice for a program sets a deadline date for the transmittal of applications to the Department.

(b) If an applicant wants a new grant, the applicant must submit an application in accordance with the requirements in the application notice.

(c) [Reserved]

(d) If the Secretary allows an applicant to submit a paper application, the applicant must show one of the following as proof of mailing by the deadline date:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(e) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[45 FR 22497, Apr. 3, 1980, as amended at 51 FR 20824, June 9, 1986; 69 FR 41201, July 8, 2004]

### **§ 75.103 Deadline date for preapplications.**

- (a) If the Secretary invites or requires preapplications under a program, the application notice for the program sets a deadline date for preapplications.
- (b) An applicant shall submit its preapplication in accordance with the procedures for applications in §75.102(b) and (d).

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.104 Applicants must meet procedural rules.**

- (a) The Secretary may make a grant only to an eligible party that submits an application.
- (b) If a maximum award amount is established in a notice published in the Federal Register, the Secretary may reject without consideration or evaluation any application that proposes a project funding level that exceeds the stated maximum award amount.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[61 FR 8455, Mar. 4, 1996]

### **§ 75.105 Annual priorities.**

- (a) *What programs are covered by this section?* This section applies to any program for which the Secretary establishes priorities for selection of applications in a particular fiscal year.
- (b) *How does the Secretary establish annual priorities?* (1) The Secretary establishes final annual priorities by publishing the priorities in a notice in the Federal Register, usually in the application notice for that program.
  - (2) The Secretary publishes proposed annual priorities for public comment, unless:
    - (i) The final annual priorities will be implemented only by inviting applications that meet the priorities (Cross-reference: See 34 CFR 75.105(c)(1));
    - (ii) The final annual priorities are chosen from a list of priorities already established in the program's regulations;
    - (iii) Publishing proposed annual priorities would seriously interfere with an orderly, responsible grant award process or would otherwise be impracticable, unnecessary, or contrary to the public interest;
    - (iv) The program statute requires or authorizes the Secretary to establish specified priorities; or
    - (v) The annual priorities are chosen from allowable activities specified in the program statute.
- (c) *How does the Secretary implement an annual priority?* The Secretary may choose one or more of the following methods to implement an annual priority:
  - (1) *Invitations.* The Secretary may simply invite applications that meet a priority. If the Secretary chooses this method, an application that meets the priority receives no competitive or absolute preference over

applications that do not meet the priority.

(2) *Competitive preference.* The Secretary may give one of the following kinds of competitive preference to applications that meet a priority.

(i) The Secretary may award some or all bonus points to an application depending on the extent to which the application meets the priority. These points are in addition to any points the applicant earns under the selection criteria (see §75.200(b)). The notice states the maximum number of additional points that the Secretary may award to an application depending upon how well the application meets the priority.

(ii) The Secretary may select an application that meets a priority over an application of comparable merit that does not meet the priority.

(3) *Absolute preference.* The Secretary may give an absolute preference to applications that meet a priority. The Secretary establishes a separate competition for applications that meet the priority and reserves all or part of a program's funds solely for that competition. The Secretary may adjust the amount reserved for the priority after determining the number of high quality applications received.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[46 FR 3205, Jan. 14, 1981, as amended at 57 FR 30337, July 8, 1992; 60 FR 63873, Dec. 12, 1995]

## **Application Contents**

Cross reference: See §75.200 for a description of discretionary and formula grant programs.

### **§ 75.109 Changes to application; number of copies.**

(a) Each applicant that submits a paper application shall submit an original and two copies to the Department, including any information that the applicant supplies voluntarily.

(b) An applicant may make changes to its application on or before the deadline date for submitting applications under the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See §75.200 How applications for new grants are selected for funding.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 41201, July 8, 2004]

### **§ 75.112 Include a proposed project period and a timeline.**

(a) An application must propose a project period for the project.

(b) An application must include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each objective of the project.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

**§ 75.117 Information needed for a multi-year project.**

An applicant that proposes a multi-year project shall include in its application:

- (a) Information that shows why a multi-year project is needed;
- (b) A budget narrative accompanied by a budget form prescribed by the Secretary, that provides budget information for each budget period of the proposed project period.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

**§ 75.118 Requirements for a continuation award.**

- (a) A recipient that wants to receive a continuation award shall submit a performance report that provides the most current performance and financial expenditure information, as directed by the Secretary, that is sufficient to meet the reporting requirements of 34 CFR 74.51, 75.590, 75.720, and 80.40.
- (b) If a recipient fails to submit a performance report that meets the requirements of paragraph (a) of this section, the Secretary denies continued funding for the grant.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3(a)(1) and 3474)

Cross reference: See §75.117 Information needed for a multi-year project, and §§75.250 through 75.253 Approval of multi-year projects, §75.590 Evaluation by the recipient, §75.720 Financial and performance reports, §74.51 Monitoring and reporting program performance, and §80.40 Monitoring and reporting program performance.

[59 FR 30261, June 10, 1994, as amended at 64 FR 50391, Sept. 16, 1999]

**§ 75.119 Information needed if private school students participate.**

If a program requires the applicant to provide an opportunity for participation of students enrolled in private schools, the application must include the information required of subgrantees under 34 CFR 76.656.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

## Separate Applications—Alternative Programs

### § 75.125 Submit a separate application to each program.

An applicant shall submit a separate application to each program under which it wants a grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987; 60 FR 46493, Sept. 6, 1995]

### § 75.126 Application must list all programs to which it is submitted.

If an applicant is submitting an application for the same project under more than one Federal program, the applicant shall list these programs in its application. The Secretary uses this information to avoid duplicate grants for the same project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

## Group Applications

### § 75.127 Eligible parties may apply as a group.

- (a) Eligible parties may apply as a group for a grant.
- (b) Depending on the program under which a group of eligible parties seeks assistance, the term used to refer to the group may vary. The list that follows contains some of the terms used to identify a group of eligible parties:
  - (1) Combination of institutions of higher education.
  - (2) Consortium.
  - (3) Joint applicants.
  - (4) Cooperative arrangements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### § 75.128 Who acts as applicant; the group agreement.

- (a) If a group of eligible parties applies for a grant, the members of the group shall either:
  - (1) Designate one member of the group to apply for the grant; or
  - (2) Establish a separate, eligible legal entity to apply for the grant.
- (b) The members of the group shall enter into an agreement that:
  - (1) Details the activities that each member of the group plans to perform; and
  - (2) Binds each member of the group to every statement and assurance made by the applicant in the application.
- (c) The applicant shall submit the agreement with its application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.129 Legal responsibilities of each member of the group.**

(a) If the Secretary makes a grant to a group of eligible applicants, the applicant for the group is the grantee and is legally responsible for:

- (1) The use of all grant funds;
- (2) Ensuring that the project is carried out by the group in accordance with Federal requirements; and
- (3) Ensuring that indirect cost funds are determined as required under §75.564(e).

(b) Each member of the group is legally responsible to:

- (1) Carry out the activities it agrees to perform; and
- (2) Use the funds that it receives under the agreement in accordance with Federal requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 59581, Nov. 17, 1994]

**State Comment Procedures**

**§ 75.155 Review procedures if State may comment on applications: Purpose of §§75.156–75.158.**

If the authorizing statute for a program requires that a specific State agency be given an opportunity to comment on each application, the State and the applicant shall use the procedures in §§75.156–75.158 for that purpose.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities) for the regulations implementing the application review procedures that States may use under E.O. 12372.

[57 FR 30338, July 8, 1992]

**§ 75.156 When an applicant under §75.155 must submit its application to the State; proof of submission.**

(a) Each applicant under a program covered by §75.155 shall submit a copy of its application to the State on or before the deadline date for submitting its application to the Department.

(b) The applicant shall attach to its application a copy of its letter that requests the State to comment on the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.157 The State reviews each application.**

A State that receives an application under §75.156 may review and comment on the application.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 3474)

**§ 75.158 Deadlines for State comments.**

- (a) The Secretary may establish a deadline date for receipt of State comments on applications.
- (b) The State shall make its comments in a written statement signed by an appropriate State official.
- (c) The appropriate State official shall submit comments to the Secretary by the deadline date for State comments. The procedures in §75.102 (b) and (d) (how to meet a deadline) of this part apply to this submission.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.159 Effect of State comments or failure to comment.**

- (a) The Secretary considers those comments of the State that relate to:
  - (1) Any selection criterion that applies under the program; or
  - (2) Any other matter that affects the selection of projects for funding under the program.
- (b) If the State fails to comment on an application on or before the deadline date for the appropriate program, the State waives its right to comment.
- (c) If the applicant does not give the State an opportunity to comment, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Development of Curricula or Instructional Materials**

**§ 75.190 Consultation.**

Each applicant that intends to develop curricula or instructional materials under a grant is encouraged to assure that the curricula or materials will be developed in a manner conducive to dissemination, through continuing consultations with publishers, personnel of State and local educational agencies, teachers, administrators, community representatives, and other individuals experienced in dissemination.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.191 Consultation costs.**

An applicant may budget reasonable consultation fees or planning costs in connection with the development of curricula or instructional materials.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.192 Dissemination.**

If an applicant proposes to publish and disseminate curricula or instructional materials under a grant, the applicant shall include an assurance in its application that the curricula or materials will reach the populations for which the curricula or materials were developed.

(Authority: 20 U.S.C. 1221e–3 and 3474)

## Subpart D—How Grants Are Made

### Selection of New Projects

#### § 75.200 How applications for new grants and cooperative agreements are selected for funding; standards for use of cooperative agreements.

(a) *Direct grant programs.* The Department administers two kinds of direct grant programs. A direct grant program is either a discretionary grant or a formula grant program.

(b) *Discretionary grant programs.* (1) A discretionary grant program is one that permits the Secretary to use discretionary judgment in selecting applications for funding.

Cross reference: See §75.219 Exceptions to the procedures under §75.217.

(2) The Secretary uses selection criteria to evaluate the applications submitted for new grants under a discretionary grant program.

(3) To evaluate the applications for new grants under the program the Secretary may use:

(i) Selection criteria established under §75.209.

(ii) Selection criteria in program-specific regulations.

(iii) Selection criteria established under §75.210.

(iv) Any combination of criteria from paragraphs (b)(3)(i), (b)(3)(ii), and (b)(3)(iii) of this section.

(4) The Secretary may award a cooperative agreement instead of a grant if the Secretary determines that substantial involvement between the Department and the recipient is necessary to carry out a collaborative project.

(5) The Secretary uses the selection procedures in this subpart to select recipients of cooperative agreements.

(c) *Formula grant programs.* (1) A formula grant program is one that entitles certain applicants to receive grants if they meet the requirements of the program. Applicants do not compete with each other for the funds, and each grant is either for a set amount or for an amount determined under a formula.

(2) The Secretary applies the program statute and regulations to fund projects under a formula grant program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27803, July 24, 1987; 57 FR 30338, July 8, 1992; 60 FR 63873, Dec. 12, 1995; 62 FR 10401, Mar. 6, 1997]

#### § 75.201 How the selection criteria will be used.

(a) In the application package or a notice published in the Federal Register, the Secretary informs applicants of—

- (1) The selection criteria chosen; and
- (2) The factors selected for considering the selection criteria, if any.

(b) If points or weights are assigned to the selection criteria, the Secretary informs applicants in the application package or a notice published in the Federal Register of—

- (1) The total possible score for all of the criteria for a program; and
- (2) The assigned weight or the maximum possible score for each criterion or factor under that criterion.

(c) If no points or weights are assigned to the selection criteria and selected factors, the Secretary evaluates each criterion equally and, within each criterion, each factor equally.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 10401, Mar. 6, 1997]

## §§ 75.202-75.206 [Reserved]

### § 75.209 Selection criteria based on statutory provisions.

(a) The Secretary may evaluate applications by—

(1) Establishing selection criteria based on statutory provisions that apply to the authorized program, which may include, but are not limited to—

- (i) Specific statutory selection criteria;
- (ii) Allowable activities;
- (iii) Application content requirements; or
- (iv) Other pre-award and post-award conditions; and

(2) Assigning the maximum possible score for each of the criteria established under paragraph (a)(1) of this section.

(b) The Secretary evaluates an application by determining how well the project proposed by the applicant meets each statutory provision selected under paragraph (a)(1) of this section.

*Example:* If a program statute requires that each application address how the applicant will serve the needs of limited English proficient children, under § 75.209 the Secretary could establish a criterion and evaluate applications based on how well the applicant's proposed project meets that statutory provision. The Secretary might decide to award up to 10 points for this criterion. Applicants who have the best proposals to serve the needs of limited English proficient children would score highest under the criterion in this example.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[60 FR 63873, Dec. 12, 1995, as amended at 62 FR 10401, Mar. 6, 1997]

### § 75.210 General selection criteria.

In determining the selection criteria to be used in each grant competition, the Secretary may select one or more of the following criteria and may select from among the list of optional factors under each criterion. However, paragraphs (d)(2) and (e)(2) of this section are mandatory factors under their respective criteria:

(a) *Need for project.* (1) The Secretary considers the need for the proposed project.

(2) In determining the need for the proposed project, the Secretary considers one or more of the following factors:

- (i) The magnitude or severity of the problem to be addressed by the proposed project.
- (ii) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.
- (iii) The extent to which the proposed project will provide services or otherwise address the needs of students at risk of educational failure.
- (iv) The extent to which the proposed project will focus on serving or otherwise addressing the needs of disadvantaged individuals.
- (v) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.
- (vi) The extent to which the proposed project will prepare personnel for fields in which shortages have been demonstrated.

(b) *Significance.* (1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers one or more of the following factors:

- (i) The national significance of the proposed project.
- (ii) The significance of the problem or issue to be addressed by the proposed project.
- (iii) The potential contribution of the proposed project to increased knowledge or understanding of educational problems, issues, or effective strategies.
- (iv) The potential contribution of the proposed project to increased knowledge or understanding of rehabilitation problems, issues, or effective strategies.
- (v) The likelihood that the proposed project will result in system change or improvement.
- (vi) The potential contribution of the proposed project to the development and advancement of theory, knowledge, and practices in the field of study.
- (vii) The potential for generalizing from the findings or results of the proposed project.
- (viii) The extent to which the proposed project is likely to yield findings that may be utilized by other appropriate agencies and organizations.
- (ix) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.
- (x) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies.
- (xi) The likely utility of the products (such as information, materials, processes, or techniques) that will result from the proposed project, including the potential for their being used effectively in a variety of other settings.
- (xii) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies.
- (xiii) The potential replicability of the proposed project or strategies, including, as appropriate, the potential for implementation in a variety of settings.
- (xiv) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.
- (xv) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in employment, independent living services, or both, as appropriate.
- (xvi) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(c) *Quality of the project design.* (1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers one or more of

the following factors:

- (i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.
  - (ii) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.
  - (iii) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.
  - (iv) The extent to which the proposed activities constitute a coherent, sustained program of research and development in the field, including, as appropriate, a substantial addition to an ongoing line of inquiry.
  - (v) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.
  - (vi) The extent to which the proposed project is based upon a specific research design, and the quality and appropriateness of that design, including the scientific rigor of the studies involved.
  - (vii) The extent to which the proposed research design includes a thorough, high-quality review of the relevant literature, a high-quality plan for research activities, and the use of appropriate theoretical and methodological tools, including those of a variety of disciplines, if appropriate.
  - (viii) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives.
  - (ix) The quality of the proposed demonstration design and procedures for documenting project activities and results.
  - (x) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.
  - (xi) The extent to which the proposed development efforts include adequate quality controls and, as appropriate, repeated testing of products.
  - (xii) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.
  - (xiii) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.
  - (xiv) The extent to which the proposed project represents an exceptional approach for meeting statutory purposes and requirements.
  - (xv) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for the competition.
  - (xvi) The extent to which the proposed project will be coordinated with similar or related efforts, and with other appropriate community, State, and Federal resources.
  - (xvii) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population.
  - (xviii) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students.
  - (xix) The extent to which the proposed project encourages parental involvement.
  - (xx) The extent to which the proposed project encourages consumer involvement.
  - (xxi) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.
  - (xxii) The quality of the methodology to be employed in the proposed project.
  - (xxiii) The extent to which fellowship recipients or other project participants are to be selected on the basis of academic excellence.
- (d) *Quality of project services.* (1) The Secretary considers the quality of the services to be provided by the

proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(ii) The extent to which entities that are to be served by the proposed technical assistance project demonstrate support for the project.

(iii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(iv) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(v) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(vi) The extent to which the training or professional development services to be provided by the proposed project are likely to alleviate the personnel shortages that have been identified or are the focus of the proposed project.

(vii) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards.

(viii) The likelihood that the services to be provided by the proposed project will lead to improvements in the skills necessary to gain employment or build capacity for independent living.

(ix) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(x) The extent to which the technical assistance services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(xi) The extent to which the services to be provided by the proposed project are focused on those with greatest needs.

(xii) The quality of plans for providing an opportunity for participation in the proposed project of students enrolled in private schools.

(e) *Quality of project personnel.* (1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers one or more of the following factors:

(i) The qualifications, including relevant training and experience, of the project director or principal investigator.

(ii) The qualifications, including relevant training and experience, of key project personnel.

(iii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(f) *Adequacy of resources.* (1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers one or more of the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the

applicant organization or the lead applicant organization.

(ii) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(iii) The extent to which the budget is adequate to support the proposed project.

(iv) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(v) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits.

(vi) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to such support.

(vii) The potential for the incorporation of project purposes, activities, or benefits into the ongoing program of the agency or organization at the end of Federal funding.

(g) *Quality of the management plan.* (1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers one or more of the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(iv) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(v) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

(h) *Quality of the project evaluation.* (1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers one or more of the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation are appropriate to the context within which the project operates.

(iii) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

(iv) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(v) The extent to which the methods of evaluation will provide timely guidance for quality assurance.

(vi) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(vii) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 10401, Mar. 6, 1997]

**§ 75.211 Selection criteria for unsolicited applications.**

(a) If the Secretary considers an unsolicited application under 34 CFR 75.222(a)(2)(ii), the Secretary uses the selection criteria and factors, if any, used for the competition under which the application could have been funded.

(b) If the Secretary considers an unsolicited application under 34 CFR 75.222(a)(2)(iii), the Secretary selects from among the criteria in §75.210(b), and may select from among the specific factors listed under each criterion, the criteria that are most appropriate to evaluate the activities proposed in the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 10403, Mar. 6, 1997]

**Selection Procedures**

**§ 75.215 How the Department selects a new project: purpose of §§75.216–75.222.**

Sections 75.216–75.222 describe the process the Secretary uses to select applications for new grants. All of these sections apply to a discretionary grant program. However, only §75.216 applies also to a formula grant program.

Cross reference: See §75.200(b) Discretionary grant program, and (c) Formula grant program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.216 Applications not evaluated for funding.**

The Secretary does not evaluate an application if—

(a) The applicant is not eligible;

(b) The applicant does not comply with all of the procedural rules that govern the submission of the application;

(c) The application does not contain the information required under the program; or

(d) The proposed project cannot be funded under the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

**§ 75.217 How the Secretary selects applications for new grants.**

- (a) The Secretary selects applications for new grants on the basis of the authorizing statute, the selection criteria, and any priorities or other requirements that have been published in the Federal Register and apply to the selection of those applications.
- (b)(1) The Secretary may use experts to evaluate the applications submitted under a program.
- (2) These experts may include persons who are not employees of the Federal Government.
- (c) The Secretary prepares a rank order of the applications based solely on the evaluation of their quality according to the selection criteria.
- (d) The Secretary then determines the order in which applications will be selected for grants. The Secretary considers the following in making these determinations:
- (1) The information in each application.
- (2) The rank ordering of the applications.
- (3) Any other information—
- (i) Relevant to a criterion, priority, or other requirement that applies to the selection of applications for new grants;
- (ii) Concerning the applicant's performance and use of funds under a previous award under any Department program; and
- (iii) Concerning the applicant's failure under any Department program to submit a performance report or its submission of a performance report of unacceptable quality.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[52 FR 27804, July 24, 1987, as amended at 62 FR 4167, Jan. 29, 1997]

### **§ 75.218 Applications not evaluated or selected for funding.**

- (a) The Secretary informs an applicant if its application—
- (1) Is not evaluated; or
- (2) Is not selected for funding.
- (b) If an applicant requests an explanation of the reason its application was not evaluated or selected, the Secretary provides that explanation.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

### **§ 75.219 Exceptions to the procedures under §75.217.**

The Secretary may select an application for funding without following the procedures in §75.217 if:

- (a) The objectives of the project cannot be achieved unless the Secretary makes the grant before the date grants can be made under the procedures in §75.217;
- (b)(1) The application was evaluated under the preceding competition of the program;
- (2) The application rated high enough to deserve selection under §75.217; and
- (3) The application was not selected for funding because the application was mishandled by the Department; or
- (c) The Secretary receives an unsolicited application that meets the requirements of §75.222.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 60 FR 12096, Mar. 3, 1995]

**§ 75.220 Procedures the Department uses under §75.219(a).**

If the special circumstances of §75.219(a) appear to exist for an application, the Secretary uses the following procedures:

- (a) The Secretary assembles a board to review the application.
- (b) The board consists of:
  - (1) A program officer of the program under which the applicant wants a grant;
  - (2) An employee from the Office of the Chief Financial Officer (OCFO) with responsibility for grant policy; and
  - (3) A Department employee who is not a program officer of the program but who is qualified to evaluate the application.
- (c) The board reviews the application to decide if:
  - (1) The special circumstances under §75.219(a) are satisfied;
  - (2) The application rates high enough, based on the selection criteria, priorities, and other requirements that apply to the program, to deserve selection; and
  - (3) Selection of the application will not have an adverse impact on the budget of the program.
- (d) The board forwards the results of its review to the Secretary.
- (e) If each of the conditions in paragraph (c) of this section is satisfied, the Secretary may select the application for funding.
- (f) Even if the Secretary does not select the application for funding, the applicant may submit its application under the procedures in Subpart C of this part.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 64 FR 50391, Sept. 16, 1999]

**§ 75.221 Procedures the Department uses under §75.219(b).**

If the special circumstances of §75.219(b) appear to exist for an application, the Secretary may select the application for funding if:

- (a) The Secretary has documentary evidence that the special circumstances of §75.219(b) exist; and
- (b) The Secretary has a statement that explains the circumstances of the mishandling.

(Authority: 20 U.S.C. 1221e–3(a)(1) and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987. Redesignated at 60 FR 12096, Mar. 3, 1995]

**§ 75.222 Procedures the Department uses under §75.219(c).**

If the Secretary receives an unsolicited application, the Secretary may consider the application under the following procedures unless the Secretary has published a notice in the Federal Register stating that the

program that would fund the application would not consider unsolicited applications:

- (a)(1) The Secretary determines whether the application could be funded under a competition planned or conducted for the fiscal year under which funds would be used to fund the application.
- (2)(i) If the application could be funded under a competition described in paragraph (a)(1) of this section and the deadline for submission of applications has not passed, the Secretary refers the application to the appropriate competition for consideration under the procedures in §75.217.
- (ii)(A) If the application could have been funded under a competition described in paragraph (a)(1) of this section and the deadline for submission of applications has passed, the Secretary may consider the application only in exceptional circumstances, as determined by the Secretary.
- (B) If the Secretary considers an application under paragraph (a)(2)(ii) of this section, the Secretary considers the application under paragraphs (b) through (e) of this section.
- (iii) If the application could not be funded under a competition described in paragraph (a)(1) of this section, the Secretary considers the application under paragraphs (b) through (e) of this section.
- (b) If an application may be considered under paragraphs (a)(2)(ii) or (iii) of this section, the Secretary determines if—
  - (1) There is a substantial likelihood that the application is of exceptional quality and national significance for a program administered by ED;
  - (2) The application meets the requirements of all applicable statutes and codified regulations that apply to the program; and
  - (3) Selection of the project will not have an adverse impact on the funds available for other awards planned for the program.
- (c) If the Secretary determines that the criteria in paragraph (b) of this section have been met, the Secretary assembles a panel of experts that does not include any employees of the Department to review the application.
- (d) The experts—
  - (1) Evaluate the application based on the selection criteria; and
  - (2) Determine whether the application is of such exceptional quality and national significance that it should be funded as an unsolicited application.
- (e) If the experts highly rate the application and determine that the application is of such exceptional quality and national significance that it should be funded as an unsolicited application, the Secretary may fund the application.

Note to § 75.222: To assure prompt consideration, applicants submitting unsolicited applications should send the application, marked “Unsolicited Application” on the outside, to the Chief, Application Control Center, U.S. Department of Education, Washington, DC 20202–4725.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[60 FR 12096, Mar. 3, 1995]

### **§ 75.223 [Reserved]**

### **§ 75.224 What are the procedures for using a multiple tier review process to evaluate applications?**

- (a) The Secretary may use a multiple tier review process to evaluate applications.
- (b) The Secretary may refuse to review applications in any tier that do not meet a minimum cut-off score established for the prior tier.

- (c) The Secretary may establish the minimum cut-off score—
  - (1) In the application notice published in the Federal Register; or
  - (2) After reviewing the applications to determine the overall range in the quality of applications received.
- (d) The Secretary may, in any tier—
  - (1) Use more than one group of experts to gain different perspectives on an application; and
  - (2) Refuse to consider an application if the application is rejected under paragraph (b) of this section by any one of the groups used in the prior tier.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[66 FR 60138, Nov. 30, 2001]

### **§ 75.225 What procedures does the Secretary use if the Secretary decides to give special consideration to novice applications?**

- (a) As used in this section, “novice applicant” means—
  - (1) Any applicant for a grant from ED that—
    - (i) Has never received a grant or subgrant under the program from which it seeks funding;
    - (ii) Has never been a member of a group application, submitted in accordance with §§75.127–75.129, that received a grant under the program from which it seeks funding; and
    - (iii) Has not had an active discretionary grant from the Federal Government in the five years before the deadline date for applications under the program.
  - (2) In the case of a group application submitted in accordance with §§75.127–75.129, a group that includes only parties that meet the requirements of paragraph (a)(1) of this section.
- (b) For the purposes of paragraph (a)(1)(iii) of this section, a grant is active until the end of the grant's project or funding period, including any extensions of those periods that extend the grantee's authority to obligate funds.
- (c) If the Secretary determines that special consideration of novice applications is appropriate, the Secretary may either—
  - (1) Establish a separate competition for novice applicants; or
  - (2) Give competitive preference to novice applicants under the procedures in 34 CFR 75.105(c)(2).
- (d) Before making a grant to a novice applicant, the Secretary imposes special conditions, if necessary, to ensure the grant is managed effectively and project objectives are achieved.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[66 FR 60138, Nov. 30, 2001; 67 FR 4316, Jan. 29, 2002]

## **Procedures To Make a Grant**

### **§ 75.230 How the Department makes a grant; purpose of §§75.231–75.236.**

If the Secretary selects an application under §§75.217, 75.220, or 75.222, the Secretary follows the procedures in §§75.231–75.236 to set the amount and determine the conditions of a grant. Sections 75.235–75.236 also apply to grants under formula grant programs.

Cross reference: See §75.200 How applications for new grants are selected for funding.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.231 Additional information.**

After selecting an application for funding, the Secretary may require the applicant to submit additional information.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.232 The cost analysis; basis for grant amount.**

(a) Before the Secretary sets the amount of a new grant, the Secretary does a cost analysis of the project. The Secretary:

- (1) Verifies the cost data in the detailed budget for the project;
- (2) Evaluates specific elements of costs; and
- (3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations.

(b) The Secretary uses the cost analysis as a basis for determining the amount of the grant to the applicant. The cost analysis shows whether the applicant can achieve the objectives of the project with reasonable efficiency and economy under the budget in the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 59 FR 30261, June 10, 1994]

**§ 75.233 Setting the amount of the grant.**

(a) Subject to any applicable matching or cost-sharing requirements, the Secretary may fund up to 100 percent of the allowable costs in the applicant's budget.

(b) In deciding what percentage of the allowable costs to fund, the Secretary may consider any other financial resources available to the applicant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

**§ 75.234 The conditions of the grant.**

(a) The Secretary makes a grant to an applicant only after determining—

- (1) The approved costs; and
- (2) Any special conditions.

(b) In awarding a cooperative agreement, the Secretary includes conditions that state the explicit character and extent of anticipated collaboration between the Department and the recipient.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992]

**§ 75.235 The notification of grant award.**

- (a) To make a grant, the Secretary issues a notification of grant award and sends it to the grantee.
- (b) The notification of grant award sets the amount of the grant award and establishes other specific conditions, if any.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30338, July 8, 1992]

**§ 75.236 Effect of the grant.**

The grant obligates both the Federal Government and the grantee to the requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR part 74, Subpart L—Programmatic Changes and Budget Revisions.

**Approval of Multi-Year Projects**

**§ 75.250 Project period can be up to 60 months.**

The Secretary may approve a project period of up to 60 months.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987]

**§ 75.251 The budget period.**

- (a) The Secretary usually approves a budget period of not more than 12 months, even if the project has a multi-year project period.
- (b) If the Secretary approves a multi-year project period, the Secretary:
  - (1) Makes a grant to the project for the initial budget period; and
  - (2) Indicates his or her intention to make continuation awards to fund the remainder of the project period.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.253 Continuation of a multi-year project after the first budget period.**

(a) The Secretary may make a continuation award for a budget period after the first budget period of an approved multi-year project if:

- (1) The Congress has appropriated sufficient funds under the program;
- (2) The recipient has either—
  - (i) Made substantial progress toward meeting the objectives in its approved application; or
  - (ii) Obtained the Secretary's approval of changes in the project that—
    - (A) Do not increase the cost of the grant; and
    - (B) Enable the recipient to meet those objectives in succeeding budget periods;
- (3) The recipient has submitted all reports as required by §75.118, and
- (4) Continuation of the project is in the best interest of the Federal Government.

(b) Subject to the criteria in paragraph (a) of this section, in selecting applications for funding under a program the Secretary gives priority to continuation awards over new grants.

(c)(1) Notwithstanding any regulatory requirements in 34 CFR part 80, a grantee may expend funds that have not been obligated at the end of a budget period for obligations of the subsequent budget period if—

- (i) The obligation is for an allowable cost that falls within the scope and objectives of the project; and
- (ii) ED regulations other than 34 CFR part 80, statutes, or the conditions of the grant do not prohibit the obligation.

Note: See 34 CFR 74.25(e)(2).

(2) The Secretary may—

(i) Require the grantee to send a written statement describing how the funds made available under this section will be used; and

(ii) Determine the amount of new funds that the Department will make available for the subsequent budget period after considering the statement the grantee provides under paragraph (c)(2)(i) of this section or any other information available to the Secretary about the use of funds under the grant.

(3) In determining the amount of new funds to make available to a grantee under this section, the Secretary considers whether the unobligated funds made available are needed to complete activities that were planned for completion in the prior budget period.

(d)(1) If the Secretary decides, under this section, not to make a continuation award, the Secretary may authorize a no-cost extension of the last budget period of the grant in order to provide for the orderly closeout of the grant.

(2) If the Secretary makes a continuation award under this section—

- (i) The Secretary makes the award under §§75.231–75.236; and
- (ii) The new budget period begins on the day after the previous budget period ends.

(e) Unless prohibited by program regulations, a recipient that is in the final budget period of a project period may seek continued assistance for the project under the procedures for selecting new projects.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30338, July 8, 1992; 59 FR 30261, June 10, 1994; 62 FR 40424, July 28, 1997]

Cross references: 1. See Subpart C—How to Apply for a Grant.

2. See §75.117 Information needed for a multi-year project; and §75.118 Application for a continuation award.

**§ 75.254 [Reserved]**

## Miscellaneous

### § 75.260 Allotments and reallocations.

- (a) Under some of the programs covered by this part, the Secretary allots funds under a statutory or regulatory formula.
- (b) Any reallocation to other grantees will be made by the Secretary in accordance with the authorizing statute for that program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987]

### § 75.261 Extension of a project period.

- (a) *General rule.* A grantee may, notwithstanding any regulatory requirement in 34 CFR part 80, extend the project period of an award one time for a period up to twelve months without the prior approval of the Secretary, if—
- (1) The grantee meets the requirements for extension of 34 CFR 74.25(e)(2); and
  - (2) ED regulations other than the regulations in 34 CFR part 80, statutes or the conditions of an award do not prohibit the extension.
- (b) *Specific rule for certain programs of the National Institute on Disability and Rehabilitation Research.* Notwithstanding paragraph (a) of this section, grantees under the following programs of NIDRR must request prior approval to extend their grants under paragraph (c) of this section:
- (1) The Knowledge Dissemination and Utilization Centers and Disability and Technical Assistance Centers authorized under 29 U.S.C. 761a(b)(2), (4), (5), (6), and (11) and implemented at 34 CFR part 350, subpart B, §§350.17–350.19.
  - (2) The Rehabilitation Research and Training Centers program authorized under 29 U.S.C. 762(b) and implemented at 34 CFR part 350, subpart C.
  - (3) The Rehabilitation Engineering Research Centers authorized under 29 U.S.C. 762(b)(3) and implemented at 34 CFR part 350, subpart D.
  - (4) The Special Projects and Demonstrations for Spinal Cord Injuries authorized under 29 U.S.C. 762(b)(4) and implemented at 34 CFR part 359.
- (c) *Other regulations.* If ED regulations, other than the regulations in 34 CFR part 80, or the conditions of the award require the grantee to get prior approval to extend the project period, the Secretary may permit the grantee to extend the project period if—
- (1) The extension does not violate any statute or regulations;
  - (2) The extension does not involve the obligation of additional Federal funds;
  - (3) The extension is to carry out the activities in the approved application; and
  - (4)(i) The Secretary determines that, due to special or unusual circumstances applicable to a class of grantees, the project periods for the grantees should be extended; or
  - (ii)(A) The Secretary determines that special or unusual circumstances would delay completion of the project beyond the end of the project period;
  - (B) The grantee requests an extension of the project at least 45 calendar days before the end of the project period; and

(C) The grantee provides a written statement before the end of the project period giving the reasons why the extension is appropriate under paragraph (c)(4)(ii)(A) of this section and the period for which the project needs extension.

(d) *Waiver*. The Secretary may waive the requirement in paragraph (a)(4)(ii)(B) of this section if—

- (1) The grantee could not reasonably have known of the need for the extension on or before the start of the 45-day time period; or
- (2) The failure to give notice on or before the start of the 45-day time period was unavoidable.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30338, July 8, 1992, as amended at 62 FR 40424, July 28, 1997]

### **§ 75.262 Conversion of a grant or a cooperative agreement.**

(a)(1) The Secretary may convert a grant to a cooperative agreement or a cooperative agreement to a grant at the time a continuation award is made under §75.253.

(2) In deciding whether to convert a grant to a cooperative agreement or a cooperative agreement to a grant, the Secretary considers the factors included in §75.200(b) (4) and (5).

(b) The Secretary and a recipient may agree at any time to convert a grant to a cooperative agreement or a cooperative agreement to a grant, subject to the factors included in §75.200(b) (4) and (5).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30339, July 8, 1992]

### **§ 75.263 Pre-award costs; waiver of approval.**

A grantee may, notwithstanding any requirement in 34 CFR part 80, incur pre-award costs as specified in 34 CFR 74.25(e)(1) unless—

- (a) ED regulations other than 34 CFR part 80 or a statute prohibit these costs; or
- (b) The conditions of the award prohibit these costs.

(Authority: 20 U.S.C. 1221e–3 and 3474; OMB Circulars A–21, A–87, and A–122)

[62 FR 40425, July 28, 1997]

### **§ 75.264 Transfers among budget categories.**

A grantee may, notwithstanding any requirement in 34 CFR part 80, make transfers as specified in 34 CFR 74.25 unless—

- (a) ED regulations other than 34 CFR part 80 or a statute prohibit these transfers; or
- (b) The conditions of the grant prohibit these transfers.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[62 FR 40425, July 28, 1997]

## Subpart E—What Conditions Must Be Met by a Grantee?

### Nondiscrimination

#### § 75.500 Federal statutes and regulations on nondiscrimination.

(a) Each grantee shall comply with the following statutes and regulations:

Subject	Statute	Regulations
Discrimination on the basis of race, color or national origin	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d-4)	34 CFR part 100.
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683)	34 CFR part 106.
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)	34 CFR part 104.
Discrimination on the basis of age	The Age Discrimination Act (42 U.S.C. 6101 <i>et seq.</i> )	34 CFR part 110.

(b) A grantee that is a covered entity as defined in §108.3 of this title shall comply with the nondiscrimination requirements of the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 CFR part 108.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 71 FR 15002, Mar. 24, 2006]

### Project Staff

#### § 75.511 Waiver of requirement for a full-time project director.

(a) If regulations under a program require a full-time project director, the Secretary may waive that requirement under the following conditions:

- (1) The project will not be adversely affected by the waiver.
- (2)(i) The project director is needed to coordinate two or more related projects; or
- (ii) The project director must teach a minimum number of hours to retain faculty status.

(b) The waiver either permits the grantee:

- (1) To use a part-time project director; or
- (2) Not to use any project director.

(c)(1) An applicant or a grantee may request the waiver.

- (2) The request must be in writing and must demonstrate that a waiver is appropriate under this section.
- (3) The Secretary gives the waiver in writing. The waiver is effective on the date the Secretary signs the waiver.

(Authority: 20 U.S.C. 1221e-3 and 3474)

Cross reference: See 34 CFR 74.25, Revision of budget and program plans; and 34 CFR 80.30, Changes.

### **§ 75.515 Use of consultants.**

(a) Subject to Federal statutes and regulations, a grantee shall use its general policies and practices when it hires, uses, and pays a consultant as part of the project staff.

(b) The grantee may not use its grant to pay a consultant unless:

(1) There is a need in the project for the services of that consultant; and

(2) The grantee cannot meet that need by using an employee rather than a consultant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.516 Compensation of consultants—employees of institutions of higher education.**

If an institution of higher education receives a grant for research or for educational services, it may pay a consultant's fee to one of its employees only in unusual circumstances and only if:

(a) The work performed by the consultant is in addition to his or her regular departmental load; and

(b)(1) The consultation is across departmental lines; or

(2) The consultation involves a separate or remote operation.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.517 Changes in key staff members.**

A grantee shall comply with 34 CFR 74.25(c)(2) concerning replacement or lesser involvement of any key project staff, whether or not the grant is for research.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 64 FR 50391, Sept. 16, 1999]

### **§ 75.519 Dual compensation of staff.**

A grantee may not use its grant to pay a project staff member for time or work for which that staff member is compensated from some other source of funds.

(Authority: 20 U.S.C. 1221e–3 and 3474)

## **Conflict of Interest**

### **§ 75.524 Conflict of interest: Purpose of §75.525.**

(a) The conflict of interest regulations of the Department that apply to a grant are in §75.525.

(b) These conflict of interest regulations do not apply to a “government” as defined in 34 CFR 80.3.

(c) The regulations in §75.525 do not apply to a grantee's procurement contracts. The conflict of interest

regulations that cover those procurement contracts are in 34 CFR part 74.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980, as amended at 64 FR 50391, Sept. 16, 1999]

**§ 75.525 Conflict of interest: Participation in a project.**

(a) A grantee may not permit a person to participate in an administrative decision regarding a project if:

(1) The decision is likely to benefit that person or a member of his or her immediate family; and

(2) The person:

(i) Is a public official; or

(ii) Has a family or business relationship with the grantee.

(b) A grantee may not permit any person participating in the project to use his or her position for a purpose that is—or gives the appearance of being—motivated by a desire for a private financial gain for that person or for others.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Allowable Costs**

**§ 75.530 General cost principles.**

The general principles to be used in determining costs applicable to grants and cost-type contracts under grants are specified at 34 CFR 74.27 (for administration of grants to institutions of higher education, and other non-profit organizations) and 34 CFR 80.22 (for uniform administrative requirements for grants and cooperative agreements to State and local governments).

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR part 74, Subpart D—After-the-Award Requirements and 34 CFR part 80, Subpart C—Post-Award Requirements.

[64 FR 50391, Sept. 16, 1999]

**§ 75.531 Limit on total cost of a project.**

A grantee shall insure that the total cost to the Federal Government is not more than the amount stated in the notification of grant award.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.532 Use of funds for religion prohibited.**

(a) No grantee may use its grant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

- (2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.  
(b) [Reserved]

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004.]

### **§ 75.533 Acquisition of real property; construction.**

No grantee may use its grant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.534 Training grants—automatic increases for additional dependents.**

The Secretary may increase a grant to cover the cost of additional dependents not specified in the notice of award under §75.235 if—

- (a) Allowances for dependents are authorized by the program statute and are allowable under the grant; and  
(b) Appropriations are available to cover the cost.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992]

## **Indirect Cost Rates**

### **§ 75.560 General indirect cost rates; exceptions.**

(a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for—

- (1) Institutions of higher education, at 34 CFR 74.27;  
(2) Hospitals, at 34 CFR 74.27;  
(3) Other nonprofit organizations, at 34 CFR 74.27;  
(4) Commercial (for-profit) organizations, at 34 CFR 74.27; and  
(5) State and local governments and federally-recognized Indian tribal organizations, at 34 CFR 80.22.

(b) A grantee must have obtained a current indirect cost rate agreement from its cognizant agency, to charge indirect costs to a grant. To obtain an indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency within 90 days after the date the Department issues the Grant Award Notification (GAN).

(c) If a grantee does not have a federally recognized indirect cost rate agreement, the Secretary may permit the grantee to charge its grant for indirect costs at a temporary rate of 10 percent of budgeted direct salaries and wages.

(d)(1) If a grantee fails to submit an indirect cost rate proposal to its cognizant agency within the required 90 days, the grantee may not charge indirect costs to its grant from the end of the 90-day period until it obtains a federally recognized indirect cost rate agreement applicable to the grant.

(2) If the Secretary determines that exceptional circumstances warrant continuation of a temporary indirect cost rate, the Secretary may authorize the grantee to continue charging indirect costs to its grant at the temporary rate specified in paragraph (c) of this section even though the grantee has not submitted its indirect cost rate proposal within the 90-day period.

(3) Once a grantee obtains a federally recognized indirect cost rate that is applicable to the affected grant, the grantee may use that indirect cost rate to claim indirect cost reimbursement for expenditures made on or after the date the grantee submitted its indirect cost proposal to its cognizant agency or the start of the project period, whichever is later. However, this authority is subject to the following limitations:

(i) The total amount of funds recovered by the grantee under the federally recognized indirect cost rate is reduced by the amount of indirect costs previously recovered under the temporary indirect cost rate.

(ii) The grantee must obtain prior approval from the Secretary to shift direct costs to indirect costs in order to recover indirect costs at a higher negotiated indirect cost rate.

(iii) The grantee may not request additional funds to recover indirect costs that it cannot recover by shifting direct costs to indirect costs.

(d) The Secretary accepts an indirect cost rate negotiated by a grantee's cognizant agency, but may establish a restricted indirect cost rate for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992; 59 FR 59582, Nov. 17, 1994; 72 FR 69147, Dec. 7, 2007]

### **§ 75.561 Approval of indirect cost rates.**

(a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate for a grantee other than a local educational agency. For the purposes of this section, the term local educational agency does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so. These rates may be for periods longer than a year if rates are sufficiently stable to justify a longer period.

(c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59583, Nov. 17, 1994]

### **§ 75.562 Indirect cost rates for educational training projects.**

(a) Educational training grants provide funding for training or other educational services. Examples of the work supported by training grants are summer institutes, training programs for selected participants, the introduction of new or expanded courses, and similar instructional undertakings that are separately

budgeted and accounted for by the sponsoring institution. These grants do not usually support activities involving research, development, and dissemination of new educational materials and methods. Training grants largely implement previously developed materials and methods and require no significant adaptation of techniques or instructional services to fit different circumstances.

(b) The Secretary uses the definition in paragraph (a) to determine which grants are educational training grants.

(c)(1) Indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less.

Note to paragraph (c)(1): If the grantee did not have a federally recognized indirect cost rate agreement on the date the training grant was awarded, indirect cost recovery is also limited to the amount authorized under §75.560(d)(3).

(2) For the purposes of this section, a modified total direct cost base consists of total direct costs minus the following:

(i) The amount of each sub-award in excess of \$25,000.

(ii) Stipends.

(iii) Tuition and related fees.

(iv) Equipment, as defined in 34 CFR 74.2 and 80.3, as applicable.

NOTE TO paragraph (c)(2)(iv): If the grantee has established a threshold for equipment that is lower than \$5,000 for other purposes, it must use that threshold to exclude equipment under the modified total direct cost base for the purposes of this section.

(3) The eight percent indirect cost reimbursement limit specified in paragraph (c)(1) of this section also applies to sub-awards that fund training, as determined by the Secretary under paragraph (b) of this section.

(4) The eight percent limit does not apply to agencies of State or local governments, including federally recognized Indian tribal governments, as defined in 34 CFR 80.3.

(5) Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(d) A grantee using the training rate of eight percent is required to have documentation available for audit that shows that its negotiated indirect cost rate is at least eight percent.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59582, Nov. 17, 1994, as amended at 72 FR 69147, Dec. 7, 2007]

### **§ 75.563 Restricted indirect cost rate—programs covered.**

If a grantee decides to charge indirect costs to a program that has a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, the grantee shall use a restricted indirect cost rate computed under 34 CFR 76.564 through 76.569.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59583, Nov. 17, 1994]

### **§ 75.564 Reimbursement of indirect costs.**

- (a) Reimbursement of indirect costs is subject to the availability of funds and statutory or administrative restrictions.
- (b) The application of the rates and the determination of the direct cost base by a grantee must be in accordance with the indirect cost rate agreement approved by the grantee's cognizant agency.
- (c) Indirect cost reimbursement is not allowable under grants for—
- (1) Fellowships and similar awards if Federal financing is exclusively in the form of fixed amounts such as scholarships, stipend allowances, or the tuition and fees of an institution;
  - (2) Construction grants;
  - (3) Grants to individuals;
  - (4) Grants to organizations located outside the territorial limits of the United States;
  - (5) Grants to Federal organizations; and
  - (6) Grants made exclusively to support conferences.
- (d) Indirect cost reimbursement on grants received under programs with statutory restrictions or other limitations on indirect costs must be made in accordance with the restrictions in 34 CFR 76.564 through 76.569.
- (e)(1) Indirect costs for a group of eligible parties (See §§75.127 through 75.129) are limited to the amount derived by applying the rate of the applicant, or a restricted rate when applicable, to the direct cost base for the grant in keeping with the terms of the applicant's federally recognized indirect cost rate agreement.
- (2) If a group of eligible parties applies for a training grant under the group application procedures in §§75.127 through 75.129, the grant funds allocated among the members of the group are not considered sub-awards for the purposes of applying the indirect cost rate in §75.562(c).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[59 FR 59583, Nov. 17, 1994, as amended at 72 FR 69148, Dec. 7, 2007]

### **§ 75.580 Coordination with other activities.**

A grantee shall, to the extent possible, coordinate its project with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(Authority: 20 U.S.C. 1221e–3, 2890, and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992]

## **Evaluation**

### **§ 75.590 Evaluation by the recipient.**

A recipient shall submit a performance report, or, for the last year of a project, a final report, that evaluates at least annually—

- (a) The recipient's progress in achieving the objectives in its approved application;
- (b) The effectiveness of the project in meeting the purposes of the program; and
- (c) The effect of the project on participants being served by the project.

(Approved by the Office of Management and Budget under control number 1875–0102)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30339, July 8, 1992; 59 FR 30262, June 10, 1994; 60 FR 6660, Feb. 3, 1995]

**§ 75.591 Federal evaluation—cooperation by a grantee.**

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 86297, Dec. 30, 1980]

**§ 75.592 Federal evaluation—satisfying requirement for grantee evaluation.**

If a grantee cooperates in a Federal evaluation of a program, the Secretary may determine that the grantee meets the evaluation requirements of the program, including §75.590.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Construction**

Cross reference: See 34 CFR part 74, Subpart P—Procurement Standards.

**§ 75.600 Use of a grant for construction: Purpose of §§75.601–75.615.**

Sections 75.601–75.615 apply to:

- (a) An applicant that requests funds for construction; and
- (b) A grantee whose grant includes funds for construction.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.601 Applicant's assessment of environmental impact.**

An applicant shall include with its application its assessment of the impact of the proposed construction on the quality of the environment in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 and Executive Order 11514 (34 FR 4247).

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.602 Preservation of historic sites must be described in the application.**

- (a) An applicant shall describe in its application the relationship of the proposed construction to and probable effect on any district, site, building, structure, or object that is:

- (1) Included in the National Register of Historic Places; or
- (2) Eligible under criteria established by the Secretary of Interior for inclusion in the National Register of Historic Places.

Cross reference: See 36 CFR part 60 for these criteria.

- (b) In deciding whether to make a grant, the Secretary considers:
- (1) The information provided by the applicant under paragraph (a) of this section; and
  - (2) Any comments by the Advisory Council on Historic Preservation.

Cross reference: See 36 CFR part 800, which provides for comments from the Council.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.603 Grantee's title to site.**

A grantee must have or obtain a full title or other interest in the site, including right of access, that is sufficient to insure the grantee's undisturbed use and possession of the facilities for 50 years or the useful life of the facilities, whichever is longer.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.604 Availability of cost-sharing funds.**

A grantee shall ensure that sufficient funds are available to meet any non-Federal share of the cost of constructing the facility.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.605 Beginning the construction.**

- (a) A grantee shall begin work on construction within a reasonable time after the grant for the construction is made.
- (b) Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.606 Completing the construction.**

- (a) A grantee shall complete its construction within a reasonable time.
- (b) The grantee shall complete the construction in accordance with the application and approved drawings and specifications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.607 General considerations in designing facilities and carrying out construction.**

(a) A grantee shall insure that the construction is:

- (1) Functional;
- (2) Economical; and
- (3) Not elaborate in design or extravagant in the use of materials, compared with facilities of a similar type constructed in the State or other applicable geographic area.

(b) The grantee shall, in developing plans for the facilities, consider excellence of architecture and design and inclusion of works of art. The grantee may not spend more than one percent of the cost of the project on inclusion of works of art.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.608 Areas in the facilities for cultural activities.**

A grantee may make reasonable provision, consistent with the other uses to be made of the facilities, for areas in the facilities that are adaptable for artistic and other cultural activities.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30339, July 8, 1992]

**§ 75.609 Comply with safety and health standards.**

In planning for and designing facilities, a grantee shall observe:

- (a) The standards under the Occupational Safety and Health Act of 1970 (Pub. L. 91–576) (See 36 CFR part 1910); and
- (b) State and local codes, to the extent that they are more stringent.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.610 Access by the handicapped.**

A grantee shall comply with the Federal regulations on access by the handicapped that apply to construction and alteration of facilities. These regulations are:

- (a) For residential facilities—24 CFR part 40; and
- (b) For non-residential facilities—41 CFR subpart 101–19.6.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.611 Avoidance of flood hazards.**

In planning the construction, a grantee shall, in accordance with the provisions of Executive Order 11988 of February 10, 1978 (43 FR 6030) and rules and regulations that may be issued by the Secretary to carry out those provisions:

- (a) Evaluate flood hazards in connection with the construction; and

(b) As far as practicable, avoid uneconomic, hazardous, or unnecessary use of flood plains in connection with the construction.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.612 Supervision and inspection by the grantee.**

A grantee shall maintain competent architectural engineering supervision and inspection at the construction site to insure that the work conforms to the approved drawings and specifications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.613 Relocation assistance by the grantee.**

A grantee is subject to the regulations on relocation assistance and real property acquisition in 34 CFR part 15.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.614 Grantee must have operational funds.**

A grantee shall insure that, when construction is completed, sufficient funds will be available for effective operation and maintenance of the facilities.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.615 Operation and maintenance by the grantee.**

A grantee shall operate and maintain the facilities in accordance with applicable Federal, State, and local requirements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.616 Energy conservation.**

(a) To the extent feasible, a grantee shall design and construct facilities to maximize the efficient use of energy.

(b) The following standards of the American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) are incorporated by reference in this section:

- (1) ASHRAE–90 A–1980 (Sections 1–9).
- (2) ASHRAE–90 B–1975 (Sections 10–11).
- (3) ASHRAE–90 C–1977 (Section 12).

Incorporation by reference of these provisions has been approved by the Director of the Office of the Federal Register pursuant to the Director's authority under 5 U.S.C. 552 (a) and 1 CFR part 51. The incorporated document is on file at the Department of Education, Grants and Contracts Service, rm. 3636 ROB–3, 400 Maryland Avenue, SW., Washington, DC 20202–4700 or at the National Archives and

Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: [http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html). These standards may be obtained from the publication sales department at the American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc., 1791 Tullie Circle, NE., Atlanta, Georgia 30329.

(c) A grantee shall comply with ASHRAE standards listed in paragraph (b) of this section in designing and constructing facilities built with project funds.

(Authority: 20 U.S.C. 1221e–3 and 3474, 42 U.S.C. 8373(b), and E.O. 12185)

[57 FR 30339, July 8, 1992, as amended at 69 FR 18803, Apr. 9, 2004]

### **§ 75.617 Compliance with the Coastal Barrier Resources Act.**

A recipient may not use, within the Coastal Barrier Resources System, funds made available under a program administered by the Secretary for any purpose prohibited by 31 U.S.C. chapter 55 (sections 3501–3510).

(Authority: 20 U.S.C. 1221e–3 and 3474, 31 U.S.C. 3504, 3505)

[57 FR 30339, July 8, 1992]

### **Equipment and Supplies**

Cross reference: See 34 CFR 74.32 Real property; 34 CFR 74.35 Supplies and other expendable property; 34 CFR 74.36 Intangible property; 34 CFR 74.2 Definitions; 34 CFR 80.31 Real property; 34 CFR 80.32 Equipment; 34 CFR 80.33 Supplies; and 34 CFR 80.34 Copyrights.

### **§ 75.618 Charges for use of equipment or supplies.**

A grantee may not charge students or school personnel for the ordinary use of equipment or supplies purchased with grant funds.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **Publications and Copyrights**

#### **§ 75.620 General conditions on publication.**

(a) *Content of materials.* Subject to any specific requirements that apply to its grant, a grantee may decide the format and content of project materials that it publishes or arranges to have published.

(b) *Required statement.* The grantee shall ensure that any publication that contains project materials also contains the following statements:

The contents of this (insert type of publication; e.g., book, report, film) were developed under a grant from the Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980]

### **§ 75.621 Copyright policy for grantees.**

A grantee may copyright project materials in accordance with 34 CFR part 74 or 80, as appropriate.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR 74.22 Payment; 34 CFR 74.24 Program income; and 34 CFR 74.36 Intangible property; 34 CFR 80.25 Program income; and 34 CFR 80.34 Copyrights.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 19118, May 26, 1988; 57 FR 30339, July 8, 1992]

### **§ 75.622 Definition of “project materials.”**

As used in §§75.620–75.621, “project materials” means a copyrightable work developed with funds from a grant of the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30339, July 8, 1992]

## **Inventions and Patents**

Cross reference: See 34 CFR 74.25, Program income and 34 CFR 80.25, Program income.

### **§ 75.626 Show Federal support; give papers to vest title.**

Any patent application filed by a grantee for an invention made under a grant must include the following statement in the first paragraph:

The invention described in this application was made under a grant from the Department of Education.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86297, Dec. 30, 1980; 57 FR 30339, July 8, 1992]

## **Other Requirements for Certain Projects**

Cross reference: See 34 CFR 74.21, Standards for financial management systems; 34 CFR 74.48, Contract provisions; 34 CFR 80.20, Standards for financial management and 34 CFR 80.36, Procurement.

**§ 75.650 Participation of students enrolled in private schools.**

If the authorizing statute for a program requires a grantee to provide for participation by students enrolled in private schools, the grantee shall provide a genuine opportunity for equitable participation in accordance with the requirements that apply to subgrantees under 34 CFR 76.650–76.662.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.681 Protection of human research subjects.**

If a grantee uses a human subject in a research project, the grantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR part 97—Protection of Human Subjects.

**§ 75.682 Treatment of animals.**

If a grantee uses an animal in a project, the grantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.683 Health or safety standards for facilities.**

A grantee shall comply with any Federal health or safety requirements that apply to the facilities that the grantee uses for the project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Subpart F—What Are the Administrative Responsibilities of a Grantee?**

**General Administrative Responsibilities**

**§ 75.700 Compliance with statutes, regulations, and applications.**

A grantee shall comply with applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, and applications.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.701 The grantee administers or supervises the project.**

A grantee shall directly administer or supervise the administration of the project.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.702 Fiscal control and fund accounting procedures.**

A grantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR part 74, Subpart C—Post-Award Requirements and Subpart D—After-the-Award Requirements and 34 CFR part 80, Subpart C—Post-Award Requirements and Subpart D—After-the-Grant Requirements.

**§ 75.703 Obligation of funds during the grant period.**

A grantee may use grant funds only for obligations it makes during the grant period.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 75.707 When obligations are made.**

The following table shows when a grantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property	On the date the grantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the grantee	When the services are performed.
(c) Personal services by a contractor who is not an employee of the grantee	On the date on which the grantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the grantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the grantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the grantee uses the property.
(h) A preagreement cost that was properly approved by the Secretary under the cost principles identified in 34 CFR 74.171 or 80.22	

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30340, July 8, 1992]

**§ 75.708 Prohibition of subgrants.**

(a) A grantee may not make a subgrant under a program covered by this part unless specifically authorized by statute.

(b) A grantee may contract for supplies, equipment, construction, and other services, in accordance with 34 CFR part 74, Subpart C—Post-Award Requirements (Procurement Standards §§74.40–74.48) and 34 CFR part 80, Subpart C—Post-Award Requirements (§80.36 Procurement).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804, July 24, 1987; 64 FR 50392, Sept. 16, 1999]

**Reports**

Cross reference: See 34 CFR 74.51, Monitoring and reporting program performance; 34 CFR 74.52, Financial reporting; 34 CFR 80.40, Monitoring and reporting program performance; and 34 CFR 80.41 Financial reporting.

**§ 75.720 Financial and performance reports.**

(a) This section applies to the reports required under—

(1) 34 CFR 74.51 (Monitoring and reporting program performance) and 34 CFR 74.52 (Financial reporting); and

(2) 34 CFR 80.40 (Monitoring and reporting program performance) and 34 CFR 80.41 (Financial reporting).

(b) A grantee shall submit these reports annually, unless the Secretary allows less frequent reporting. However, the Secretary may require a grantee of a grant made under 34 CFR part 700, 706, 707, or 708 (certain programs of the Office of Educational Research and Improvement) to submit performance reports more often than annually.

(c) The Secretary may require a grantee to report more frequently than annually under 34 CFR 74.14 (Special award conditions), 34 CFR 74.21 (Standards for financial management systems), 34 CFR 80.12 (Special grant or subgrant conditions for “high-risk” grantees) or 34 CFR 80.20 (Standards for financial management systems).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30340, July 8, 1992, as amended at 64 FR 50392, Sept. 16, 1999]

**§ 75.721 [Reserved]****Records**

Cross reference: See 34 CFR 74.53, Retention and access requirements for records and 34 CFR 80.42, Retention and access requirements for records.

**§ 75.730 Records related to grant funds.**

A grantee shall keep records that fully show:

- (a) The amount of funds under the grant;
- (b) How the grantee uses the funds;
- (c) The total cost of the project;
- (d) The share of that cost provided from other sources; and
- (e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

### **§ 75.731 Records related to compliance.**

A grantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.732 Records related to performance.**

- (a) A grantee shall keep records of significant project experiences and results.
- (b) The grantee shall use the records under paragraph (a) to:
  - (1) Determine progress in accomplishing project objectives; and
  - (2) Revise those objectives, if necessary.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See 34 CFR 74.25, Revision of budget and program plans.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

### **§ 75.733 [Reserved]**

## **Privacy**

### **§ 75.740 Protection of and access to student records; student rights in research, experimental programs, and testing.**

- (a) Most records on present or past students are subject to the requirements of section 444 of GEPA and its implementing regulations in 34 CFR part 99. (Section 444 is the Family Educational Rights and Privacy

Act of 1974.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 445 of GEPA and its implementing regulations at 34 CFR part 98.

(Authority: 20 U.S.C. 1221e–3, 1232g, 1232h, and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30340, July 8, 1992; 60 FR 46493, Sept. 6, 1995]

## **Subpart G—What Procedures Does the Department Use To Get Compliance?**

Cross reference: See 34 CFR part 74, Subpart M—Grant and Subgrant Closeout, Suspension, and Termination.

### **§ 75.900 Waiver of regulations prohibited.**

- (a) No official, agent, or employee of ED may waive any regulation that applies to a Department program, unless the regulation specifically provides that it may be waived.
- (b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 75.901 Suspension and termination.**

- (a) [Reserved]
- (b) The Secretary may use the Education Appeal Board to resolve disputes that are not subject to other procedures.

Cross reference: See the following sections in part 74:

- (1) Section 74.113 (Violation of terms).
- (2) Section 74.114 (Suspension).
- (3) Section 74.115 (Termination).
- (4) The last sentence of §74.73(c) (Financial reporting after a termination).
- (5) Section 74.112 (Amounts payable to the Federal Government).

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 86297, Dec. 30, 1980]

### **§ 75.902 [Reserved]**

### **§ 75.903 Effective date of termination.**

Termination is effective on the latest of:

- (a) The date of delivery to the grantee of the notice of termination;

- (b) The termination date given in the notice of termination; or
- (c) The date of a final decision of the Secretary under part 78 of this title.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

**§ 75.910 Cooperation with audits.**

A grantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee for the purpose of obtaining relevant information.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[54 FR 21775, May 19, 1989]

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[www.gpoaccess.gov](http://www.gpoaccess.gov)

## 34 CFR PART 76—STATE-ADMINISTERED PROGRAMS

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**Authority:** 20 U.S.C. 1221e–3 and 3474, unless otherwise noted.

**Source:** 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

## Subpart A—General

### Regulations That Apply to State-Administered Programs

#### § 76.1 Programs to which part 76 applies.

- (a) The regulations in part 76 apply to each State-administered program of the Department.
- (b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term *State formula grant program* means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 84059, Dec. 22, 1980; 50 FR 29330, July 18, 1985; 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

#### § 76.2 Exceptions in program regulations to part 76.

If a program has regulations that are not consistent with part 76, the implementing regulations for that program identify the sections of part 76 that do not apply.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 54 FR 21776, May 19, 1989]

### Eligibility for a Grant or Subgrant

#### § 76.50 Statutes determine eligibility and whether subgrants are made.

- (a) Under a program covered by this part, the Secretary makes a grant:
- (1) To the State agency designated by the authorizing statute for the program; or
  - (2) To the State agency designated by the State in accordance with the authorizing statute.
- (b) The authorizing statute determines the extent to which a State may:
- (1) Use grant funds directly; and
  - (2) Make subgrants to eligible applicants.
- (c) The regulations in part 76 on subgrants apply to a program only if subgrants are authorized under that program.
- (d) The authorizing statute determines the eligibility of an applicant for a subgrant.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27804,

July 24, 1987; 54 FR 21776, May 19, 1989]

**§ 76.51 A State distributes funds by formula or competition.**

If a program statute authorizes a State to make subgrants, the statute:

- (a) Requires the State to use a formula to distribute funds;
- (b) Gives the State discretion to select subgrantees through a competition among the applicants or through some other procedure; or
- (c) Allows some combination of these procedures.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 54 FR 21776, May 19, 1989]

**§ 76.52 Eligibility of faith-based organizations for a subgrant.**

(a)(1) A faith-based organization is eligible to apply for and to receive a subgrant under a program of the Department on the same basis as any other private organization, with respect to programs for which such other organizations are eligible.

(2) In the selection of subgrantees, States shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(b) The provisions of §76.532 apply to a faith-based organization that receives a subgrant from a State under a State-administered program of the Department.

(c) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a subgrant from a State under a State-administered program of the Department, and participation in any such inherently religious activities by beneficiaries of the programs supported by the subgrant must be voluntary.

(d)(1) A faith-based organization that applies for or receives a subgrant from a State under a State-administered program of the Department may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(2) A faith-based organization may, among other things—

(i) Retain religious terms in its name;

(ii) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(iii) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(iv) Select its board members and otherwise govern itself on a religious basis; and

(v) Include religious references in its mission statement and other chartering or governing documents.

(e) A private organization that receives a subgrant from a State under a State-administered program of the Department shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(f) If a State or subgrantee contributes its own funds in excess of those funds required by a matching or grant agreement to supplement Federally funded activities, the State or subgrantee has the option to segregate those additional funds or commingle them with the funds required by the matching requirements or grant agreement. However, if the additional funds are commingled, this section applies to all of the

commingled funds.

(g) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from the Department.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004]

## Subpart B—How a State Applies for a Grant

### State Plans and Applications

#### § 76.100 Effect of this subpart.

This subpart establishes general requirements that a State must meet to apply for a grant under a program covered by this part. Additional requirements are in the authorizing statute and the implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[52 FR 27804, July 24, 1987]

#### § 76.101 The general State application.

A State that makes subgrants to local educational agencies under a program subject to this part shall have on file with the Secretary a general application that meets the requirements of section 441 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1221e–3, 1232d, and 3474)

[52 FR 27804, July 24, 1987, as amended at 60 FR 46493, Sept. 6, 1995]

#### § 76.102 Definition of “State plan” for part 76.

As used in this part, *State plan* means any of the following documents:

Document	Program	Authorizing statute	Principal Office
State plan	Assistance to States for Education of Handicapped Children	Part B (except section 619), Individuals with Disabilities Education Act (20 U.S.C. 1411–1420)	OSERS
Application	Preschool Grants	Section 619, Individuals with Disabilities Education Act (20 U.S.C. 1419)	OSERS

Application	Handicapped Infants and Toddlers	Part H, Individuals with Disabilities Education Act (20 U.S.C. 1471–1485)	OSERS
Application or written request for assistance	Client Assistance Program	Section 112, Rehabilitation Act of 1973 (29 U.S.C. 732)	OSERS
Application	Removal of Architectural Barriers to the Handicapped Program	Section 607, Individuals with Disabilities Education Act (20 U.S.C. 1406)	OSERS
State plan	State Vocational Rehabilitation Services Program	Title I, Parts A-C, Rehabilitation Act of 1973 (29 U.S.C. 720–741)	OSERS
State plan supplement	State Supported Employment Services Program	Title VI, Part C, Rehabilitation Act of 1973 (29 U.S.C. 795j–795r)	OSERS
State plan	State Independent Living Services Program	Title VII, Part A, Rehabilitation Act of 1973 (29 U.S.C. 796–796d)	OSERS
State plan	State Vocational Education Program	Title I, Part B, Carl D. Perkins Vocational Education Act (20 U.S.C. 2321–2325)	OVAE
State plan and application	State-Administered Adult Education Program	Section 341, Adult Education Act (20 U.S.C. 1206)	OVAE
State plan	Even Start Family Literacy Program	Title I, Chapter 1, Part B of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2741–2749)	OESE
State application	State Grants for Strengthening Instruction in Mathematics and Science	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993)	OESE
State application	Federal, State and Local Partnership for Educational Improvement	Title I, Chapter 2, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952 and 2971–2976)	OESE
State plan or application	Migrant Education Program	Sections 1201, 1202, Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2781 and 2782)	OESE
Application	State Student Incentive Grant Program	Section 415C, Higher Education Act of 1965 (20 U.S.C. 1070c–2)	OPE
Application	Paul Douglas Teacher Scholarship Program	Section 553, Higher Education Act of 1965 (20 U.S.C. 1111b)	OPE

Basic State plan, long-range program, and annual program	The Library Services and Construction Act State-Administered Program	Library Services and Construction Act (20 U.S.C. 351–355e–3)	OERI
Application	Emergency Immigrant Education Program	Emergency Immigrant Education Act (20 U.S.C. 3121–3130)	OBEMLA
Application	Transition Program for Refugee Children	Section 412(d) Immigration and Naturalization Act (8 U.S.C. 1522 (d))	OBEMLA
Any document that the authorizing statute for a State-administered program requires a State to submit to receive funds	Any State-administered program without implementing regulations	Section 408(a)(1), General Education Provisions Act and Section 414, Department of Education Organization Act (20 U.S.C. 1221e–3(a)(1) and 3474)	Dept-wide

(Authority: 20 U.S.C. 1221e–3 and 3474)

[57 FR 30340, July 8, 1992]

### § 76.103 Multi-year State plans.

- (a) Beginning with fiscal year 1996, each State plan will be effective for a period of more than one fiscal year, to be determined by the Secretary or by regulations.
- (b) If the Secretary determines that the multi-year State plans under a program should be submitted by the States on a staggered schedule, the Secretary may require groups of States to submit or resubmit their plans in different years.
- (c) This section does not apply to:
- (1) The annual accountability report under part A of title I of the Vocational Education Act;
  - (2) The annual programs under the Library Services and Construction Act;
  - (3) The application under sections 141–143 of the Elementary and Secondary Education Act; and
  - (4) The State application under section 209 of title II of the Education for Economic Security Act.
- (d) A State may submit an annual State plan under the Vocational Education Act. If a State submits an annual plan under that program, this section does not apply to that plan.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA “shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.” Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: 20 U.S.C. 1231g(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985; 60 FR 46493, Sept. 6, 1995]

**§ 76.104 A State shall include certain certifications in its State plan.**

(a) A State shall include the following certifications in each State plan:

- (1) That the plan is submitted by the State agency that is eligible to submit the plan.
  - (2) That the State agency has authority under State law to perform the functions of the State under the program.
  - (3) That the State legally may carry out each provision of the plan.
  - (4) That all provisions of the plan are consistent with State law.
  - (5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.
  - (6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.
  - (7) That the agency that submits the plan has adopted or otherwise formally approved the plan.
  - (8) That the plan is the basis for State operation and administration of the program.
- (b) [Reserved]

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.106 State documents are public information.**

A State shall make the following documents available for public inspection:

- (a) All State plans and related official materials.
- (b) All approved subgrant applications.
- (c) All documents that the Secretary transmits to the State regarding a program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Consolidated Grant Applications for Insular Areas**

**Authority:** Title V, Pub. L. 95–134, 91 Stat. 1159 (48 U.S.C. 1469a).

**§ 76.125 What is the purpose of these regulations?**

- (a) Sections 76.125 through 76.137 of this part contain requirements for the submission of an application by an Insular Area for the consolidation of two or more grants under the programs described in paragraph (c) of this section.
- (b) For the purpose of §§76.125–76.137 of this part the term *Insular Area* means the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.
- (c) The Secretary may make an annual consolidated grant to assist an Insular Area in carrying out one or more State-administered formula grant programs of the Department.

(Authority: 20 U.S.C. 1221e–3 and 3474)

[47 FR 17421, Apr. 22, 1982, as amended at 54 FR 21776, May 19, 1989; 57 FR 30341, July 8, 1992]

### **§ 76.126 What regulations apply to the consolidated grant applications for insular areas?**

The following regulations apply to those programs included in a consolidated grant:

- (a) The regulations in §§76.125 through 76.137; and
- (b) The regulations that apply to each specific program included in a consolidated grant for which funds are used.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

### **§ 76.127 What is the purpose of a consolidated grant?**

An Insular Area may apply for a consolidated grant for two or more of the programs listed in §76.125(c).

This procedure is intended to:

- (a) Simplify the application and reporting procedures that would otherwise apply for each of the programs included in the consolidated grant; and
- (b) Provide the Insular Area with flexibility in allocating the funds under the consolidated grant to achieve any of the purposes to be served by the programs that are consolidated.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

### **§ 76.128 What is a consolidated grant?**

A consolidated grant is a grant to an Insular Area for any two or more of the programs listed in §76.125(c). The amount of the consolidated grant is the sum of the allocations the Insular Area receives under each of the programs included in the consolidated grant if there had been no consolidation.

*Example.* Assume the Virgin Islands applies for a consolidated grant that includes programs under the Adult Education Act, Vocational Education Act, and Chapter 1 of the Education Consolidation and Improvement Act. If the Virgin Islands' allocation under the formula for each of these three programs is \$150,000; the total consolidated grant to the Virgin Islands would be \$450,000.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

### **§ 76.129 How does a consolidated grant work?**

- (a) An Insular Area shall use the funds it receives under a consolidated grant to carry out, in its jurisdiction, one or more of the programs included in the grant.

*Example.* Assume that Guam applies for a consolidated grant under the Vocational Education Act, the Handicapped Preschool and School Programs-Incentive Grants, and the Adult Education Act and that the sum of the allocations under these programs is \$700,000. Guam may choose to allocate this \$700,000 among all of the programs authorized under the three programs. Alternatively, it may choose to allocate

the entire \$700,000 to one or two of the programs; for example, the Adult Education Act Program.

(b) An Insular Area shall comply with the statutory and regulatory requirements that apply to each program under which funds from the consolidated grant are expended.

*Example.* Assume that American Samoa uses part of the funds under a consolidated grant for the State program under the Adult Education Act. American Samoa need not submit to the Secretary a State plan that requires policies and procedures to assure all students equal access to adult education programs. However, in carrying out the program, American Samoa must meet and be able to demonstrate compliance with this equal access requirement.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

### **§ 76.130 How are consolidated grants made?**

(a) The Secretary annually makes a single consolidated grant to each Insular Area that meets the requirements of §§76.125 through 76.137 and each program under which the grant funds are to be used and administered.

(b) The Secretary may decide that one or more programs cannot be included in the consolidated grant if the Secretary determines that the Insular Area failed to meet the program objectives stated in its plan for the previous fiscal year in which it carried out the programs.

(c) Under a consolidated grant, an Insular Area may use a single advisory council for any or all of the programs that require an advisory council.

(d) Although Pub. L. 95–134 authorizes the Secretary to consolidate grant funds that the Department awards to an Insular Area, it does not confer eligibility for any grant funds. The eligibility of a particular Insular Area to receive grant funds under a Federal education program is determined under the statute and regulations for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

### **§ 76.131 How does an insular area apply for a consolidated grant?**

(a) An Insular Area that desires to apply for a grant consolidating two or more programs listed in §76.125

(c) shall submit to the Secretary an application that:

(1) Contains the assurances in §76.132; and

(2) Meets the application requirements in paragraph (c) of this section.

(b) The submission of an application that contains these requirements and assurances takes the place of a separate State plan or other similar document required by this part or by the authorizing statutes and regulations for programs included in the consolidated grant.

(c) An Insular Area shall include in its consolidated grant application a program plan that:

(1) Contains a list of the programs in §76.125(c) to be included in the consolidated grant;

(2) Describes the program or programs in §76.125(c) under which the consolidated grant funds will be used and administered;

(3) Describes the goals, objectives, activities, and the means of evaluating program outcomes for the programs for which the Insular Area will use the funds received under the consolidated grant during the

fiscal year for which it submits the application, including needs of the population that will be met by the consolidation of funds; and

(4) Contains a budget that includes a description of the allocation of funds—including any anticipated carryover funds of the program in the consolidated grant from the preceding year—among the programs to be included in the consolidated grant.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 53 FR 49143, Dec. 6, 1988]

### **§ 76.132 What assurances must be in a consolidated grant application?**

(a) An Insular Area shall include in its consolidated grant application assurances to the Secretary that it will:

(1) Follow policies and use administrative practices that will insure that non-Federal funds will not be supplanted by Federal funds made available under the authority of the programs in the consolidated grant;

(2) Comply with the requirements (except those relating to the submission of State plans or similar documents) in the authorizing statutes and implementing regulations for the programs under which funds are to be used and administered, (except requirements for matching funds);

(3) Provide for proper and efficient administration of funds in accordance with the authorizing statutes and implementing regulations for those programs under which funds are to be used and administered;

(4) Provide for fiscal control and fund accounting procedures to assure proper disbursement of, and accounting for, Federal funds received under the consolidated grant;

(5) Submit an annual report to the Secretary containing information covering the program or programs for which the grant is used and administered, including the financial and program performance information required under 34 CFR 74.51–74.52 and 34 CFR 80.40–80.41.

(6) Provide that funds received under the consolidated grant will be under control of, and that title to property acquired with these funds will be in, a public agency, institution, or organization. The public agency shall administer these funds and property;

(7) Keep records, including a copy of the State Plan or application document under which funds are to be spent, which show how the funds received under the consolidated grant have been spent.

(8) Adopt and use methods of monitoring and providing technical assistance to any agencies, organizations, or institutions that carry out the programs under the consolidated grant and enforce any obligations imposed on them under the applicable statutes and regulations.

(9) Evaluate the effectiveness of these programs in meeting the purposes and objectives in the authorizing statutes under which program funds are used and administered;

(10) Conduct evaluations of these programs at intervals and in accordance with procedures the Secretary may prescribe; and

(11) Provide appropriate opportunities for participation by local agencies, representatives of the groups affected by the programs, and other interested institutions, organizations, and individuals in planning and operating the programs.

(b) These assurances remain in effect for the duration of the programs they cover.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 64 FR 50392, Sept. 16, 1999]

**§ 76.133 What is the reallocation authority?**

(a) After an Insular Area receives a consolidated grant, it may reallocate the funds in a manner different from the allocation described in its consolidated grant application. However, the funds cannot be used for purposes that are not authorized under the programs in the consolidated grant under which funds are to be used and administered.

(b) If an Insular Area decides to reallocate the funds it receives under a consolidated grant, it shall notify the Secretary by amending its original application to include an update of the information required under §76.131.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

**§ 76.134 What is the relationship between consolidated and non-consolidated grants?**

(a) An Insular Area may request that any number of programs in §76.125(c) be included in its consolidated grant and may apply separately for assistance under any other programs listed in §76.125(c) for which it is eligible.

(b) Those programs that an Insular Area decides to exclude from consolidation—for which it must submit separate plans or applications—are implemented in accordance with the applicable program statutes and regulations. The excluded programs are not subject to the provisions for allocation of funds among programs in a consolidated grant.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

**§ 76.135 Are there any requirements for matching funds?**

The Secretary waives all requirements for matching funds for those programs that are consolidated by an Insular Area in a consolidated grant application.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

**§ 76.136 Under what programs may consolidated grant funds be spent?**

Insular Areas may only use and administer funds under programs described in §76.125(c) during a fiscal year for which the Insular Area is entitled to receive funds under an appropriation for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 57 FR 30341, July 8, 1992]

**§ 76.137 How may carryover funds be used under the consolidated grant application?**

Any funds under any applicable program which are available for obligation and expenditure in the year succeeding the fiscal year for which they are appropriated must be obligated and expended in accordance with the consolidated grant application submitted by the Insular Area for that program for the succeeding fiscal year.

(Authority: 20 U.S.C. 1225(b); 48 U.S.C. 1469a)

**Amendments****§ 76.140 Amendments to a State plan.**

(a) If the Secretary determines that an amendment to a State plan is essential during the effective period of the plan, the State shall make the amendment.

(b) A State shall also amend a State plan if there is a significant and relevant change in:

(1) The information or the assurances in the plan;

(2) The administration or operation of the plan; or

(3) The organization, policies, or operations of the State agency that received the grant, if the change materially affects the information or assurances in the plan.

(Authority: 20 U.S.C. 1221e–3, 1231g(a), and 3474)

**§ 76.141 An amendment requires the same procedures as the document being amended.**

If a State amends a State plan under §76.140, the State shall use the same procedures as those it must use to prepare and submit a State plan.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.142 An amendment is approved on the same basis as the document being amended.**

The Secretary uses the same procedures to approve an amendment to a State plan—or any other document a State submits—as the Secretary uses to approve the original document.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Subpart C—How a Grant Is Made to a State****Approval or Disapproval by the Secretary****§ 76.201 A State plan must meet all statutory and regulatory requirements.**

The Secretary approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.202 Opportunity for a hearing before a State plan is disapproved.**

The Secretary may disapprove a State plan only after:

- (a) Notifying the State;
- (b) Offering the State a reasonable opportunity for a hearing; and
- (c) Holding the hearing, if requested by the State.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.235 The notification of grant award.**

- (a) To make a grant to a State, the Secretary issues and sends to the State a notification of grant award.
- (b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Allotments and Reallotments of Grant Funds**

**§ 76.260 Allotments are made under program statute or regulations.**

- (a) The Secretary allots program funds to a State in accordance with the authorizing statute or implementing regulations for the program.
- (b) Any reallotment to other States will be made by the Secretary in accordance with the authorizing statute or implementing regulations for that program.

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

[50 FR 29330, July 18, 1985]

**§ 76.261 Reallotted funds are part of a State's grant.**

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Secretary does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**Subpart D—How To Apply to the State for a Subgrant**

**§ 76.300 Contact the State for procedures to follow.**

An applicant for a subgrant can find out the procedures it must follow by contacting the State agency that administers the program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Cross reference: See subparts E and G of this part for the general responsibilities of the State regarding applications for subgrants.

**§ 76.301 Local educational agency general application.**

A local educational agency that applies for a subgrant under a program subject to this part shall have on file with the State a general application that meets the requirements of Section 442 of the General Education Provisions Act.

Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3, 1232d, and 3474)

[52 FR 27804, July 24, 1987, as amended at 53 FR 49143, Dec. 6, 1988; 60 FR 46493, Sept. 6, 1995]

**§ 76.302 The notice to the subgrantee.**

A State shall notify a subgrantee in writing of:

- (a) The amount of the subgrant;
- (b) The period during which the subgrantee may obligate the funds; and
- (c) The Federal requirements that apply to the subgrant.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1221e–3 and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

**§ 76.303 Joint applications and projects.**

- (a) Two or more eligible parties may submit a joint application for a subgrant.
- (b) If the State must use a formula to distribute subgrant funds (see §76.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.
- (c) If the State funds the application, each subgrantee shall:
  - (1) Carry out the activities that the subgrantee agreed to carry out; and
  - (2) Use the funds in accordance with Federal requirements.
- (d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.304 Subgrantee shall make subgrant application available to the public.**

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(Authority: 20 U.S.C. 1221e–3, 1232e, and 3474)

**Subpart E—How a Subgrant Is Made to an Applicant**

**§ 76.400 State procedures for reviewing an application.**

A State that receives an application for a subgrant shall take the following steps:

(a) *Review*. The State shall review the application.

(b) *Approval—entitlement programs*. The State shall approve an application if:

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program.

(c) *Approval—discretionary programs*. The State may approve an application if:

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) *Disapproval—entitlement and discretionary programs*. If an application does not meet the requirements of the Federal statutes and regulations that apply to a program, the State shall not approve the application.

(Authority: 20 U.S.C. 1221e–3 and 3474)

**§ 76.401 Disapproval of an application—opportunity for a hearing.**

(a) *State agency hearing before disapproval*. Under the programs listed in the chart below, the State agency that administers the program shall provide an applicant with notice and an opportunity for a hearing before it may disapprove the application.

Program	Authorizing statute	Implementing regulations Title 34 CFR Part
Chapter 1, Program in Local Educational Agencies	Title I, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701–2731, 2821–2838, 2851–2854, and 2891–2901)	200

Chapter 1, Program for Neglected and Delinquent Children	Title 1, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2801–2804)	203
State Grants for Strengthening Instruction in Mathematics and Science	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993)	208
Federal, State, and Local Partnership for Educational Improvement	Title I, Chapter 2, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952 and 2971–2976)	298
Assistance to States for Education of Handicapped Children	Part B, Individuals with Disabilities Education Act (except Section 619) (20 U.S.C. 1411–1420)	300
Preschool Grants	Section 619, Individuals with Disabilities Education Act (20 U.S.C. 1419)	301
Chapter 1, State-Operated or Supported Programs for Handicapped Children	Title 1, Chapter 1, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2791–2795)	302
Transition Program for Refugee Children	Section 412(d), Immigration and Naturalization Act (8 U.S.C. 1522 (d))	538
Emergency Immigrant Education Program	Emergency Immigrant Education Act (20 U.S.C. 3121–3130)	581
Financial Assistance for Construction, Reconstruction, or Renovation of Higher Education Facilities	Section 711, Higher Education Act of 1965 (20 U.S.C. 1132b)	617

(b) *Other programs—hearings not required.* Under other programs covered by this part, a State agency—other than a State educational agency—is not required to provide an opportunity for a hearing regarding the agency's disapproval of an application.

(c) If an applicant for a subgrant alleges that any of the following actions of a State educational agency violates a State or Federal statute or regulation, the State educational agency and the applicant shall use the procedures in paragraph (d) of this section:

- (1) Disapproval of or failure to approve the application or project in whole or in part.
- (2) Failure to provide funds in amounts in accordance with the requirements of statutes and regulations.

(d) *State educational agency hearing procedures.* (1) If the applicant applied under a program listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing before the agency disapproves the application.

(2) If the applicant applied under a program not listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing either before or after the agency

disapproves the application.

(3) The applicant shall request the hearing within 30 days of the action of the State educational agency.

(4)(i) Within 30 days after it receives a request, the State educational agency shall hold a hearing on the record and shall review its action.

(ii) No later than 10 days after the hearing the agency shall issue its written ruling, including findings of fact and reasons for the ruling.

(iii) If the agency determines that its action was contrary to State or Federal statutes or regulations that govern the applicable program, the agency shall rescind its action.

(5) If the State educational agency does not rescind its final action after a review under this paragraph, the applicant may appeal to the Secretary. The applicant shall file a notice of the appeal with the Secretary within 20 days after the applicant has been notified by the State educational agency of the results of the agency's review. If supported by substantial evidence, findings of fact of the State educational agency are final.

(6)(i) The Secretary may also issue interim orders to State educational agencies as he or she may decide are necessary and appropriate pending appeal or review.

(ii) If the Secretary determines that the action of the State educational agency was contrary to Federal statutes or regulations that govern the applicable program, the Secretary issues an order that requires the State educational agency to take appropriate action.

(7) Each State educational agency shall make available at reasonable times and places to each applicant all records of the agency pertaining to any review or appeal the applicant is conducting under this section, including records of other applicants.

(8) If a State educational agency does not comply with any provision of this section, or with any order of the Secretary under this section, the Secretary terminates all assistance to the State educational agency under the applicable program or issues such other orders as the Secretary deems appropriate to achieve compliance.

(e) *Other State agency hearing procedures.* State agencies that are required to provide a hearing under paragraph (a) of this section—other than State educational agencies—are not required to use the procedures in paragraph (d) of this section.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA “shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.” Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1221e–3, 1231b–2, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985; 52 FR 27805, July 24, 1987; 54 FR 21775, May 19, 1989; 55 FR 14816, Apr. 18, 1990; 57 FR 30341, July 8, 1992; 60 FR 46493, Sept. 6, 1995]

## **Subpart F—What Conditions Must Be Met by the State and Its Subgrantees?**

### **Nondiscrimination**

#### **§ 76.500 Federal statutes and regulations on nondiscrimination.**

(a) A State and a subgrantee shall comply with the following statutes and regulations:

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin	Title VI of the Civil Rights Act of 1964 (45 U.S.C. 2000d through 2000d-4)	34 CFR part 100.
Discrimination on the basis of sex	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683)	34 CFR part 106.
Discrimination on the basis of handicap	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)	34 CFR part 104.
Discrimination on the basis of age	The Age Discrimination Act (42 U.S.C. 6101 <i>et seq.</i> )	34 CFR part 110.

(b) A State or subgrantee that is a covered entity as defined in §108.3 of this title shall comply with the nondiscrimination requirements of the Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 CFR part 108.

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 71 FR 15002, Mar. 24, 2006]

## Allowable Costs

### § 76.530 General cost principles.

Both 34 CFR 74.27 and 34 CFR 80.22 reference the general cost principles that apply to grants, subgrants and cost type contracts under grants and subgrants.

(Authority: 20 U.S.C. 1221e-3, 3474 and 6511(a))

[64 FR 50392, Sept. 16, 1999]

### § 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

- (1) Religious worship, instruction, or proselytization.
- (2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(b) [Reserved]

(Authority: 20 U.S.C. 1221e-3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 69 FR 31711, June 4, 2004]

### § 76.533 Acquisition of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

#### **§ 76.534 Use of tuition and fees restricted.**

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost sharing, or maintenance of effort requirements of a program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

### **Indirect Cost Rates**

#### **§ 76.560 General indirect cost rates; exceptions.**

- (a) The differences between direct and indirect costs and the principles for determining the general indirect cost rate that a grantee may use for grants under most programs are specified in the cost principles for—
- (1) Institutions of higher education, at 34 CFR 74.27;
  - (2) Hospitals, at 34 CFR 74.27;
  - (3) Other nonprofit organizations, at 34 CFR 74.27;
  - (4) Commercial (for-profit) organizations, at 34 CFR 74.27; and
  - (5) State and local governments and federally-recognized Indian tribal organizations, at 34 CFR 80.22.
- (b) A grantee must have a current indirect cost rate agreement to charge indirect costs to a grant. To obtain an indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency and negotiate an indirect cost rate agreement.
- (c) The Secretary may establish a temporary indirect cost rate for a grantee that does not have an indirect cost rate agreement with its cognizant agency.
- (d) The Secretary accepts an indirect cost rate negotiated by a grantee's cognizant agency, but may establish a restricted indirect cost rate for a grantee to satisfy the statutory requirements of certain programs administered by the Department.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[57 FR 30341, July 8, 1992, as amended at 59 FR 59582, Nov. 17, 1994]

#### **§ 76.561 Approval of indirect cost rates.**

- (a) If the Department of Education is the cognizant agency, the Secretary approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term local educational agency does not include a State agency.
- (b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so. These rates may be for periods longer than a year if rates are sufficiently stable to justify a longer period.
- (c) The Secretary generally approves indirect cost rate agreements annually. Indirect cost rate agreements may be approved for periods longer than a year if the Secretary determines that rates will be

sufficiently stable to justify a longer rate period.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[59 FR 59583, Nov. 17, 1994]

### **§ 76.563 Restricted indirect cost rate—programs covered.**

Sections 76.564 through 76.569 apply to agencies of State and local governments that are grantees under programs with a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, and to their subgrantees under these programs.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[59 FR 59583, Nov. 17, 1994]

### **§ 76.564 Restricted indirect cost rate—formula.**

(a) An indirect cost rate for a grant covered by §76.563 or 34 CFR 75.563 is determined by the following formula:

Restricted indirect cost rate = (General management costs + Fixed costs) ÷ (Other expenditures)

(b) General management costs, fixed costs, and other expenditures must be determined under §§76.565 through 76.567.

(c) Under the programs covered by §76.563, a subgrantee of an agency of a State or a local government (as those terms are defined in 34 CFR 80.3) or a grantee subject to 34 CFR 75.563 that is not a State or local government agency may use—

(1) An indirect cost rate computed under paragraph (a) of this section; or

(2) An indirect cost rate of eight percent unless the Secretary determines that the subgrantee or grantee would have a lower rate under paragraph (a) of this section.

(d) Indirect costs that are unrecovered as a result of these restrictions may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

### **§ 76.565 General management costs—restricted rate.**

(a) As used in §76.564, *general management costs* means the costs of activities that are for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) General management costs include the costs of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management. The term also includes certain occupancy and space maintenance costs as determined under §76.568.

(c) The term does not include expenditures for—

- (1) Divisional administration that is limited to one component of the grantee;
- (2) The governing body of the grantee;
- (3) Compensation of the chief executive officer of the grantee;
- (4) Compensation of the chief executive officer of any component of the grantee; and
- (5) Operation of the immediate offices of these officers.

(d) For purposes of this section—

(1) The chief executive officer of the grantee is the individual who is the head of the executive office of the grantee and exercises overall responsibility for the operation and management of the organization. The chief executive officer's immediate office includes any deputy chief executive officer or similar officer along with immediate support staff of these individuals. The term does not include the governing body of the grantee, such as a board or a similar elected or appointed governing body; and

(2) Components of the grantee are those organizational units supervised directly or indirectly by the chief executive officer. These organizational units generally exist one management level below the executive office of the grantee. The term does not include the office of the chief executive officer or a deputy chief executive officer or similar position.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

#### **§ 76.566 Fixed costs—restricted rate.**

As used in §76.564, *fixed costs* means contributions of the grantee to fringe benefits and similar costs, but only those associated with salaries and wages that are charged as indirect costs, including—

- (a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;
- (b) Unemployment compensation payments; and
- (c) Property, employee, health, and liability insurance.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

#### **§ 76.567 Other expenditures—restricted rate.**

(a) As used in §76.564, *other expenditures* means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available. The term also includes direct occupancy and space maintenance costs as determined under §76.568 and costs related to the chief executive officers of the grantee and components of the grantee and their offices (see §76.565(c) and (d)).

(b) The term does not include—

- (1) General management costs determined under §76.565;
- (2) Fixed costs determined under §76.566;
- (3) Subgrants;
- (4) Capital outlay;
- (5) Debt service;
- (6) Fines and penalties;
- (7) Contingencies; and

(8) Election expenses. However, the term does include election expenses that result from elections required by an applicable Federal statute.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59583, Nov. 17, 1994]

### **§ 76.568 Occupancy and space maintenance costs—restricted rate.**

(a) As used in the calculation of a restricted indirect cost rate, *occupancy and space maintenance costs* means such costs as—

- (1) Building costs whether owned or rented;
- (2) Janitorial services and supplies;
- (3) Building, grounds, and parking lot maintenance;
- (4) Guard services;
- (5) Light, heat, and power;
- (6) Depreciation, use allowances, and amortization; and
- (7) All other related space costs.

(b) Occupancy and space maintenance costs associated with organization-wide service functions (accounting, payroll, personnel) may be included as general management costs if a space allocation or use study supports the allocation.

(c) Occupancy and space maintenance costs associated with functions that are not organization-wide must be included with other expenditures in the indirect cost formula. These costs may be charged directly to affected programs only to the extent that statutory supplanting prohibitions are not violated. This reimbursement must be approved in advance by the Secretary.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59584, Nov. 17, 1994]

### **§ 76.569 Using the restricted indirect cost rate.**

(a) Under the programs referenced in §76.563, the maximum amount of indirect costs under a grant is determined by the following formula:

Indirect costs=(Restricted indirect cost rate)×(Total direct costs of the grant minus capital outlays, subgrants, and other distorting or unallowable items as specified in the grantee's indirect cost rate agreement)

(b) If a grantee uses a restricted indirect cost rate, the general management and fixed costs covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[59 FR 59584, Nov. 17, 1994]

### **§ 76.580 Coordination with other activities.**

A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities

that are in the same geographic area served by the project and that serve similar purposes and target groups.

(Authority: 20 U.S.C. 1221e–3, 2890, and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30341, July 8, 1992]

## Evaluation

### **§ 76.591 Federal evaluation—cooperation by a grantee.**

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1221e–3, 1226c, 1231a, 3474, and 6511(a))

[45 FR 86298, Dec. 30, 1980, as amended at 57 FR 30341, July 8, 1992]

### **§ 76.592 Federal evaluation—satisfying requirement for State or subgrantee evaluation.**

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Secretary may determine that the State or subgrantee meets the evaluation requirements of the program.

(Authority: 20 U.S.C. 1226c; 1231a)

## Construction

### **§ 76.600 Where to find construction regulations.**

(a) A State or a subgrantee that requests program funds for construction, or whose grant or subgrant includes funds for construction, shall comply with the rules on construction that apply to applicants and grantees under 34 CFR 75.600–75.617.

(b) The State shall perform the functions that the Secretary performs under §§75.602 (Preservation of historic sites) and 75.605 (Approval of drawings and specifications) of this title.

(c) The State shall provide to the Secretary the information required under 34 CFR 75.602(a) (Preservation of historic sites).

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 57 FR 30341, July 8, 1992]

## Participation of Students Enrolled in Private Schools

### **§ 76.650 Private schools; purpose of §§76.651–76.662.**

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651–76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e–3 and 3474)

Note: Some program statutes authorize the Secretary—under certain circumstances—to provide benefits directly to private school students. These “bypass” provisions—where they apply—are implemented in the individual program regulations.

### **§ 76.651 Responsibility of a State and a subgrantee.**

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§76.652–76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§76.651–76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 76.652 Consultation with representatives of private school students.**

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### **§ 76.653 Needs, number of students, and types of services.**

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

- (a) The needs of students enrolled in private schools.
- (b) The number of those students who will participate in a project.
- (c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.654 Benefits for private school students.**

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

- (1) Have the same needs as the public school students to be served; and
- (2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.655 Level of expenditures for students enrolled in private schools.**

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

- (1) A student enrolled in a private school who receives benefits under the program; and
- (2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.656 Information in an application for a subgrant.**

An applicant for a subgrant shall include the following information in its application:

- (a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.
- (b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.
- (c) The number of students enrolled in private schools who will receive benefits under the program.
- (d) The basis the applicant used to select the students.
- (e) The manner and extent to which the applicant complied with §76.652 (consultation).

- (f) The places and times that the students will receive benefits under the program.
- (g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.657 Separate classes prohibited.**

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

- (a) The classes are at the same site; and
- (b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.658 Funds not to benefit a private school.**

- (a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.
- (b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:
  - (1) The needs of a private school; or
  - (2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.659 Use of public school personnel.**

A subgrantee may use program funds to make public personnel available in other than public facilities:

- (a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and
- (b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.660 Use of private school personnel.**

A subgrantee may use program funds to pay for the services of an employee of a private school if:

- (a) The employee performs the services outside of his or her regular hours of duty; and
- (b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e–3 and 3474)

#### **§ 76.661 Equipment and supplies.**

- (a) Under some program statutes, a public agency must keep title to and exercise continuing

administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

- (1) Are used only for the purposes of the project; and
- (2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

- (1) The equipment or supplies are no longer needed for the purposes of the project; or
- (2) Removal is necessary to avoid use of the equipment or supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### § 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

(Authority: 20 U.S.C. 1221e–3 and 3474)

### Procedures for Bypass

### § 76.670 Applicability and filing requirements.

(a) The regulations in §§76.671 through 76.677 apply to the following programs under which the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass:

CFDA number and name of program	Authorizing statute	Implementing regulations title 34 CFR part
84.010 Chapter 1 Program in Local Educational Agencies	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 <i>et seq.</i> )	200
84.151 Federal, State, and Local Partnership for Educational Improvement	Chapter 2, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911–2952, 2971–2976)	298
84.164 Mathematics and Science Education	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981–2993)	208

84.186 State and Local Programs	Part B, Drug Free Schools and Communities Act of 1986 (20 U.S.C. 3191–3197)	None
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(b) *Filing requirements.* (1) Any written submission under §§76.671 through 76.675 must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) If a document is filed by facsimile transmission, the Secretary or the hearing officer, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 2727(b), 2972(d)–(e), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

### § 76.671 Notice by the Secretary.

(a) Before taking any final action to implement a bypass under a program listed in §76.670, the Secretary provides the affected grantee and subgrantee, if appropriate, with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the grantee and subgrantee to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the grantee and subgrantee that they—

(i) Have at least 45 days after receiving the written notice to submit written objections to the proposed bypass; and

(ii) May request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the grantee and subgrantee by certified mail with return receipt requested.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

### § 76.672 Bypass procedures.

Sections 76.673 through 76.675 contain the procedures that the Secretary uses in conducting a show cause hearing. The hearing officer may modify the procedures for a particular case if all parties agree the modification is appropriate.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

### **§ 76.673 Appointment and functions of a hearing officer.**

(a) If a grantee or subgrantee requests a hearing to show cause why the Secretary should not implement a bypass, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the grantee, subgrantee, and representatives of the private school children of the time and place of the hearing.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

### **§ 76.674 Hearing procedures.**

(a) The following procedures apply to a show cause hearing regarding implementation of a bypass:

(1) The hearing officer arranges for a transcript to be taken.

(2) The grantee, subgrantee, and representatives of the private school children each may—

(i) Be represented by legal counsel; and

(ii) Submit oral or written evidence and arguments at the hearing.

(b) Within 10 days after the hearing, the hearing officer—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the grantee, subgrantee, representatives of the private school children, or Department officials.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

### **§ 76.675 Posthearing procedures.**

(a)(1) Within 120 days after the record of a show cause hearing is closed, the hearing officer issues a written decision on whether a bypass should be implemented.

(2) The hearing officer sends copies of the decision to the grantee, subgrantee, representatives of the private school children, and the Secretary.

(b) Within 30 days after receiving the hearing officer's decision, the grantee, subgrantee, and representatives of the private school children may each submit to the Secretary written comments on the decision.

(c) The Secretary may adopt, reverse, modify, or remand the hearing officer's decision.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

**§ 76.676 Judicial review of a bypass action.**

If a grantee or subgrantee is dissatisfied with the Secretary's final action after a proceeding under §§76.672 through 76.675, it may, within 60 days after receiving notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 2727(b)(4)(B)–(D), 2972(h)(2)–(4), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

**§ 76.677 Continuation of a bypass.**

The Secretary continues a bypass until the Secretary determines that the grantee or subgrantee will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 1221e–3, 2727(b)(3)(D), 2972(f), and 3474)

[54 FR 21776, May 19, 1989]

**Other Requirements for Certain Programs**

**§ 76.681 Protection of human subjects.**

If a State or a subgrantee uses a human subject in a research project, the State or subgrantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30341, July 8, 1992]

**§ 76.682 Treatment of animals.**

If a State or a subgrantee uses an animal in a project, the State or subgrantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: Pub. L. 89–544, as amended)

**§ 76.683 Health or safety standards for facilities.**

A State and a subgrantee shall comply with any Federal health or safety requirements that apply to the facilities that the State or subgrantee uses for a project.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

## **Subpart G—What Are the Administrative Responsibilities of the State and Its Subgrantees?**

### **General Administrative Responsibilities**

#### **§ 76.700 Compliance with statutes, regulations, State plan, and applications.**

A State and a subgrantee shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

#### **§ 76.701 The State or subgrantee administers or supervises each project.**

A State or a subgrantee shall directly administer or supervise the administration of each project.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

#### **§ 76.702 Fiscal control and fund accounting procedures.**

A State and a subgrantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

#### **§ 76.703 When a State may begin to obligate funds.**

(a)(1) The Secretary may establish, for a program subject to this part, a date by which a State must submit for review by the Department a State plan and any other documents required to be submitted under guidance provided by the Department under paragraph (b)(3) of this section.

(2) If the Secretary does not establish a date for the submission of State plans and any other documents required under guidance provided by the Department, the date for submission is three months before the date the Secretary may begin to obligate funds under the program.

(b)(1) This paragraph (b) describes the circumstances under which the submission date for a State plan may be deferred.

(2) If a State asks the Secretary in writing to defer the submission date for a State plan because of a Presidentially declared disaster that has occurred in that State, the Secretary may defer the submission date for the State plan and any other document required under guidance provided by the Department if the Secretary determines that the disaster significantly impairs the ability of the State to submit a timely State plan or other document required under guidance provided by the Department.

(3)(i) The Secretary establishes, for a program subject to this part, a date by which the program office must deliver guidance to the States regarding the contents of the State plan under that program.

- (ii) The Secretary may only establish a date for the delivery of guidance to the States so that there are at least as many days between that date and the date that State plans must be submitted to the Department as there are days between the date that State plans must be submitted to the Department and the date that funds are available for obligation by the Secretary on July 1, or October 1, as appropriate.
- (iii) If a State does not receive the guidance by the date established under paragraph (b)(3)(i) of this section, the submission date for the State plan under the program is deferred one day for each day that the guidance is late in being received by the State.

Note: The following examples describe how the regulations in §76.703(b)(3) would act to defer the date that a State would have to submit its State plan.

*Example 1.* The Secretary decides that State plans under a forward-funded program must be submitted to the Department by May first. The Secretary must provide guidance to the States under this program by March first, so that the States have at least as many days between the guidance date and the submission date (60) as the Department has between the submission date and the date that funds are available for obligation (60). If the program transmits guidance to the States on February 15, specifying that State plans must be submitted by May first, States generally would have to submit State plans by that date. However, if, for example, a State did not receive the guidance until March third, that State would have until May third to submit its State plan because the submission date of its State plan would be deferred one day for each day that the guidance to the State was late.

*Example 2.* If a program publishes the guidance in the Federal Register on March third, the States would be considered to have received the guidance on that day. Thus, the guidance could not specify a date for the submission of State plans before May second, giving the States 59 days between the date the guidance is published and the submission date and giving the Department 58 days between the submission date and the date that funds are available for obligation.

(c)(1) For the purposes of this section, the submission date of a State plan or other document is the date that the Secretary receives the plan or document.

(2) The Secretary does not determine whether a State plan is substantially approvable until the plan and any documents required under guidance provided by the Department have been submitted.

(3) The Secretary notifies a State when the Department has received the State plan and all documents required under guidance provided by the Department.

(d) If a State submits a State plan in substantially approvable form (or an amendment to the State plan that makes it substantially approvable), and submits any other document required under guidance provided by the Department, on or before the date the State plan must be submitted to the Department, the State may begin to obligate funds on the date that the funds are first available for obligation by the Secretary.

(e) If a State submits a State plan in substantially approvable form (or an amendment to the State plan that makes it substantially approvable) or any other documents required under guidance provided by the Department after the date the State plan must be submitted to the Department, and—

(1) The Department determines that the State plan is substantially approvable on or before the date that the funds are first available for obligation by the Secretary, the State may begin to obligate funds on the date that the funds are first available for obligation by the Secretary; or

(2) The Department determines that the State plan is substantially approvable after the date that the funds are first available for obligation by the Secretary, the State may begin to obligate funds on the earlier of the two following dates:

(i) The date that the Secretary determines that the State plan is substantially approvable.

(ii) The date that is determined by adding to the date that funds are first available for obligation by the Secretary—

(A) The number of days after the date the State plan must be submitted to the Department that the State

- plan or other document required under guidance provided by the Department is submitted; and
- (B) If applicable, the number of days after the State receives notice that the State plan is not substantially approvable that the State submits additional information that makes the plan substantially approvable.
- (f) Additional information submitted under paragraph (e)(2)(ii)(B) of this section must be signed by the person who submitted the original State plan (or an authorized delegate of that officer).
- (g)(1) If the Department does not complete its review of a State plan during the period established for that review, the Secretary will grant pre-award costs for the period after funds become available for obligation by the Secretary and before the State plan is found substantially approvable.
- (2) The period established for the Department's review of a plan does not include any day after the State has received notice that its plan is not substantially approvable.

Note: The following examples describe how the regulations in §76.703 would be applied in certain circumstances. For the purpose of these examples, assume that the grant program established an April 1 due date for the submission of the State plan and that funds are first available for obligation by the Secretary on July 1.

*Example 1.* Paragraph (d): A State submits a plan in substantially approvable form by April 1. The State may begin to obligate funds on July 1.

*Example 2.* Paragraph (e)(1): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on June 20. The State may begin to obligate funds on July 1.

*Example 3.* Paragraph (e)(2)(i): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on July 15. The State may begin to obligate funds on July 15.

*Example 4.* Paragraph (e)(2)(ii)(A): A State submits a plan in substantially approvable form on May 15, and the Department notifies the State that the plan is substantially approvable on August 21. The State may begin to obligate funds on August 14. (In this example, the plan is 45 days late. By adding 45 days to July 1, we reach August 14, which is earlier than the date, August 21, that the Department notifies the State that the plan is substantially approvable. Therefore, if the State chose to begin drawing funds from the Department on August 14, obligations made on or after that date would generally be allowable.)

*Example 5.* Paragraph (e)(2)(i): A State submits a plan on May 15, and the Department notifies the State that the plan is not substantially approvable on July 10. The State submits changes that make the plan substantially approvable on July 20 and the Department notifies the State that the plan is substantially approvable on July 25. The State may begin to obligate funds on July 25. (In this example, the original submission is 45 days late. In addition, the Department notifies the State that the plan is not substantially approvable and the time from that notification until the State submits changes that make the plan substantially approvable is an additional 10 days. By adding 55 days to July 1, we reach August 24. However, since the Department notified the State that the plan was substantially approvable on July 25, that is the date that the State may begin to obligate funds.)

*Example 6.* Paragraph (e)(2)(ii)(B): A State submits a plan on May 15, and the Department notifies the State that the plan is not substantially approvable on August 1. The State submits changes that make the plan substantially approvable on August 20, and the Department notifies the State that the plan is substantially approvable on September 5. The State may choose to begin drawing funds from the Department on September 2, and obligations made on or after that date would generally be allowable. (In this example, the original submission is 45 days late. In addition, the Department notifies the State that the plan is not substantially approvable and the time from that notification until the State submits changes that make the plan substantially approvable is an additional 19 days. By adding 64 days to July 1, we reach September 2, which is earlier than September 5, the date that the Department notifies the State that the plan is substantially approvable.)

*Example 7.* Paragraph (g): A State submits a plan on April 15 and the Department notifies the State that the plan is not substantially approvable on July 16. The State makes changes to the plan and submits a substantially approvable plan on July 30. The Department had until July 15 to decide whether the plan was substantially approvable because the State was 15 days late in submitting the plan. The date the State may begin to obligate funds under the regulatory deferral is July 29 (based on the 15 day deferral for late submission plus a 14 day deferral for the time it took to submit a substantially approvable plan after having received notice). However, because the Department was one day late in completing its review of the plan, the State would get pre-award costs to cover the period of July 1 through July 29.

(h) After determining that a State plan is in substantially approvable form, the Secretary informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(Authority: 20 U.S.C. 1221e–3, 3474, 6511(a) and 31 U.S.C. 6503)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 60 FR 41294, Aug. 11, 1995; 61 FR 14484, Apr. 2, 1996]

#### **§ 76.704 New State plan requirements that must be addressed in a State plan.**

(a) This section specifies the State plan requirements that must be addressed in a State plan if the State plan requirements established in statutes or regulations change on a date close to the date that State plans are due for submission to the Department.

(b)(1) A State plan must meet the following requirements:

- (i) Every State plan requirement in effect three months before the date the State plan is due to be submitted to the Department under 34 CFR 76.703; and
- (ii) Every State plan requirement included in statutes or regulations that will be effective on or before the date that funds become available for obligation by the Secretary and that have been signed into law or published in the Federal Register as final regulations three months before the date the State plan is due to be submitted to the Department under 34 CFR 76.703.

(2) If a State plan does not have to meet a new State plan requirement under paragraph (b)(1) of this section, the Secretary takes one of the following actions:

- (i) Require the State to submit assurances and appropriate documentation to show that the new requirements are being followed under the program.
- (ii) Extend the date for submission of State plans and approve pre-award costs as necessary to hold the State harmless.

(3) If the Secretary requires a State to submit assurances under paragraph (b)(2) of this section, the State shall incorporate changes to the State plan as soon as possible to comply with the new requirements. The State shall submit the necessary changes before the start of the next obligation period.

(Authority: 20 U.S.C. 1221e–3, 3474, 6511(a) and 31 U.S.C. 6503)

[60 FR 41296, Aug. 11, 1995]

#### **§ 76.707 When obligations are made.**

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the State or subgrantee uses the property.
(h) A preagreement cost that was properly approved by the State under the cost principals identified in 34 CFR 74.171 and 80.22.	

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 55 FR 14817, Apr. 18, 1990; 57 FR 30342, July 8, 1992]

### **§ 76.708 When certain subgrantees may begin to obligate funds.**

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see §76.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

- (1) The date that the State may begin to obligate funds under §76.703; or
- (2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles that are appended to 34 CFR part 74 (Appendices C–F).

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980. Further redesignated at 60 FR 41295, Aug. 11, 1995]

### **§ 76.709 Funds may be obligated during a “carryover period.”**

- (a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.
- (b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA “shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.” Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: U.S.C. 1221e–3, 1225(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980. Redesignated at 60 FR 41295, Aug. 11, 1995]

**§ 76.710 Obligations made during a carryover period are subject to current statutes, regulations, and applications.**

A State and a subgrantee shall use carryover funds in accordance with:

- (a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and
- (b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA “shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.” Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: U.S.C. 1221e–3, 1225(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296, Dec. 30, 1980. Redesignated at 60 FR 41295, Aug. 11, 1995]

**§ 76.711 Requesting funds by CFDA number.**

If a program is listed in the Catalog of Federal Domestic Assistance (CFDA), a State, when requesting funds under the program, shall identify that program by the CFDA number.

(Authority: 20 U.S.C. 1221e–3, 6511(a), 3474, 31 U.S.C. 6503)

[60 FR 41296, Aug. 11, 1995]

## Reports

### § 76.720 State reporting requirements.

(a) This section applies to a State's reports required under 34 CFR 80.40 (Monitoring and reporting of program performance) and 34 CFR 80.41 (Financial reporting), and other reports required by the Secretary and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

(b) A State must submit these reports annually unless—

(1) The Secretary allows less frequent reporting; or

(2) The Secretary requires a State to report more frequently than annually, including reporting under 34 CFR 80.12 (Special grant or subgrant conditions for “high-risk” grantees) or 34 CFR 80.20 (Standards for financial management systems).

(c)(1) A State must submit these reports in the manner prescribed by the Secretary, including submitting any of these reports electronically and at the quality level specified in the data collection instrument.

(2) Failure by a State to submit reports in accordance with paragraph (c)(1) of this section constitutes a failure, under section 454 of the General Education Provisions Act, 20 U.S.C. 1234c, to comply substantially with a requirement of law applicable to the funds made available under that program.

(3) For reports that the Secretary requires to be submitted in an electronic manner, the Secretary may establish a transition period of up to two years following the date the State otherwise would be required to report the data in the electronic manner, during which time a State will not be required to comply with that specific electronic submission requirement, if the State submits to the Secretary—

(i) Evidence satisfactory to the Secretary that the State will not be able to comply with the electronic submission requirement specified by the Secretary in the data collection instrument on the first date the State otherwise would be required to report the data electronically;

(ii) Information requested in the report through an alternative means that is acceptable to the Secretary, such as through an alternative electronic means; and

(iii) A plan for submitting the reports in the required electronic manner and at the level of quality specified in the data collection instrument no later than the date two years after the first date the State otherwise would be required to report the data in the electronic manner prescribed by the Secretary.

(Authority: 20 U.S.C. 1221e–3, 1231a, and 3474)

[72 FR 3702, Jan. 25, 2007]

### § 76.722 Subgrantee reporting requirements.

A State may require a subgrantee to submit reports in a manner and format that assists the State in complying with the requirements under 34 CFR 76.720 and in carrying out other responsibilities under the program.

(Authority: 20 U.S.C. 1221e–3, 1231a, and 3474)

[72 FR 3703, Jan. 25, 2007]

## Records

**§ 76.730 Records related to grant funds.**

A State and a subgrantee shall keep records that fully show:

- (a) The amount of funds under the grant or subgrant;
- (b) How the State or subgrantee uses the funds;
- (c) The total cost of the project;
- (d) The share of that cost provided from other sources; and
- (e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880–0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

**§ 76.731 Records related to compliance.**

A State and a subgrantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

**Privacy****§ 76.740 Protection of and access to student records; student rights in research, experimental programs, and testing.**

(a) Most records on present or past students are subject to the requirements of section 438 of GEPA and its implementing regulations under 34 CFR part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(b) Under most programs administered by the Secretary, research, experimentation, and testing are subject to the requirements of section 439 of GEPA and its implementing regulations at 34 CFR part 98.

(Authority: 20 U.S.C. 1221e-3, 1232g, 1232h, 3474, and 6511(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 57 FR 30342, July 8, 1992]

**Use of Funds by States and Subgrantees****§ 76.760 More than one program may assist a single activity.**

A State or a subgrantee may use funds under more than one program to support different parts of the same project if the State or subgrantee meets the following conditions:

- (a) The State or subgrantee complies with the requirements of each program with respect to the part of the project assisted with funds under that program.

(b) The State or subgrantee has an accounting system that permits identification of the costs paid for under each program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

**§ 76.761 Federal funds may pay 100 percent of cost.**

A State or a subgrantee may use program funds to pay up to 100 percent of the cost of a project if:

- (a) The State or subgrantee is not required to match the funds; and
- (b) The project can be assisted under the authorizing statute and implementing regulations for the program.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

**State Administrative Responsibilities**

**§ 76.770 A State shall have procedures to ensure compliance.**

Each State shall have procedures for reviewing and approving applications for subgrants and amendments to those applications, for providing technical assistance, for evaluating projects, and for performing other administrative responsibilities the State has determined are necessary to ensure compliance with applicable statutes and regulations.

(Authority: 20 U.S.C. 1221e-3 and 3474)

[57 FR 30342, July 8, 1992]

**§ 76.783 State educational agency action—subgrantee's opportunity for a hearing.**

- (a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:
  - (1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or
  - (2) Terminating further assistance for an approved project.
- (b) The procedures in §76.401(d)(2)–(7) apply to any request for a hearing under this section.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA “shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act.” Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under section 427 or other applicable law.

(Authority: 20 U.S.C. 1231b–2)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86296,

Dec. 30, 1980; 57 FR 30342, July 8, 1992]

## **Subpart H—How Does a State or Local Educational Agency Allocate Funds to Charter Schools?**

**Source:** 64 FR 71965, Dec. 22, 1999, unless otherwise noted.

### **General**

#### **§ 76.785 What is the purpose of this subpart?**

The regulations in this subpart implement section 10306 of the Elementary and Secondary Education Act of 1965 (ESEA), which requires States to take measures to ensure that each charter school in the State receives the funds for which it is eligible under a covered program during its first year of operation and during subsequent years in which the charter school expands its enrollment.

(Authority: 20 U.S.C. 8065a)

#### **§ 76.786 What entities are governed by this subpart?**

The regulations in this subpart apply to—

- (a) State educational agencies (SEAs) and local educational agencies (LEAs) that fund charter schools under a covered program, including SEAs and LEAs located in States that do not participate in the Department's Public Charter Schools Program;
- (b) State agencies that are not SEAs, if they are responsible for administering a covered program. State agencies that are not SEAs must comply with the provisions in this subpart that are applicable to SEAs; and
- (c) Charter schools that are scheduled to open or significantly expand their enrollment during the academic year and wish to participate in a covered program.

(Authority: 20 U.S.C. 8065a)

#### **§ 76.787 What definitions apply to this subpart?**

For purposes of this subpart—

*Academic year* means the regular school year (as defined by State law, policy, or practice) and for which the State allocates funds under a covered program.

*Charter school* has the same meaning as provided in title X, part C of the ESEA.

*Charter school LEA* means a charter school that is treated as a local educational agency for purposes of the applicable covered program.

*Covered program* means an elementary or secondary education program administered by the Department under which the Secretary allocates funds to States on a formula basis, except that the term does not include a program or portion of a program under which an SEA awards subgrants on a discretionary, noncompetitive basis.

*Local educational agency* has the same meaning for each covered program as provided in the authorizing statute for the program.

*Significant expansion of enrollment* means a substantial increase in the number of students attending a

charter school due to a significant event that is unlikely to occur on a regular basis, such as the addition of one or more grades or educational programs in major curriculum areas. The term also includes any other expansion of enrollment that the SEA determines to be significant.

(Authority: 20 U.S.C. 8065a)

## Responsibilities for Notice and Information

### § 76.788 What are a charter school LEA's responsibilities under this subpart?

- (a) *Notice.* At least 120 days before the date a charter school LEA is scheduled to open or significantly expand its enrollment, the charter school LEA or its authorized public chartering agency must provide its SEA with written notification of that date.
- (b) *Information.* (1) In order to receive funds, a charter school LEA must provide to the SEA any available data or information that the SEA may reasonably require to assist the SEA in estimating the amount of funds the charter school LEA may be eligible to receive under a covered program.
- (2)(i) Once a charter school LEA has opened or significantly expanded its enrollment, the charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require.
- (ii) An SEA is not required to provide funds to a charter school LEA until the charter school LEA provides the SEA with the required actual enrollment and eligibility data.
- (c) *Compliance.* Except as provided in §76.791(a), or the authorizing statute or implementing regulations for the applicable covered program, a charter school LEA must establish its eligibility and comply with all applicable program requirements on the same basis as other LEAs.

(Approved by the Office of Management and Budget under control number 1810–0623)

(Authority: 20 U.S.C. 8065a)

### § 76.789 What are an SEA's responsibilities under this subpart?

- (a) *Information.* Upon receiving notice under §76.788(a) of the date a charter school LEA is scheduled to open or significantly expand its enrollment, an SEA must provide the charter school LEA with timely and meaningful information about each covered program in which the charter school LEA may be eligible to participate, including notice of any upcoming competitions under the program.
- (b) *Allocation of Funds.* (1) An SEA must allocate funds under a covered program in accordance with this subpart to any charter school LEA that—
- (i) Opens for the first time or significantly expands its enrollment during an academic year for which the State awards funds by formula or through a competition under the program;
- (ii) In accordance with §76.791(a), establishes its eligibility and complies with all applicable program requirements; and
- (iii) Meets the requirements of §76.788(a).
- (2) In order to meet the requirements of this subpart, an SEA may allocate funds to, or reserve funds for, an eligible charter school LEA based on reasonable estimates of projected enrollment at the charter school LEA.
- (3)(i) The failure of an eligible charter school LEA or its authorized public chartering agency to provide notice to its SEA in accordance with §76.788(a) relieves the SEA of any obligation to allocate funds to the

charter school within five months.

(ii) Except as provided in §76.792(c), an SEA that receives less than 120 days' actual notice of the date an eligible charter school LEA is scheduled to open or significantly expand its enrollment must allocate funds to the charter school LEA on or before the date the SEA allocates funds to LEAs under the applicable covered program for the succeeding academic year.

(iii) The SEA may provide funds to the charter school LEA from the SEA's allocation under the applicable covered program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Approved by the Office of Management and Budget under control number 1810–0623)

(Authority: 20 U.S.C. 8065a)

### **Allocation of Funds by State Educational Agencies**

#### **§ 76.791 On what basis does an SEA determine whether a charter school LEA that opens or significantly expands its enrollment is eligible to receive funds under a covered program?**

(a) For purposes of this subpart, an SEA must determine whether a charter school LEA is eligible to receive funds under a covered program based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA opens or significantly expands its enrollment.

(b) For the year the charter school LEA opens or significantly expands its enrollment, the eligibility determination may not be based on enrollment or eligibility data from a prior year, even if the SEA makes eligibility determinations for other LEAs under the program based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

#### **§ 76.792 How does an SEA allocate funds to eligible charter school LEAs under a covered program in which the SEA awards subgrants on a formula basis?**

(a) For each eligible charter school LEA that opens or significantly expands its enrollment on or before November 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives the proportionate amount of funds for which the charter school LEA is eligible under each covered program.

(b) For each eligible charter school LEA that opens or significantly expands its enrollment after November 1 but before February 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives at least a *pro rata* portion of the proportionate amount of funds for which the charter school LEA is eligible under each covered program. The *pro rata* amount must be based on the number of months or days during the academic year the charter school LEA will participate in the program as compared to the total number of months or days in the academic year.

(c) For each eligible charter school LEA that opens or significantly expands its enrollment on or after February 1 of an academic year, the SEA may implement procedures to provide the charter school LEA with a *pro rata* portion of the proportionate amount of funds for which the charter school LEA is eligible under each covered program.

(Authority: 20 U.S.C. 8065a)

**§ 76.793 When is an SEA required to allocate funds to a charter school LEA under this subpart?**

Except as provided in §§76.788(b) and 76.789(b)(3):

(a) For each eligible charter school LEA that opens or significantly expands its enrollment on or before November 1 of an academic year, the SEA must allocate funds to the charter school LEA within five months of the date the charter school LEA opens or significantly expands its enrollment; and

(b)(1) For each eligible charter school LEA that opens or significantly expands its enrollment after November 1, but before February 1 of an academic year, the SEA must allocate funds to the charter school LEA on or before the date the SEA allocates funds to LEAs under the applicable covered program for the succeeding academic year.

(2) The SEA may provide funds to the charter school LEA from the SEA's allocation under the program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

**§ 76.794 How does an SEA allocate funds to charter school LEAs under a covered program in which the SEA awards subgrants on a discretionary basis?**

(a) *Competitive programs.* (1) For covered programs in which the SEA awards subgrants on a competitive basis, the SEA must provide each eligible charter school LEA in the State that is scheduled to open on or before the closing date of any competition under the program a full and fair opportunity to apply to participate in the program.

(2) An SEA is not required to delay the competitive process in order to allow a charter school LEA that has not yet opened or significantly expanded its enrollment to compete for funds under a covered program.

(b) *Noncompetitive discretionary programs.* The requirements in this subpart do not apply to discretionary programs or portions of programs under which the SEA does not award subgrants through a competition.

(Authority: 20 U.S.C. 8065a)

**Adjustments****§ 76.796 What are the consequences of an SEA allocating more or fewer funds to a charter school LEA under a covered program than the amount for which the charter school LEA is eligible when the charter school LEA actually opens or significantly expands its enrollment?**

(a) An SEA that allocates more or fewer funds to a charter school LEA than the amount for which the charter school LEA is eligible, based on actual enrollment or eligibility data when the charter school LEA opens or significantly expands its enrollment, must make appropriate adjustments to the amount of funds allocated to the charter school LEA as well as to other LEAs under the applicable program.

(b) Any adjustments to allocations to charter school LEAs under this subpart must be based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA first opens or significantly expands its enrollment, even if allocations or adjustments to allocations to other LEAs in the State are based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

**§ 76.797 When is an SEA required to make adjustments to allocations under this subpart?**

- (a) The SEA must make any necessary adjustments to allocations under a covered program on or before the date the SEA allocates funds to LEAs under the program for the succeeding academic year.
- (b) In allocating funds to a charter school LEA based on adjustments made in accordance with paragraph (a) of this section, the SEA may use funds from the SEA's allocation under the applicable covered program for the academic year in which the charter school LEA opened or significantly expanded its enrollment, or from the SEA's allocation under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

**Applicability of This Subpart to Local Educational Agencies****§ 76.799 Do the requirements in this subpart apply to LEAs?**

- (a) Each LEA that is responsible for funding a charter school under a covered program must comply with the requirements in this subpart on the same basis as SEAs are required to comply with the requirements in this subpart.
- (b) In applying the requirements in this subpart (except for §§76.785, 76.786, and 76.787) to LEAs, references to SEA (or State), charter school LEA, and LEA must be read as references to LEA, charter school, and public school, respectively.

(Authority: 20 U.S.C. 8065a)

**Subpart I—What Procedures Does the Secretary Use To Get Compliance?**

**Source:** 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980, and further redesignated at 64 FR 71965, Dec. 22, 1999.

**§ 76.900 Waiver of regulations prohibited.**

- (a) No official, agent, or employee of ED may waive any regulation that applies to a Department program unless the regulation specifically provide that it may be waived.
- (b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31(1963))

**§ 76.901 Office of Administrative Law Judges.**

- (a) The Office of Administrative Law Judges, established under Part E of GEPA, has the following functions:
- (1) Recovery of funds hearings under section 452 of GEPA.
  - (2) Withholding hearings under section 455 of GEPA.

- (3) Cease and desist hearings under section 456 of GEPA.
- (4) Any other proceeding designated by the Secretary under section 451 of GEPA.
- (b) The regulations of the Office of Administrative Law Judges are at 34 CFR part 81.

(Authority: 20 U.S.C. 1234)

[57 FR 30342, July 8, 1992]

**§ 76.902 Judicial review.**

After a hearing by the Secretary, a State is usually entitled—generally by the statute that required the hearing—to judicial review of the Secretary's decision.

(Authority: 20 U.S.C. 1221e–3, 3474, and 6511(a))

**§ 76.910 Cooperation with audits.**

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. appendix 3, sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e–3(a)(1), 1232f)

[54 FR 21776, May 19, 1989]

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## 34 CFR PART 77—DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

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### Section Contents

[§ 77.1 Definitions that apply to all Department programs.](#)

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#### § 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in part 74 or 80 of this title apply to the regulations in title 34 of the Code of Federal Regulations. The section of part 74 or 80 that contains the definition is given in parentheses.

*Award* (§74.2)

*Contract* (includes definition of “Subcontract”) (§74.2) (§80.3)

*Equipment* (§74.2) (§80.3)

*Grant* (§80.3)

*Personal property* (§74.2)

*Project period* (§74.2)

*Real property* (§74.2) (§80.3)

*Recipient* (§74.2)

*Supplies* (§74.2) (§80.3)

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in this title:

*Acquisition* means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

*Applicant* means a party requesting a grant or subgrant under a program of the Department.

*Application* means a request for a grant or subgrant under a program of the Department.

*Budget* means that recipient's financial plan for carrying out the project or program.

*Budget period* means an interval of time into which a project period is divided for budgetary purposes.

*Department* means the U.S. Department of Education.

*Director of the Institute of Museum Services* means the Director of the Institute of Museum Services or an officer or employee of the Institute of Museum Services acting for the Director under a delegation of authority.

*Director of the National Institute of Education* means the Director of the National Institute of Education or an officer or employee of the National Institute of Education acting for the Director under a delegation of authority.

*ED* means the U.S. Department of Education.

*EDGAR* means the Education Department General Administrative Regulations (34 CFR parts 74, 75, 76, 77, 79, 80, 81, 82, 85, 86, 97, 98, and 99.)

*Elementary school* means a day or residential school that provides elementary education, as determined under State law.

*Facilities* means one or more structures in one or more locations.

*Fiscal year* means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30.

*GEPA* means The General Education Provisions Act.

*Grant period* means the period for which funds have been awarded.

*Grantee* means the legal entity other than a Government subject to 34 CFR part 80 to which a grant is awarded and which is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the award document. For example, a grant award document may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually intends, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations which may be only components of a legal entity.) The term “grantee” does not include any secondary recipients such as subgrantees, contractors, etc., who may receive funds from a grantee pursuant to a grant. The definition of “grantee” for State, local, and tribal governments is contained in 34 CFR 80.3.

*Local educational agency* means:

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(c) As used in 34 CFR parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

*Minor remodeling* means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building.

The term does not include building construction, structural alterations to buildings, building maintenance, or repairs.

*Nonprofit*, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

*Nonpublic*, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

*Preschool* means the educational level from a child's birth to the time at which the State provides elementary education.

*Private*, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

*Project* means the activity described in an application.

*Public*, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government.

*Secondary school* means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

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

*Service function*, with respect to a local educational agency:

(a) Means an educational service that is performed by a legal entity—such as an intermediate agency:

(1)(i) Whose jurisdiction does not extend to the whole State; and

(ii) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(2) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(b) The term does not include a service that is performed by a cultural or educational resource.

*State* means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

*State educational agency* means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

*Work of art* means an item that is incorporated into facilities primarily because of its aesthetic value.

(Authority: 20 U.S.C. 1221e–3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989; 57 FR 30342, July 8, 1992; 59 FR 34739, July 6, 1994; 64 FR 50392, Sept. 16, 1999]

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## 34 CFR PART 79—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF EDUCATION PROGRAMS AND ACTIVITIES

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**Authority:** 31 U.S.C. 6506; 42 U.S.C. 3334; and E.O. 12372, unless otherwise noted.

**Source:** 48 FR 29166, June 24, 1983, unless otherwise noted.

**§ 79.1 What is the purpose of these regulations?**

(a) The regulations in this part implement Executive Order 12372, “Intergovernmental Review of Federal Programs,” issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of Section 401 of the Intergovernmental Cooperation Act of 1968 and Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional, and local coordination for review of proposed federal financial assistance.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

(Authority: E.O. 12372)

## **§ 79.2 What definitions apply to these regulations?**

*Department* means the U.S. Department of Education.

*Order* means Executive Order 12372, issued July 14, 1982, amended April 8, 1983, and titled “Intergovernmental Review of Federal Programs.”

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

*State* means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

(Authority: E.O. 12372)

## **§ 79.3 What programs and activities of the Department are subject to these regulations?**

(a) The Secretary publishes in the Federal Register a list of the Department's programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

(b) If a program or activity of the Department that provides Federal financial assistance does not have implementing regulations, the regulations in this part apply to that program or activity.

(c) The following programs and activities are excluded from coverage under this part:

(1) Proposed legislation.

(2) Regulation and budget formulation.

(3) National security matters.

(4) Procurement.

(5) Direct payments to individuals.

(6) Financial transfers for which the Department has no funding discretion or direct authority to approve specific sites or projects (e.g., block grants under Chapter 2 of the Education Consolidation and Improvement Act of 1981).

(7) Research and development national in scope.

(8) Assistance to federally recognized Indian tribes.

(d) In addition to the programs and activities excluded in paragraph (c) of this section, the Secretary may only exclude a Federal financial assistance program or activity from coverage under this part if the program or activity does not directly affect State or local governments.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20824, June 9, 1986]

#### **§ 79.4 What are the Secretary's general responsibilities under the Order?**

- (a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the nonfederal funds for, or that would be directly affected by, proposed federal financial assistance from the Department.
- (b) If a state adopts a process under the Order to review and coordinate proposed federal financial assistance, the Secretary, to the extent permitted by law:
- (1) Uses the state process to determine official views of state and local elected officials;
  - (2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;
  - (3) Makes efforts to accommodate state and local elected official's concerns with proposed federal financial assistance that are communicated through the state process;
  - (4) Allows the states to simplify and consolidate existing federally required state plan submissions;
  - (5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of state plans for federally required state plans;
  - (6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed federal financial assistance has an impact on interstate metropolitan urban centers or other interstate areas; and
  - (7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

(Authority: E.O. 12372, Sec. 2)

#### **§ 79.5 What is the Secretary's obligation with respect to Federal interagency coordination?**

The Secretary, to the maximum extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

(Authority: E.O. 12372)

#### **§ 79.6 What procedures apply to the selection of programs and activities under these regulations?**

- (a) A state may select any program or activity published in the Federal Register in accordance with §79.3 for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.
- (b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.
- (c) A state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

(Authority: E.O. 12372, sec. 2)

### **§ 79.7 How does the Secretary communicate with State and local officials concerning the Department's programs and activities?**

(a) [Reserved]

(b)(1) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed federal financial assistance if:

- (i) The state has not adopted a process under the Order; or
- (ii) The assistance involves a program or activity not selected for the state process.

(2) This notice may be made by publication in the Federal Register or other means which the Secretary determine appropriate.

(Authority: E.O. 12372, Sec. 2)

### **§ 79.8 How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?**

(a) Except in unusual circumstances, the Secretary gives State processes or directly affected State, areawide, regional, and local officials and entities—

- (1) At least 30 days to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and
- (2) At least 60 days to comment on proposed Federal financial assistance other than noncompeting continuation awards.

(b) The Secretary establishes a date for mailing or hand-delivering comments under paragraph (a) of this section using one of the following two procedures:

- (1) If the comments relate to continuation award applications, the Secretary notifies each applicant and each State Single Point of Contact (SPOC) of the date by which SPOC comments should be submitted.
- (2) If the comments relate to applications for new grants, the Secretary establishes the date in a notice published in the Federal Register.

(c) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

(d) Applicants for programs and activities subject to Section 204 of the Demonstration Cities and Metropolitan Act shall allow areawide agencies a 60-day opportunity for review and comment.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

### **§ 79.9 How does the Secretary receive and respond to comments?**

(a) The Secretary follows the procedure in §79.10 if:

- (1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a State process recommendation, and identifies it as such, for a program selected under §79.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional, or local officials and entities if there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional, and local officials and entities may submit comments to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional, and local officials and entities may submit comments to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of §79.10.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of §79.10 of this part, if those comments are provided by a single point of contact, or directly to the Department by a commenting party.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

### **§ 79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?**

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in such form as the Secretary deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of the notification.

(Authority: E.O. 12372, Sec. 2)

### **§ 79.11 What are the Secretary's obligations in interstate situations?**

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance that has an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity.

- (3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;
- (4) Responding under §79.10 if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.
- (b) In an interstate situation subject to this section, the Secretary uses the procedures in §79.10 if a state process provides a state process recommendation to the Department through a single point of contact.

(Authority: E.O. 12372, Sec. 2(e))

### **§ 79.12 How may a State simplify, consolidate, or substitute federally required State plans?**

(a) As used in this section:

- (1) *Simplify* means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.
  - (2) *Consolidate* means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.
  - (3) *Substitute* means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.
- (b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute federally required state plans without prior approval by the Secretary.
  - (c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

(Authority: E.O. 12372, sec. 2)

### **§ 79.13 [Reserved]**

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## **34 CFR PART 80—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS**

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**Authority:** 20 U.S.C. 1221e–3(a)(1) and 3474, OMB Circular A–102, unless otherwise noted.

**Source:** 53 FR 8071 and 8087, Mar. 11, 1988, unless otherwise noted.

### **Subpart A—General**

#### **§ 80.1 Purpose and scope of this part.**

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

#### **§ 80.2 Scope of subpart.**

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

### § 80.3 Definitions.

As used in this part:

*Accrued expenditures* mean the charges incurred by the grantee during a given period requiring the provision of funds for:

- (1) Goods and other tangible property received;
- (2) Services performed by employees, contractors, subgrantees, subcontractors, and other payees; and
- (3) Other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

*Accrued income* means the sum of:

- (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and
- (2) Amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

*Acquisition cost* of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

*Administrative* requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

*Awarding agency* means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

*Cash contributions* means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

*Contract* means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

*Cost sharing or matching* means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

*Cost-type contract* means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

*Equipment* means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

*Expenditure report* means:

- (1) For nonconstruction grants, the SF–269 “Financial Status Report” (or other equivalent report);

(2) For construction grants, the SF-271 “Outlay Report and Request for Reimbursement” (or other equivalent report).

*Federally recognized Indian tribal government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

*Government* means a State or local government or a federally recognized Indian tribal government.

*Grant* means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

*Grantee* means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

*Local government* means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

*Obligations* means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

*OMB* means the United States Office of Management and Budget.

*Outlays (expenditures)* mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

*Percentage of completion method* refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

*Prior approval* means documentation evidencing consent prior to incurring specific cost.

*Real property* means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

*Share*, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

*State* means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under

United States Housing Act of 1937.

(1) The definition of *State* in this section is used for the purpose of determining the scope of part 80 regulations. Some program regulations contain different definitions for *State* based on program statute eligibility requirements.

*Subgrant* means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

*Subgrantee* means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

*Supplies* means all tangible personal property other than *equipment* as defined in this part.

*Suspension* means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

*Termination* means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include:

- (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;
- (2) Withdrawal of the unobligated balance as of the expiration of a grant;
- (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or
- (4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

*Terms of a grant or subgrant* mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

*Third party in-kind contributions* mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

*Unliquidated obligations* for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

*Unobligated balance* means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

#### **§ 80.4 Applicability.**

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §80.6, or:

- (1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

- (2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).
- (3) Entitlement grants to carry out the following programs of the Social Security Act:
- (i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);
  - (ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);
  - (iii) Foster Care and Adoption Assistance (Title IV-E of the Act);
  - (iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and
  - (v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).
- (4) Entitlement grants under the following programs of The National School Lunch Act:
- (i) School Lunch (section 4 of the Act),
  - (ii) Commodity Assistance (section 6 of the Act),
  - (iii) Special Meal Assistance (section 11 of the Act),
  - (iv) Summer Food Service for Children (section 13 of the Act), and
  - (v) Child Care Food Program (section 17 of the Act).
- (5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:
- (i) Special Milk (section 3 of the Act), and
  - (ii) School Breakfast (section 4 of the Act).
- (6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).
- (7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;
- (8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522 (e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;
- (9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and
- (10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).
- (b) *Entitlement programs*. Entitlement programs enumerated above in §80.4(a) (3) through (8) are subject to Subpart E.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

### § 80.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §80.6.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

## § 80.6 Additions and exceptions.

- (a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the Federal Register.
- (b) Exceptions for classes of grants or grantees may be authorized only by the Secretary after consultation with OMB.
- (c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

## Subpart B—Pre-Award Requirements

### § 80.10 Forms for applying for grants.

- (a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.
- (2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.
- (b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.
- (2) Applicants are not required to submit more than the original and two copies of preapplications or applications.
- (3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.
- (4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

(Approved by the Office of Management and Budget under control number 1880–0517)

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

**§ 80.11 State plans.**

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, “Intergovernmental Review of Federal Programs,” States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

- (1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,
- (2) Repeat the assurance language in the statutes or regulations, or
- (3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect:

- (1) New or revised Federal statutes or regulations or
- (2) A material change in any State law, organization, policy, or State agency operation.

The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

**§ 80.12 Special grant or subgrant conditions for “high-risk” grantees.**

(a) A grantee or subgrantee may be considered “high risk” if an awarding agency determines that a grantee or subgrantee:

- (1) Has a history of unsatisfactory performance, or
- (2) Is not financially stable, or
- (3) Has a management system which does not meet the management standards set forth in this part, or
- (4) Has not conformed to terms and conditions of previous awards, or
- (5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

- (1) Payment on a reimbursement basis;
- (2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;
- (3) Requiring additional, more detailed financial reports;
- (4) Additional project monitoring;
- (5) Requiring the grantee or subgrantee to obtain technical or management assistance; or
- (6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

- (1) The nature of the special conditions/restrictions;
- (2) The reason(s) for imposing them;
- (3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

## Subpart C—Post-Award Requirements

### Financial Administration

#### § 80.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to:

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and  
 (2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as

apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

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(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

## § 80.21 Payment.

(a) *Scope*. This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard*. Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances*. Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement*. Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances*. If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment*. (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments*. (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §80.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

## § 80.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) For each kind of organization, there is a set of Federal principles for determining allowable costs. For the costs of a State, local, or Indian tribal government, the Secretary applies the cost principles in OMB Circular A-87, as amended on June 9, 1987.

For the costs of a—	Use the principles in—
State, local or Indian tribal government	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular	OMB Circular A-122.
Educational institutions.	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OBM Circular A-122 as not subject to that circular	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

## § 80.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

## **§ 80.24 Matching or cost sharing.**

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions* —(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in §80.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §80.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

- (ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect cost. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.
- (iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:
- (A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or
- (B) A cost savings to the grantee or subgrantee.
- (iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.
- (c) *Valuation of donated services* —(1) *Volunteer services*. Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.
- (2) *Employees of other organizations*. When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.
- (d) *Valuation of third party donated supplies and loaned equipment or space*. (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.
- (2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.
- (e) *Valuation of third party donated equipment, buildings, and land*. If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:
- (1) *Awards for capital expenditures*. If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,
- (2) *Other awards*. If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:
- (i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.
- (ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §80.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The

amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

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(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

## **§ 80.25 Program income.**

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. “During the grant period” is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §80.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§80.31 and 80.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be

deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

## § 80.26 Non-Federal audit.

(a) *Basic Rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends \$300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractors have complied with laws and regulations affecting the expenditures of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, OMB Circular A-133, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, §80.36 shall be followed.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 3474, OMB Circulars A-102, A-128 and A-133)

Note: The requirements for non-Federal audits are contained in the appendix to part 80—Audit Requirements for State and Local Governments.

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 56 FR 1698, Jan. 16, 1991; 62 FR 45939, 45943, Aug. 29, 1997]

## Changes, Property, and Subawards

### § 80.30 Changes.

- (a) *General*. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.
- (b) *Relation to cost principles*. The applicable cost principles (see §80.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.
- (c) *Budget changes* —(1) *Nonconstruction projects*. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:
- (i) Any revision which would result in the need for additional funding.
  - (ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.
  - (iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).
- (2) *Construction projects*. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.
- (3) *Combined construction and nonconstruction projects*. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.
- (d) *Programmatic changes*. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:
- (1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).
  - (2) Need to extend the period of availability of funds.
  - (3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.
  - (4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §80.36 but does not apply to the procurement of equipment, supplies, and general support services.
- (e) *Additional prior approval requirements*. The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.
- (f) *Requesting prior approval*. (1) A request for prior approval of any budget revision will be in the same

budget form the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §80.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

### **§ 80.31 Real property.**

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use*. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition*. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title*. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property*. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title*. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

(d) The provisions of paragraph (c) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

## § 80.32 Equipment.

- (a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.
- (b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.
- (c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.
- (2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.
- (3) Notwithstanding the encouragement in §80.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.
- (4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.
- (d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:
- (1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.
  - (2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.
  - (3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.
  - (4) Adequate maintenance procedures must be developed to keep the property in good condition.
  - (5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.
- (e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:
- (1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.
  - (2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.
  - (3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

- (1) Title will remain vested in the Federal Government.
- (2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.
- (3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

- (1) The property shall be identified in the grant or otherwise made known to the grantee in writing.
- (2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow §80.32(e).
- (3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

(h) The provisions of paragraphs (c), (d), (e), and (g) of this section do not apply to disaster assistance under 20 U.S.C. 241–1(b)–(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631–647.

(Approved by the Office of Management and Budget under control number 1880–0517)

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

### **§ 80.33 Supplies.**

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

### **§ 80.34 Copyrights.**

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

- (a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and
- (b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

### **§ 80.35 Subawards to debarred and suspended parties.**

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension." (Authority: 20 U.S.C. 3474; OMB Circular A-102)

### § 80.36 Procurement.

(a) *States*. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards*. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only:

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §80.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or

service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed* —(1) *Procurement by small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S. C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) *Procurement by sealed bids (formal advertising)*. Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §80.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;  
 (B) Two or more responsible bidders are willing and able to compete effectively and for the business; and  
 (C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;  
 (B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;  
 (C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;  
 (D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) *Procurement by competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

- (iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;
  - (iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
  - (v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.
- (4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.
- (i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:
    - (A) The item is available only from a single source;
    - (B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
    - (C) The awarding agency authorizes noncompetitive proposals; or
    - (D) After solicitation of a number of sources, competition is determined inadequate.
  - (ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.
  - (iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.
- (e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.*
- (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.
  - (2) Affirmative steps shall include:
    - (i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
    - (ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
    - (iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;
    - (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;
    - (v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
    - (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.
- (f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or

based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §80.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "brand name" product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum

requirements shall be as follows:

- (1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.
- (2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
- (3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.
- (i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.
  - (1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)
  - (2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)
  - (3) Compliance with Executive Order 11246 of September 24, 1965, entitled “Equal Employment Opportunity,” as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)
  - (4) Compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)
  - (5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation)
  - (6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers)
  - (7) Notice of awarding agency requirements and regulations pertaining to reporting.
  - (8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
  - (9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.
  - (10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
  - (11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.
  - (12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)
  - (13) Mandatory standards and policies relating to energy efficiency which are contained in the state

energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

(j) *Contracting with faith-based organizations.* (1)(i) A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible.

(ii) In the selection of goods and services providers, grantees and subgrantees, including States, shall not discriminate for or against a private organization on the basis of the organization's religious character or affiliation.

(2) The provisions of §§75.532 and 76.532 applicable to grantees and subgrantees apply to a faith-based organization that contracts with a grantee or subgrantee, including a State, unless the faith-based organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(3) A private organization that engages in inherently religious activities, such as religious worship, instruction, or proselytization, must offer those services separately in time or location from any programs or services supported by a contract with a grantee or subgrantee, including a State, and participation in any such inherently religious activities by beneficiaries of the programs supported by the contract must be voluntary, unless the organization is selected as a result of the genuine and independent private choices of individual beneficiaries of the program and provided the organization otherwise satisfies the requirements of the program.

(4)(i) A faith-based organization that contracts with a grantee or subgrantee, including a State, may retain its independence, autonomy, right of expression, religious character, and authority over its governance.

(ii) A faith-based organization may, among other things—

(A) Retain religious terms in its name;

(B) Continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs;

(C) Use its facilities to provide services without removing or altering religious art, icons, scriptures, or other symbols from these facilities;

(D) Select its board members and otherwise govern itself on a religious basis; and

(E) Include religious references in its mission statement and other chartering or governing documents.

(5) A private organization that contracts with a grantee or subgrantee, including a State, shall not discriminate against a beneficiary or prospective beneficiary in the provision of program services on the basis of religion or religious belief.

(6) A religious organization's exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization contracts with a grantee or subgrantee.

(Approved by the Office of Management and Budget under control number 1880–0517)

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988; 60 FR 19639, 19643, Apr. 19, 1995; 69 FR 31711, June 4, 2004]

### **§ 80.37 Subgrants.**

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal

governments. States shall:

- (1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;
- (2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;
- (3) Ensure that a provision for compliance with §80.42 is placed in every cost reimbursement subgrant; and
- (4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

- (1) Ensure that every subgrant includes a provision for compliance with this part;
- (2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and
- (3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

- (1) Section 80.10;
- (2) Section 80.11;
- (3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in §80.21; and
- (4) Section 80.50.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

## Reports, Records Retention, and Enforcement

### § 80.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

- (i) A comparison of actual accomplishments to the objectives established for the period. Where the output

of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

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(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

## **§ 80.41 Financial reporting.**

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under

this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report* —(1) *Form*. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §80.41(e)(2)(iii).

(2) *Accounting basis*. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency*. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date*. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report* —(1) *Form*. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements*. Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees*. When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date*. Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement* —(1) *Advance payments*. Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements*. Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §80.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs* —(1) *Grants that support construction activities paid by reimbursement method.* (i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §80.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §80.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by §80.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §80.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §80.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §80.41(b)(2).

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(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

## **§ 80.42 Retention and access requirements for records.**

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or  
 (ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see §80.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(4) A recipient that receives funds under a program subject to 20 U.S.C. 1232f (section 437 of the General Education Provisions Act) shall retain records for a minimum of three years after the starting date specified in paragraph (c) of this section.

(c) *Starting date of retention period* —(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee

or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records* —(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

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(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988; 64 FR 50392, Sept. 16, 1999]

### **§ 80.43 Enforcement.**

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

- (1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,
- (2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,
- (3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,
- (4) Withhold further awards for the program, or
- (5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see §80.35).

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

#### **§ 80.44 Termination for convenience.**

Except as provided in §80.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either §80.43 or paragraph (a) of this section.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

### **Subpart D—After-the-Grant Requirements**

#### **§ 80.50 Closeout.**

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

- (1) Final performance or progress report.
- (2) Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable).
- (3) Final request for payment (SF–270) (if applicable).
- (4) Invention disclosure (if applicable).
- (5) *Federally-owned property report.* In accordance with §80.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

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(Authority: 20 U.S.C. 3474; OMB Circular A–102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

### **§ 80.51 Later disallowances and adjustments.**

The closeout of a grant does not affect:

- (a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;
- (b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;
- (c) Records retention as required in §80.42;
- (d) Property management requirements in §§80.31 and 80.32; and
- (e) Audit requirements in §80.26.

(Authority: 20 U.S.C. 3474; OMB Circular A–102)

### **§ 80.52 Collection of amounts due.**

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

- (1) Making an administrative offset against other requests for reimbursements,
- (2) Withholding advance payments otherwise due to the grantee, or
- (3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date

from which interest is computed is not extended by litigation or the filing of any form of appeal.

**Subpart E—Entitlement [Reserved]**

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## 34 CFR PART 81—GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

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**Authority:** 20 U.S.C. 1221e–3, 1234–1234i, and 3474(a), unless otherwise noted.

**Source:** 54 FR 19512, May 5, 1989, unless otherwise noted.

## Subpart A—General Provisions

### § 81.1 Purpose.

The regulations in this part govern the enforcement of legal requirements under applicable programs administered by the Department of Education and implement Part E of the General Education Provisions Act (GEPA).

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

### § 81.2 Definitions.

The following definitions apply to the terms used in this part:

*Administrative Law Judge* (ALJ) means a judge appointed by the Secretary in accordance with section 451 (b) and (c) of GEPA.

*Applicable program* means any program for which the Secretary of Education has administrative responsibility, except a program authorized by—

(a) The Higher Education Act of 1965, as amended;

(b) The Act of September 30, 1950 (Pub. L. 874, 81st Congress), as amended; or

(c) The Act of September 23, 1950 (Pub. L. 815, 81st Congress), as amended.

*Department* means the United States Department of Education.

*Disallowance decision* means the decision of an authorized Departmental official that a recipient must return funds because it made an expenditure of funds that was not allowable or otherwise failed to discharge its obligation to account properly for funds. Such a decision, referred to as a “preliminary departmental decision” in section 452 of GEPA, is subject to review by the Office of Administrative Law Judges.

*Party* means either of the following:

(a) A recipient that appeals a decision.

(b) An authorized Departmental official who issues a decision that is appealed.

*Recipient* means the recipient of a grant or cooperative agreement under an applicable program.

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

(Authority: 20 U.S.C. 1221e–3, 1234 (b), (c), and (f)(1), 1234a(a)(1), 1234i, and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

### **§ 81.3 Jurisdiction of the Office of Administrative Law Judges.**

(a) The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program:

(1) Hearings for recovery of funds.

(2) Withholding hearings.

(3) Cease and desist hearings.

(b) The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the Federal Register.

(Authority: 5 U.S.C. 554, 20 U.S.C. 1234(a))

### **§ 81.4 Membership and assignment to cases.**

(a) The Secretary appoints Administrative Law Judges as members of the OALJ.

(b) The Secretary appoints one of the members of the OALJ to be the chief judge. The chief judge is responsible for the efficient and effective administration of the OALJ.

(c) The chief judge assigns an ALJ to each case or class of cases within the jurisdiction of the OALJ.

(Authority: 20 U.S.C. 1221e–3, 1234 (b) and (c), and 3474(a))

### **§ 81.5 Authority and responsibility of an Administrative Law Judge.**

(a) An ALJ assigned to a case conducts a hearing on the record. The ALJ regulates the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case in accordance with applicable law.

(b) An ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(c) An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is

or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case.

(d)(1) An ALJ may disqualify himself or herself at any time on the basis of the standards in paragraph (c) of this section.

(2) A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the disqualification matter before proceeding further with the case.

(Authority: 5 U.S.C. 556(b); 20 U.S.C. 1221e–3, 1234 (d), (f)(1) and (g)(1), and 3474(a))

### **§ 81.6 Hearing on the record.**

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.

(b) Except as otherwise provided in this part or in a notice of designation under §81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) At a party's request, the ALJ shall confer with the parties in person or by conference telephone call before determining whether an evidentiary hearing or an oral argument is needed.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474)

### **§ 81.7 Non-party participation.**

(a) A person or organization, other than a party, that wishes to participate in a case shall file an application to participate with the ALJ assigned to the case. The application must—

(1) Identify the case in which participation is sought;

(2) State how the applicant's interest relates to the case;

(3) State how the applicant's participation would aid in the disposition of the case; and

(4) State how the applicant seeks to participate.

(b) The ALJ may permit an applicant to participate if the ALJ determines that the applicant's participation—

(1) Will aid in the disposition of the case;

(2) Will not unduly delay the proceedings; and

(3) Will not prejudice the adjudication of the parties' rights.

(c) If the ALJ permits an applicant to participate, the ALJ permits the applicant to file briefs.

(d)(1) In addition to the participation described in paragraph (c) of this section, the ALJ may permit the applicant to participate in any or all of the following ways:

(i) Submit documentary evidence.

(ii) Participate in an evidentiary hearing afforded the parties.

(iii) Participate in an oral argument afforded the parties.

(2) The ALJ may place appropriate limits on an applicant's participation to ensure the efficient conduct of the proceedings.

(e) A non-party participant shall comply with the requirements for parties in §81.11 and §81.12.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

### **§ 81.8 Representation.**

A party to, or other participant in, a case may be represented by counsel.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

### **§ 81.9 Location of proceedings.**

(a) An ALJ may hold conferences of the parties in person or by conference telephone call.

(b) Any conference, hearing, argument, or other proceeding at which the parties are required to appear in person is held in the Washington, DC metropolitan area unless the ALJ determines that the convenience and necessity of the parties or their representatives requires that it be held elsewhere.

(Authority: 5 U.S.C. 554(b); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

### **§ 81.10 Ex parte communications.**

A party to, or other participant in, a case may not communicate with an ALJ on any fact in issue in the case or on any matter relevant to the merits of the case unless the parties are given notice and an opportunity to participate.

(Authority: 5 U.S.C. 554(d)(1), 557(d)(1)(A); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

### **§ 81.11 Motions.**

(a) To obtain an order or a ruling from an ALJ, a party shall make a motion to the ALJ.

(b) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(c) If a party files a motion, the party shall serve a copy of the motion on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of the motion may be made upon the other party by facsimile transmission.

(d) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(e) The date of service of a motion is determined by the standards for determining a filing date in §81.12 (d).

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

### **§ 81.12 Filing requirements.**

- (a) Any written submission to an ALJ or the OALJ under this part must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.
- (b) If a party files a brief or other document with an ALJ or the OALJ, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.
- (c) Any written submission to an ALJ or the OALJ must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.
- (d)(1) The filing date for a written submission to an ALJ or the OALJ is the date the document is—
- (i) Hand-delivered;
  - (ii) Mailed; or
  - (iii) Sent by facsimile transmission.
- (2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day.
- (e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.
- (f) If a document is filed by facsimile transmission, a follow-up hard copy must be filed by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 57 FR 56795, Nov. 30, 1992]

### **§ 81.13 Mediation.**

- (a) Voluntary mediation is available for proceedings that are pending before the OALJ.
- (b) A mediator must be independent of, and agreed to by, the parties to the case.
- (c) A party may request mediation by filing a motion with the ALJ assigned to the case. The OALJ arranges for a mediator if the parties to the case agree to mediation.
- (d) A party may terminate mediation at any time. Mediation is limited to 120 days unless the mediator informs the ALJ that—
- (1) The parties are likely to resolve some or all of the dispute; and
  - (2) An extension of time will facilitate an agreement.
- (e) The ALJ stays the proceedings during mediation.
- (f)(1) Evidence of conduct or statements made during mediation is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during mediation.
- (2) A mediator may not disclose, in any proceeding under this part, information acquired as a part of his or her official mediation duties that relates to any fact in issue in the case or any matter relevant to the merits of the case.

(Authority: 20 U.S.C. 1221e–3, 1234 (f)(1) and (h), and 3474(a))

### **§ 81.14 Settlement negotiations.**

- (a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement

negotiations, or for approval of a settlement agreement, the ALJ may grant a stay of the proceedings upon a finding of good cause.

(b) Evidence of conduct or statements made during settlement negotiations is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during settlement negotiations.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 554(c)(1), 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

### **§ 81.15 Evidence.**

(a) The Federal Rules of Evidence do not apply to proceedings under this part. However, the ALJ accepts only evidence that is—

- (1) Relevant;
- (2) Material;
- (3) Not unduly repetitious; and
- (4) Not inadmissible under §81.13 or §81.14.

(b) The ALJ may take official notice of facts that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Authority: 5 U.S.C. 556 (d) and (e); 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

### **§ 81.16 Discovery.**

(a) The parties to a case are encouraged to exchange relevant documents and information voluntarily.

(b) The ALJ, at a party's request, may order compulsory discovery described in paragraph (c) of this section if the ALJ determines that—

- (1) The order is necessary to secure a fair, expeditious, and economical resolution of the case;
- (2) The discovery requested is likely to elicit relevant information with respect to an issue in the case;
- (3) The discovery request was not made primarily for the purposes of delay or harassment; and
- (4) The order would serve the ends of justice.

(c) If a compulsory discovery is permissible under paragraph (b) of this section, the ALJ may order a party to do one or more of the following:

- (1) Make relevant documents available for inspection and copying by the party making the request.
- (2) Answer written interrogatories that inquire into relevant matters.
- (3) Have depositions taken.

(d) The ALJ may issue a subpoena to enforce an order described in this section and may apply to the appropriate court of the United States to enforce the subpoena.

(e) The ALJ may not compel the discovery of information that is legally privileged.

(f)(1) The ALJ limits the period for discovery to not more than 90 days but may grant an extension for good cause.

(2) At a party's request, the ALJ may set a specific schedule for discovery.

(Authority: 20 U.S.C. 1234(f)(1) and (g))

**§ 81.17 Privileges.**

The privilege of a person or governmental organization not to produce documents or provide information in a proceeding under this part is governed by the principles of common law as interpreted by the courts of the United States.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

**§ 81.18 The record.**

(a) The ALJ arranges for any evidentiary hearing or oral argument to be recorded and transcribed and makes the transcript available to the parties. Transcripts are made available to non-Departmental parties at a cost not to exceed the actual cost of duplication.

(b) The record of a hearing on the record consists of—

- (1) All papers filed in the proceeding;
- (2) Documentary evidence admitted by the ALJ;
- (3) The transcript of any evidentiary hearing or oral argument; and
- (4) Rulings, orders, and subpoenas issued by the ALJ.

(Authority: 5 U.S.C. 556(e), 557(c); 20 U.S.C. 1221e–3(a)(1), 1234(f)(1), 3474(a))

[54 FR 19512, May 5, 1989, as amended at 58 FR 43473, Aug. 16, 1993]

**§ 81.19 Costs and fees of parties.**

The Equal Access to Justice Act, 5 U.S.C. 504, applies by its terms to proceedings under this part. Regulations under that statute are in 34 CFR part 21.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), and 3474(a))

**§ 81.20 Interlocutory appeals to the Secretary from rulings of an ALJ.**

(a) A ruling by an ALJ may not be appealed to the Secretary until the issuance of an initial decision, except that the Secretary may, at any time prior to the issuance of an initial decision, grant review of a ruling upon either an ALJ's certification of the ruling to the Secretary for review, or the filing of a petition seeking review of an interim ruling by one or both of the parties, if—

- (1) That ruling involves a controlling question of substantive or procedural law; and
- (2) The immediate resolution of the question will materially advance the final disposition of the proceeding or subsequent review will be an inadequate remedy.

(b)(1) A petition for interlocutory review of an interim ruling must include the following:

- (i) A brief statement of the facts necessary to an understanding of the issue on which review is sought.
  - (ii) A statement of the issue.
  - (iii) A statement of the reasons showing that the ruling complained of involves a controlling question of substantive or procedural law and why immediate review of the ruling will materially advance the disposition of the case, or why subsequent review will be an inadequate remedy.
- (2) A petition may not exceed ten pages, double-spaced, and must be accompanied by a copy of the

ruling and any findings and opinions relating to the ruling. The petition must be filed with the Office of Hearings and Appeals, which immediately forwards the petition to the Office of the Secretary.

(c) A copy of the petition must be provided to the ALJ at the time the petition is filed under paragraph (b) (2) of this section, and a copy of a petition or any certification must be served upon the parties by certified mail, return receipt requested. The petition or certification must reflect that service.

(d) If a party files a petition under this section, the ALJ may state to the Secretary a view as to whether review is appropriate or inappropriate by submitting a brief statement addressing the party's petition within 10 days of the ALJ's receipt of the petition for interlocutory review. A copy of the statement must be served on all parties by certified mail, return receipt requested.

(e)(1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed ten pages, double-spaced, in length. A copy of the response must be filed with the ALJ by hand delivery, by regular mail, or by facsimile transmission.

(2) A party shall serve a copy of its response on all parties on the filing date by hand-delivery or regular mail. If agreed upon by the parties, service of a copy of the response may be made upon the other parties by facsimile transmission.

(f) The filing of a request for interlocutory review does not automatically stay the proceedings. Rather, a stay during consideration of a petition for review may be granted by the ALJ if the ALJ has certified or stated to the Secretary that review of the ruling is appropriate. The Secretary may order a stay of proceedings at any time after the filing of a request for interlocutory review.

(g) The Secretary notifies the parties if a petition or certification for interlocutory review is accepted, and may provide the parties a reasonable time within which to submit written argument or other existing material in the administrative record with regard to the merit of the petition or certification.

(h) If the Secretary takes no action on a request for interlocutory review within 15 days of receipt of it, the request is deemed to be denied.

(i) The Secretary may affirm, modify, set aside, or remand the ALJ's ruling.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1234(f)(1))

[58 FR 43473, Aug. 16, 1993]

## **Subpart B—Hearings for Recovery of Funds**

### **§ 81.30 Basis for recovery of funds.**

(a) Subject to the provisions of §81.31, an authorized Departmental official requires a recipient to return funds to the Department if—

- (1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or
- (2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental official may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

**§ 81.31 Measure of recovery.**

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that—

- (a) Meets the standards for proportionality in §81.32;
- (b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in §81.23; and
- (c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under §81.34.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(k), 1234b (a) and (b), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

**§ 81.32 Proportionality.**

- (a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.
- (2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:
  - (i) Serving only eligible beneficiaries.
  - (ii) Providing only authorized services or benefits.
  - (iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.
  - (iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.
  - (v) Maintaining accountability for the use of funds.
- (b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

**§ 81.33 Mitigating circumstances.**

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

- (1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the Federal Register under this section;

- (2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;
- (3) The recipient actually relied on the guidance as the basis for the conduct that constituted the violation; and
- (4) The recipient's reliance on the guidance was reasonable.
- (c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that—
- (1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;
- (2) The request was submitted to the Department at the address provided by notice published in the Federal Register under this section;
- (3) The request—
- (i) Accurately described the proposed expenditure or practice; and
- (ii) Included the facts necessary for the Department's determination of its legality;
- (4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer—
- (i) Examined the proposed expenditure or practice; and
- (ii) Believed it was permissible under State and Federal law applicable at the time of the certification;
- (5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;
- (6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and
- (7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90-day period.
- (d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that—
- (1) The recipient was legally bound by the decree;
- (2) The recipient actually relied on the decree when it engaged in the conduct that constituted the violation; and
- (3) The recipient's reliance on the decree was reasonable.
- (e) If a Departmental official authorized to provide the requested guidance responds to a request described in paragraph (c) of this section more than 90 days after its receipt, the recipient that made the request shall comply with the guidance at the earliest practicable time.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234b(b), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

### **§ 81.34 Notice of a disallowance decision.**

- (a) If an authorized Departmental official decides that a recipient must return funds under §81.30, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.
- (b)(1) The notice must establish a prima facie case for the recovery of funds, including an analysis reflecting the value of the program services actually obtained in a determination of harm to the Federal

interest.

(2) For the purpose of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

(c) The notice must inform the recipient that it may—

(1) Obtain a review of the disallowance decision by the OALJ; and

(2) Request mediation under §81.13.

(d) The notice must describe—

(1) The time available to apply for a review of the disallowance decision; and

(2) The procedure for filing an application for review.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993; 60 FR 46494, Sept. 6, 1995; 61 FR 14484, Apr. 2, 1996]

### **§ 81.35 Reduction of claims.**

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by—

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under §81.31, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR part 103; or

(c) Compromising the claim under §81.36, if applicable.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(j), and 3474(a); 31 U.S.C. 3711)

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

### **§ 81.36 Compromise of claims under General Education Provisions Act.**

(a) The Secretary or an authorized Departmental official as appropriate may compromise a claim established under this subpart without following the procedures in 4 CFR part 103 if—

(1)(i) The amount of the claim does not exceed \$200,000; or

(ii) The difference between the amount of the claim and the amount agreed to be returned does not exceed \$200,000; and

(2) The Secretary or the official determines that—

(i) The collection of the amount by which the claim is reduced under the compromise would not be practical or in the public interest; and

(ii) The practice that resulted in the disallowance decision has been corrected and will not recur.

(b) Not less than 45 days before compromising a claim under this section, the Department publishes a notice in the Federal Register stating—

- (1) The intention to compromise the claim; and
- (2) That interested persons may comment on the proposed compromise.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a (j), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

### **§ 81.37 Application for review of a disallowance decision.**

(a) If a recipient wishes to obtain review of a disallowance decision, the recipient shall file a written application for review with the Office of Administrative Law Judges, c/o Docket Clerk, Office of Hearings and Appeals, and, as required by §81.12(b), shall serve a copy on the applicable Departmental official who made the disallowance decision.

(b) A recipient shall file an application for review not later than 60 days after the date it receives the notice of a disallowance decision.

(c) Within 10 days after receipt of a copy of the application for review, the authorized Departmental official who made the disallowance decision shall provide the ALJ with a copy of any document identified in the notice pursuant to §81.34(b)(2).

(d) An application for review must contain—

- (1) A copy of the disallowance decision of which review is sought;
- (2) A statement certifying the date the recipient received the notice of that decision;
- (3) A short and plain statement of the disputed issues of law and fact, the recipient's position with respect to these issues, and the disallowed funds the recipient contends need not be returned; and
- (4) A statement of the facts and the reasons that support the recipient's position.

(e) The ALJ who considers a timely application for review that substantially complies with the requirements of paragraph (c) of this section may permit the recipient to supplement or amend the application with respect to issues that were timely raised. Any requirement to return funds that is not timely appealed becomes the final decision of the Department.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(b)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993; 58 FR 51013, Sept. 30, 1993; 60 FR 46494, Sept. 6, 1995]

### **§ 81.38 Consideration of an application for review.**

(a) The ALJ assigned to the case under §81.4 considers an application for review of a disallowance decision.

(b) The ALJ decides whether the notice of a disallowance decision meets the requirements of §81.34, as provided by section 451(e) of GEPA.

(1) If the notice does not meet those requirements, the ALJ—

(i) Returns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision;

(ii) Gives the official the reasons why the notice does not meet the requirements of §81.34; and

(iii) Informs the recipient of the ALJ's decision by certified mail, return receipt requested.

- (2) An authorized Departmental official may modify and reissue a notice that an ALJ returns.
- (c) If the notice of a disallowance decision meets the requirements of §81.34, the ALJ decides whether the application for review meets the requirements of §81.37.
- (1) If the application, including any supplements or amendments under §81.37(d), does not meet those requirements, the disallowance decision becomes the final decision of the Department.
- (2) If the application meets those requirements, the ALJ—
- (i) Informs the recipient and the authorized Departmental official that the OALJ has accepted jurisdiction of the case; and
- (ii) Schedules a hearing on the record.
- (3) The ALJ informs the recipient of the disposition of its application for review by certified mail, return receipt requested. If the ALJ decides that the application does not meet the requirements of §81.37, the ALJ informs the recipient of the reasons for the decision.

(Authority: 20 U.S.C. 1221e–3, 1234 (e) and (f)(1), 1234a(b), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

### **§ 81.39 Submission of evidence.**

- (a) The ALJ schedules the submission of the evidence, whether oral or documentary, to occur within 90 days of the OALJ's receipt of an acceptable application for review under §81.37.
- (b) The ALJ may waive the 90-day requirement for good cause.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(c), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

### **§ 81.40 Burden of proof.**

If the OALJ accepts jurisdiction of a case under §81.38, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because—

- (a) An expenditure identified in the disallowance decision as unallowable was allowable;
- (b) The recipient discharged its obligation to account properly for the funds;
- (c) The amount required to be returned does not meet the standards for proportionality in §81.32;
- (d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in §81.33; or
- (e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(b)(3), 1234b(b)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

### **§ 81.41 Initial decision.**

- (a) The ALJ makes an initial decision based on the record.

(b) The initial decision includes the ALJ's findings of fact, conclusions of law, and reasoning on all material issues.

(c) The initial decision is transmitted to the Secretary by hand-delivery or Department mail, and to the parties by certified mail, return receipt requested, by the Office of Administrative Law Judges.

(d) For the purpose of this part, “initial decision” includes an ALJ's modified decision after the Secretary's remand of a case.

(Authority: 5 U.S.C. 557(c); 20 U.S.C 1221e–3, 1234(f)(1), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993]

### **§ 81.42 Petition for review of initial decision.**

(a) If a party seeks to obtain the Secretary's review of the initial decision of an ALJ, the party shall file a petition for review with the Office of Hearings and Appeals, which immediately forwards the petition to the Office of the Secretary.

(b) A party shall file a petition for review not later than 30 days after the date it receives the initial decision.

(c) If a party files a petition for review, the party shall serve a copy of the petition on the other party on the filing date by hand delivery or by “overnight or express” mail. If agreed upon by the parties, service of a copy of the petition may be made upon the other party by facsimile transmission.

(d) Any written submission to the Secretary under this section must be accompanied by a statement certifying the date that the filed material was served on the other party.

(e) A petition for review of an initial decision must contain—

(1) The identity of the initial decision for which review is sought; and

(2) A statement of the reasons asserted by the party for affirming, modifying, setting aside, or remanding the initial decision in whole or in part.

(f)(1) A party may respond to a petition for review of an initial decision by filing a statement of its views on the issues raised in the petition with the Secretary, as provided for in this section, not later than 15 days after the date it receives the petition.

(2) A party shall serve a copy of its statement of views on the other party by hand delivery or mail, and shall certify that it has done so pursuant to the provisions of paragraph (d) of this section. If agreed upon by the parties, service of a copy of the statement of views may be made upon the other party by facsimile transmission.

(g)(1) The filing date for written submissions under this section is the date the document is—

(i) Hand delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(2) If a scheduled filing date falls on a Saturday, Sunday or a Federal holiday, the filing deadline is the next business day.

(Authority: 20 U.S.C. 1221e–3, 1234(f)(1), 1234a(e), and 3474(a))

[58 FR 43474, Aug. 16, 1993]

### **§ 81.43 Review by the Secretary.**

(a)(1) The Secretary's review of an initial decision is based on the record of the case, the initial decision,

and any proper submissions of the parties or other participants in the case.

(2) During the Secretary's review of the initial decision there shall not be any *ex parte* contact between the Secretary and individuals representing the Department or the recipient.

(b) The ALJ's findings of fact, if supported by substantial evidence, are conclusive.

(c) The Secretary may affirm, modify, set aside, or remand the ALJ's initial decision.

(1) If the Secretary modifies, sets aside, or remands an initial decision, in whole or in part, the Secretary's decision includes a statement of reasons that supports the Secretary's decision.

(2)(i) The Secretary may remand the case to the ALJ with instructions to make additional findings of fact or conclusions of law, or both, based on the evidence of record. The Secretary may also remand the case to the ALJ for further briefing or for clarification or revision of the initial decision.

(ii) If a case is remanded, the ALJ shall make new or modified findings of fact or conclusions of law or otherwise modify the initial decision in accordance with the Secretary's remand order.

(iii) A party may appeal a modified decision of the ALJ under the provisions of §§81.42 through 81.45. However, upon that review, the ALJ's new or modified findings, if supported by substantial evidence, are conclusive.

(3) The Secretary, for good cause shown, may remand the case to the ALJ to take further evidence, and the ALJ may make new or modified findings of fact and may modify the initial decision based on that new evidence. These new or modified findings of fact are likewise conclusive if supported by substantial evidence.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(d), and 3474(a))

[58 FR 43474, Aug. 16, 1993, as amended at 60 FR 46494, Sept. 6, 1995]

#### **§ 81.44 Final decision of the Department.**

(a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.

(b) If the Secretary modifies or sets aside the ALJ's initial decision, a copy of the Secretary's decision is sent by the Office of Hearings and Appeals to the parties by certified mail, return receipt requested. The Secretary's decision becomes the final decision of the Department on the date the recipient receives the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(g), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, 43474, Aug. 16, 1993]

#### **§ 81.45 Collection of claims.**

(a) An authorized Departmental official collects a claim established under this subpart by using the standards and procedures in 34 CFR part 30.

(b) A claim established under this subpart may be collected—

(1) 30 days after a recipient receives notice of a disallowance decision if the recipient fails to file an acceptable application for review under §81.37; or

(2) On the date of the final decision of the Department under §81.44 if the recipient obtains review of a disallowance decision.

(c) The Department takes no collection action pending judicial review of a final decision of the Department under section 458 of GEPA.

(d) If a recipient obtains review of a disallowance decision under §81.38, the Department does not collect interest on the claim for the period between the date of the disallowance decision and the date of the final decision of the Department under §81.44.

(Authority: 20 U.S.C. 1234(f)(1); 1234a(f)(1) and (2), (i), and (1))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

### **Appendix to Part 81—Illustrations of Proportionality**

(1) *Ineligible beneficiaries.* A State uses 15 percent of its grant to meet the special educational needs of children who were migratory, but who have not migrated for more than five years as a Federal program statute requires for eligibility to participate in the program. Result: Recovery of 15 percent of the grant—all program funds spent for the benefit of those children. Although the services were authorized, the children were not eligible to receive them.

(2) *Ineligible beneficiaries.* A Federal program designed to meet the special educational needs of gifted and talented children requires that at least 80 percent of the children served in any project must be identified as gifted or talented. A local educational agency (LEA) conducts a project in which 76 students are identified as gifted or talented and 24 are not. The project was designed and implemented to meet the special educational needs of gifted and talented students. Result: The LEA must return five percent of the project costs. The LEA provided authorized services for a project in which the 76 target students had to constitute at least 80 percent of the total. Thus, the maximum number of non-target students permitted was 19. Project costs relating to the remaining five students must be returned.

(3) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that only 15 percent of the children were identified as gifted or talented. On the basis of the low percentage of these children and other evidence, the authorized Departmental official finds that the project as a whole did not address their special educational needs and was outside the purpose of the statute. Result: The LEA must return its entire award. The difference between the required percentage of gifted and talented children and the percentage actually enrolled is so substantial that, if consistent with other evidence, the official may reasonably conclude the entire grant was misused.

(4) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that 60 percent of the children were identified as gifted or talented, and it is not clear whether the project was designed or implemented to meet the special educational needs of these children. Result: If it is determined that the project was designed and implemented to serve their special educational needs, the LEA must return 25 percent of the project costs. A project that included 60 target children would meet the requirement that 80 percent of the children served be gifted and talented if it included no more than 15 other children. Thus, while the LEA provided authorized services, only 75 percent of the beneficiaries were authorized to participate in the project (60 target children and 15 others). If the authorized Departmental official, after examining all the relevant facts, determines that the project was not designed and implemented to serve the special educational needs of gifted or talented students, the LEA must return its entire award because it did not provide services authorized by the statute.

(5) *Unauthorized activities.* An LEA uses ten percent of its grant under a Federal program that authorizes activities only to meet the special educational needs of educationally deprived children to pay for health services that are available to all children in the LEA. All the children who use the Federally funded health services happen to be educationally deprived, and thus eligible to receive program services. Result: Recovery of ten percent of the grant—all program funds spent for the health services. Although the

children were eligible to receive program services, the health services were unrelated to a special educational need and, therefore, not authorized by law.

(6) *Set-aside requirement.* A State uses 22 percent of its grant for one fiscal year under a Federal adult education program to provide programs of equivalency to a certificate of graduation from a secondary school. The adult education program statute restricts those programs to no more than 20 percent of the State's grant. Result: Two percent of the State's grant must be returned. Although all 22 percent of the funds supported adult education, the State had no authority to spend more than 20 percent on secondary school equivalency programs.

(7) *Set-aside requirement.* A State uses eight percent of its basic State grant under a Federal vocational education program to pay for the excess cost of vocational education services and activities for handicapped individuals. The program statute requires a State to use ten percent of its basic State grant for this purpose. Result: The State must return two percent of its basic State grant, regardless of how it was used. Because the State was required to spend that two percent on services and activities for handicapped individuals and did not do so, it diverted those funds from their intended purposes, and the Federal interest was harmed to that extent.

(8) *Excess cost requirement.* An LEA uses funds reserved for the disadvantaged under a Federal vocational education program to pay for the cost of the same vocational education services it provides to non-disadvantaged individuals. The program statute requires that funds reserved for the disadvantaged must be used to pay only for the supplemental or additional costs of vocational education services that are not provided to other individuals and that are required for disadvantaged individuals to participate in vocational education. Result: All the funds spent on the disadvantaged must be returned. Although the funds were spent to serve the disadvantaged, the funds were available to pay for only the supplemental or additional costs of providing services to the disadvantaged.

(9) *Maintenance-of-effort requirement.* An LEA participates in a Federal program in fiscal year 1988 that requires it to maintain its expenditures from non-Federal sources for program purposes to receive its full allotment. The program statute requires that non-Federal funds expended in the first preceding fiscal year must be at least 90 percent of non-Federal funds expended in the second preceding fiscal year and provides for a reduction in grant amount proportional to the shortfall in expenditures. No waiver of the requirement is authorized. In fiscal year 1986 the LEA spent \$100,000 from non-Federal sources for program purposes; in fiscal year 1987, only \$87,000. Result: The LEA must return 1/30 of its fiscal year 1988 grant—the amount of its grant that equals the proportion of its shortfall (\$3,000) to the required level of expenditures (\$90,000). If, instead, the statute made maintenance of expenditures a clear condition of the LEA's eligibility to receive funds and did not provide for a proportional reduction in the grant award, the LEA would be required to return its entire grant.

(10) *Supplanting prohibition.* An LEA uses funds under a Federal drug education program to provide drug abuse prevention counseling to students in the eighth grade. The LEA is required to provide that same counseling under State law. Funds under the Federal program statute are subject to a supplement-not-supplant requirement. Result: All the funds used to provide the required counseling to the eighth-grade students must be returned. The Federal funds did not increase the total amount of spending for program purposes because the counseling would have been provided with non-Federal funds if the Federal funds were not available.

(11) *Matching requirement.* A State receives an allotment of \$90,000 for fiscal year 1988 under a Federal adult education program. It expends its full allotment and \$8,000 from its own resources for adult education. Under the Federal statute, the Federal share of expenditures for the State's program is 90 percent. Result: The State must return the unmatched Federal funds, or \$18,000. Expenditure of a \$90,000 Federal allotment required \$10,000 in matching State expenditures, \$2,000 more than the State's actual expenditures. At a ratio of one State dollar for every nine Federal dollars, \$18,000 in Federal funds were unmatched.

(12) *Application requirements.* In order to receive funds under a Federal program that supports a wide range of activities designed to improve the quality of elementary and secondary education, an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students—an authorized activity under the Federal statute. However, the LEA does not consult with interested parties and does not amend its application. Result: 20 percent of the LEA's subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of the application process, but caused significant harm to other Federal interests associated with the program as follows: the required planning process was circumvented because the LEA did not consult with the specified local interests; program accountability was impaired because neither the SEA nor the various local interests that were to be consulted had an opportunity to review and comment on the merits of the gifted and talented program activities, and the LEA never had to justify those activities to them; and fiscal accountability was impaired because the SEA and those various local interests were, in effect, misled by the LEA's unamended application regarding the expenditure of Federal funds.

(13) *Harmless violation.* Under a Federal program, a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring, and evaluation. Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified. Result: No financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

**NOTE TO READER:** The content of this document is taken from the e-CFR version of Title 34 of the Code of Federal Regulations (CFR), as published by the Office of the Federal Register at the Government Printing Office web site, GPO ACCESS. The e-CFR is not an official version of the CFR. While the Department has made an effort to ensure the accuracy of the regulations contained in this electronic text, this CD-ROM is intended for information and educational purposes only. The official version of these regulations are those published by the Office of the Federal Register (OFR). Individuals relying on this CD-ROM for legal research should verify their results against the official editions of the CFR, Federal Register, and List of CFR Sections Affected (LSA), all available online at:

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## 34 CFR PART 82—NEW RESTRICTIONS ON LOBBYING

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**Authority:** Section 319, Pub. L. 101–121 (31 U.S.C. 1352); 20 U.S.C. 3474.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

**Source:** 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted.

**Subpart A—General****§ 82.100 Conditions on use of funds.**

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

**§ 82.105 Definitions.**

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

## **§ 82.110 Certification and disclosure.**

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

- (1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or
- (2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

- (1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or
- (2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

- (1) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or
- (2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,
- (3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

- (1) A subcontract exceeding \$100,000 at any tier under a Federal contract;

- (2) A subgrant, contract, or subcontract exceeding \$100,000 at any tier under a Federal grant;
- (3) A contract or subcontract exceeding \$100,000 at any tier under a Federal loan exceeding \$150,000; or,
- (4) A contract or subcontract exceeding \$100,000 at any tier under a Federal cooperative agreement,
- Shall file a certification, and a disclosure form, if required, to the next tier above.
- (e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.
- (f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.
- (g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.
- (h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

## **Subpart B—Activities by Own Employees**

### **§ 82.200 Agency and legislative liaison.**

- (a) The prohibition on the use of appropriated funds, in §82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.
- (b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.
- (c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:
- (1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,
  - (2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.
- (d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:
- (1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;
  - (2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,
  - (3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95–507 and other subsequent amendments.
- (e) Only those activities expressly authorized by this section are allowable under this section.

**§ 82.205 Professional and technical services.**

(a) The prohibition on the use of appropriated funds, in §82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

**§ 82.210 Reporting.**

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

**Subpart C—Activities by Other Than Own Employees****§ 82.300 Professional and technical services.**

(a) The prohibition on the use of appropriated funds, in §82.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition

for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §82.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, “professional and technical services” shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

## **Subpart D—Penalties and Enforcement**

### **§ 82.400 Penalties.**

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of \$10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an

appropriate civil penalty between \$10,000 and \$100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

#### **§ 82.405 Penalty procedures.**

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

#### **§ 82.410 Enforcement.**

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

### **Subpart E—Exemptions**

#### **§ 82.500 Secretary of Defense.**

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

### **Subpart F—Agency Reports**

#### **§ 82.600 Semi-annual compilation.**

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and

to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

### **§ 82.605 Inspector General report.**

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

## **Appendix A to Part 82—Certification Regarding Lobbying**

### *Certification for Contracts, Grants, Loans, and Cooperative Agreements*

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

*Statement for Loan Guarantees and Loan Insurance*

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

**Appendix B to Part 82—Disclosure Form To Report Lobbying**

# Appendix B to Part 82—Disclosure Form To Report Lobbying

## DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB  
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352  
(See instructions for public burden disclosure.)

<b>1. Type of Federal Action:</b> <input type="checkbox"/> a. contract <input type="checkbox"/> b. grant <input type="checkbox"/> c. cooperative agreement <input type="checkbox"/> d. loan <input type="checkbox"/> e. loan guarantee <input type="checkbox"/> f. loan insurance		<b>2. Status of Federal Action:</b> <input type="checkbox"/> a. bid/offer application <input type="checkbox"/> b. initial award <input type="checkbox"/> c. post-award		<b>3. Report Type:</b> <input type="checkbox"/> a. initial filing <input type="checkbox"/> b. material change <b>For Material Change Only:</b> year _____ quarter _____ date of last report _____	
<b>4. Name and Address of Reporting Entity:</b> <input type="checkbox"/> Prime <input type="checkbox"/> Subawardee (for _____ of known)			<b>5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:</b>		
<b>6. Federal Department/Agency:</b>  Congressional District, if known: _____			<b>7. Federal Program Name/Description:</b>  CFDA Number, if applicable: _____		
<b>8. Federal Action Number, if known:</b>			<b>9. Award Amount, if known:</b> \$ _____		
<b>10. a. Name and Address of Lobbying Entity</b> (of individual, last name, first name, A/E):  <small>(attach Continuation Sheets SF-LLL-A, if necessary)</small>			<b>b. Individuals Performing Services</b> (including address if different from No. 10a) (last name, first name, A/E):  <small>(attach Continuation Sheets SF-LLL-A, if necessary)</small>		
<b>11. Amount of Payment</b> (check all that apply): \$ _____ <input type="checkbox"/> actual <input type="checkbox"/> planned			<b>12. Type of Payment</b> (check all that apply): <input type="checkbox"/> a. retainer <input type="checkbox"/> b. one-time fee <input type="checkbox"/> c. commission <input type="checkbox"/> d. contingent fee <input type="checkbox"/> e. deferred <input type="checkbox"/> f. other, specify: _____		
<b>12. Form of Payment</b> (check all that apply): <input type="checkbox"/> a. cash <input type="checkbox"/> b. in-kind, specify: nature _____ value _____					
<b>13. Brief Description of Services Performed or to be Performed and Dates of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:</b>  <small>(attach Continuation Sheets SF-LLL-A, if necessary)</small>					
<b>15. Continuation Sheets SF-LLL-A attached:</b> <input type="checkbox"/> Yes <input type="checkbox"/> No					
<b>16. Information required through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material approximation of fact upon which reliance may be placed by the law officer when the transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress electronically and will be available to public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.</b>			<b>Signature:</b> _____ <b>Print Name:</b> _____ <b>Title:</b> _____ <b>Telephone No.:</b> _____ <b>Date:</b> _____		
<b>Federal Use Only:</b>			Authorized for Local Reproduction Standard Form 101		

[Click the note at right for information about getting a current version of form SF-LLL.](#)



## INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 37, U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the first tier. Subawardees include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient, include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number, Invitation for Bid (IFB) number, grant announcement number, the contract, grant, or loan award number, the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-00-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.  
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (3348-0046), Washington, D.C. 20503.

**DISCLOSURE OF LOBBYING ACTIVITIES  
CONTINUATION SHEET**

Approved by OAG  
01/18/2016

Reporting Entity \_\_\_\_\_ Page \_\_\_\_\_ of \_\_\_\_\_

**NOTE TO READER:** The content of this document is taken from the e-CFR version of Title 34 of the Code of Federal Regulations (CFR), as published by the Office of the Federal Register at the Government Printing Office web site, GPO ACCESS. The e-CFR is not an official version of the CFR. While the Department has made an effort to ensure the accuracy of the regulations contained in this electronic text, this CD-ROM is intended for information and educational purposes only. The official version of these regulations are those published by the Office of the Federal Register (OFR). Individuals relying on this CD-ROM for legal research should verify their results against the official editions of the CFR, Federal Register, and List of CFR Sections Affected (LSA), all available online at:

[www.gpoaccess.gov](http://www.gpoaccess.gov)

## **34 CFR PART 84—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)**

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**Authority:** E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327, unless otherwise noted.

**Source:** 68 FR 66557, 66610, Nov. 26, 2003, unless otherwise noted.

## Subpart A—Purpose and Coverage

**§ 84.100 What does this part do?**

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L.

103–355, 108 Stat. 3243 at 3327.)

### § 84.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

- (1) A recipient of an assistance award from the Department of Education; or
  - (2) A(n) ED awarding official. (See definitions of award and recipient in §§84.605 and 84.660, respectively.)
- (b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A(n) ED awarding official	A, D and E.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### § 84.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the ED Deciding Official determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### § 84.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in §84. 510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

## Subpart B—Requirements for Recipients Other Than Individuals

### § 84.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

- (a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures

that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

- (1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§84.205 through 84.220); and
  - (2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see §84.225).
- (b) Second, you must identify all known workplaces under your Federal awards (see §84.230).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.205 What must I include in my drug-free workplace statement?**

You must publish a statement that—

- (a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;
- (b) Specifies the actions that you will take against employees for violating that prohibition; and
- (c) Lets each employee know that, as a condition of employment under any award, he or she:
  - (1) Will abide by the terms of the statement; and
  - (2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.210 To whom must I distribute my drug-free workplace statement?**

You must require that a copy of the statement described in §84.205 be given to each employee who will be engaged in the performance of any Federal award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.215 What must I include in my drug-free awareness program?**

You must establish an ongoing drug-free awareness program to inform employees about—

- (a) The dangers of drug abuse in the workplace;
- (b) Your policy of maintaining a drug-free workplace;
- (c) Any available drug counseling, rehabilitation, and employee assistance programs; and
- (d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?**

If you are a new recipient that does not already have a policy statement as described in §84.205 and an ongoing awareness program as described in §84.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more	must have the policy statement and program in place within 30 days after award.
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program	may ask the ED awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?**

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by §84.205(c)(2), or you otherwise learn of the conviction.

Your notification to the Federal agencies must\_

- (1) Be in writing;
- (2) Include the employee's position title;
- (3) Include the identification number(s) of each affected award;
- (4) Be sent within ten calendar days after you learn of the conviction; and
- (5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either\_

- (1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or
- (2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.230 How and when must I identify workplaces?**

(a) You must identify all known workplaces under each ED award. A failure to do so is a violation of your

drug-free workplace requirements. You may identify the workplaces\_

- (1) To the ED official that is making the award, either at the time of application or upon award; or
  - (2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by ED officials or their designated representatives.
- (b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used ( e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).
- (c) If you identified workplaces to the ED awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the ED awarding official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

## **Subpart C—Requirements for Recipients Who Are Individuals**

### **§ 84.300 What must I do to comply with this part if I am an individual recipient?**

As a condition of receiving a(n) ED award, if you are an individual recipient, you must agree that—

- (a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and
- (b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:
  - (1) In writing.
  - (2) Within 10 calendar days of the conviction.
  - (3) To the ED awarding official or other designee for each award that you currently have, unless §84.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the identification number(s) of each affected award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.301 [Reserved]**

## **Subpart D—Responsibilities of ED Awarding Officials**

### **§ 84.400 What are my responsibilities as a(n) ED awarding official?**

As a(n) ED awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

- (a) Subpart B of this part, if the recipient is not an individual; or
- (b) Subpart C of this part, if the recipient is an individual.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L.

103–355, 108 Stat. 3243 at 3327.)

## **Subpart E—Violations of this Part and Consequences**

### **§ 84.500 How are violations of this part determined for recipients other than individuals?**

A recipient other than an individual is in violation of the requirements of this part if the ED Deciding Official determines, in writing, that—

- (a) The recipient has violated the requirements of subpart B of this part; or
- (b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.505 How are violations of this part determined for recipients who are individuals?**

An individual recipient is in violation of the requirements of this part if the ED Deciding Official determines, in writing, that—

- (a) The recipient has violated the requirements of subpart C of this part; or
- (b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.510 What actions will the Federal Government take against a recipient determined to have violated this part?**

If a recipient is determined to have violated this part, as described in §84.500 or §84.505, the Department of Education may take one or more of the following actions—

- (a) Suspension of payments under the award;
- (b) Suspension or termination of the award; and
- (c) Suspension or debarment of the recipient under 34 CFR Part 85, for a period not to exceed five years.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.515 Are there any exceptions to those actions?**

The ED Deciding Official may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the ED Deciding Official determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

## **Subpart F—Definitions**

### **§ 84.605 Award.**

*Award* means an award of financial assistance by the Department of Education or other Federal agency directly to a recipient.

(a) The term award includes:

- (1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.
- (2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 34 CFR Part 85 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

- (1) Technical assistance that provides services instead of money.
- (2) Loans.
- (3) Loan guarantees.
- (4) Interest subsidies.
- (5) Insurance.
- (6) Direct appropriations.
- (7) Veterans' benefits to individuals ( *i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.610 Controlled substance.**

*Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.615 Conviction.**

*Conviction* means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

### **§ 84.620 Cooperative agreement.**

*Cooperative agreement* means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in §84.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.625 Criminal drug statute.**

*Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.630 Debarment.**

*Debarment* means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.635 Drug-free workplace.**

*Drug-free workplace* means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.640 Employee.**

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

- (1) All direct charge employees;
- (2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and
- (3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient ( e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.645 Federal agency or agency.**

*Federal agency or agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.650 Grant.**

*Grant* means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.655 Individual.**

*Individual* means a natural person.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.660 Recipient.**

*Recipient* means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

#### **§ 84.665 State.**

*State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

**§ 84.670 Suspension.**

*Suspension* means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

(Authority: E.O.s 12549 and 12689; 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.)

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[www.gpoaccess.gov](http://www.gpoaccess.gov)

## PART 85—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

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#### [Appendix to Part 85—Covered Transactions](#)

**Authority:** E.O. 12549 (3 CFR 1986 Comp., p.189); E.O. 12698 (3 CFR 1989 Comp., p.235); sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); 20 U.S.C. 1082, 1094, 1221e-3, and 3474, unless otherwise noted.

**Source:** 68 FR 66544, 66611, 66612, 66613, 66614, Nov. 26, 2003, unless otherwise noted.

#### **§ 85.25 How is this part organized?**

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

In subpart . . .	You will find provisions related to . . .
A	general information about this rule.

B	the types of ED transactions that are covered by the Governmentwide nonprocurement suspension and debarment system.
C	the responsibilities of persons who participate in covered transactions.
D	the responsibilities of ED officials who are authorized to enter into covered transactions.
E	the responsibilities of Federal agencies for the <i>Excluded Parties List System</i> (Disseminated by the General Services Administration).
F	the general principles governing suspension, debarment, voluntary exclusion and settlement.
G	suspension actions.
H	debarment actions.
I	definitions of terms used in this part.
J	[Reserved]

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

If you are . . .	See subpart(s) . . .
(1) a participant or principal in a nonprocurement transaction	A, B, C, and I.
(2) a respondent in a suspension action	A, B, F, G and I.
(3) a respondent in a debarment action	A, B, F, H and I.
(4) a suspending official	A, B, D, E, F, G and I.
(5) a debarring official	A, B, D, E, F, H and I.
(6) a (n) ED official authorized to enter into a covered transaction	A, B, D, E and I.
(7) Reserved	J.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.50 How is this part written?

(a) This part uses a “plain language” format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as “I” and “you,” change from subpart to subpart depending on the audience being addressed. The pronoun “we” always is the Department of Education.

(c) The “Covered Transactions” diagram in the appendix to this part shows the levels or “tiers” at which the Department of Education enforces an exclusion under this part.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded*, which refers only to discretionary actions taken by a suspending or debarring

official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified*, which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible*, which generally refers to a person who is either excluded or disqualified.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## Subpart A—General

### § 85.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for ED nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189), Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103–355, 108 Stat. 3327).

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.105 Does this part apply to me?

Portions of this part (see table at §85.25(b)) apply to you if you are a(n)—

(a) Person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction;

(b) Respondent (a person against whom the Department of Education has initiated a debarment or suspension action);

(c) ED debarment or suspending official; or

(d) ED official who is authorized to enter into covered transactions with non-Federal parties.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.115 How does an exclusion restrict a person's involvement in covered transactions?**

With the exceptions stated in §§85.120, 85.315, and 85.420, a person who is excluded by the Department of Education or any other Federal agency may not:

- (a) Be a participant in a(n) ED transaction that is a covered transaction under subpart B of this part;
- (b) Be a participant in a transaction of any other Federal agency that is a covered transaction under that agency's regulation for debarment and suspension; or
- (c) Act as a principal of a person participating in one of those covered transactions.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.120 May we grant an exception to let an excluded person participate in a covered transaction?**

- (a) The ED Deciding Official may grant an exception permitting an excluded person to participate in a particular covered transaction. If the ED Deciding Official grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.
- (b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?**

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?**

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.135 May the Department of Education exclude a person who is not currently participating in a nonprocurement transaction?**

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction. Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.140 How do I know if a person is excluded?**

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?**

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS*; and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) ED transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Subpart B—Covered Transactions**

### **§ 85.200 What is a covered transaction?**

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.205 Why is it important if a particular transaction is a covered transaction?**

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under §85.310 or §85.415; or

(2) A(n) ED official obtains an exception from the ED Deciding Official to allow you to be involved in the transaction, as permitted under §85.120.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.210 Which nonprocurement transactions are covered transactions?**

All nonprocurement transactions, as defined in §85.970, are covered transactions unless listed in §85.215. (See appendix to this part.)

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.215 Which nonprocurement transactions are not covered transactions?**

The following types of nonprocurement transactions are not covered transactions:

(a) A direct award to—

(1) A foreign government or foreign governmental entity;

(2) A public international organization;

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 et seq., those benefits are not covered transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the Department of Education needs to respond to a national or agency-recognized

emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the Department of Education specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.220 Are any procurement contracts included as covered transactions?**

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under §85.210, and the amount of the contract is expected to equal or exceed \$25,000.

(2) The contract requires the consent of a(n) ED official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

(c) The contract is awarded by any contractor, subcontractor, supplier, consultant or its agent or representative in any transaction, regardless of tier, that is funded or authorized under ED programs and is expected to equal or exceed \$25,000.

(d) The contract is to perform services as a third party servicer in connection with a title IV, HEA program.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.225 How do I know if a transaction in which I may participate is a covered transaction?**

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Subpart C—Responsibilities of Participants Regarding Transactions**

### **Doing Business With Other Persons**

**§ 85.300 What must I do before I enter into a covered transaction with another person at the next lower tier?**

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

- (a) Checking the *EPLS*; or
- (b) Collecting a certification from that person if allowed by this rule; or
- (c) Adding a clause or condition to the covered transaction with that person.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.305 May I enter into a covered transaction with an excluded or disqualified person?**

- (a) You as a participant may not enter into a covered transaction with an excluded person, unless the Department of Education grants an exception under §85.120.
- (b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?**

- (a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.
- (b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Department of Education grants an exception under §85.120.
- (c) If you are a title IV, HEA participant, you may not continue a title IV, HEA transaction with an excluded person after the effective date of the exclusion unless permitted by 34 CFR 668.26, 682.702, or 668.94, as applicable

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.315 May I use the services of an excluded person as a principal under a covered transaction?**

- (a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the Department of Education grants an exception under §85.120.

(c) *Title IV, HEA transactions.* If you are a title IV, HEA participant—

(1) You may not renew or extend the term of any contract or agreement for the services of an excluded person as a principal with respect to a title IV, HEA transaction; and

(2) You may not continue to use the services of that excluded person as a principal under this kind of an agreement or arrangement more than 90 days after you learn of the exclusion or after the close of the Federal fiscal year in which the exclusion takes effect, whichever is later.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.320 Must I verify that principals of my covered transactions are eligible to participate?**

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS*.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.325 What happens if I do business with an excluded person in a covered transaction?**

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?**

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless §85.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Disclosing Information—Primary Tier Participants**

### **§ 85.335 What information must I provide before entering into a covered transaction with the**

## Department of Education?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the ED office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

- (a) Are presently excluded or disqualified;
- (b) Have been convicted within the preceding three years of any of the offenses listed in §85.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;
- (c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in §85.800(a); or
- (d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.340 If I disclose unfavorable information required under §85.335, will I be prevented from participating in the transaction?**

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under §85.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.345 What happens if I fail to disclose information required under §85.335?**

If we later determine that you failed to disclose information under §85.335 that you knew at the time you entered into the covered transaction, we may—

- (a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or
- (b) Pursue any other available remedies, including suspension and debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.350 What must I do if I learn of information required under §85.335 after entering into a covered transaction with the Department of Education?**

At any time after you enter into a covered transaction, you must give immediate written notice to the ED office with which you entered into the transaction if you learn either that—

- (a) You failed to disclose information earlier, as required by §85.335; or
- (b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in §85.335.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Disclosing Information—Lower Tier Participants**

### **§ 85.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?**

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.360 What happens if I fail to disclose the information required under §85.355?**

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.365 What must I do if I learn of information required under §85.355 after entering into a covered transaction with a higher tier participant?**

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

- (a) You failed to disclose information earlier, as required by §85.355; or
- (b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in §85.355.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Subpart D—Responsibilities of ED Officials Regarding Transactions**

### **§ 85.400 May I enter into a transaction with an excluded or disqualified person?**

- (a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under §85.120.
- (b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?**

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under §85.120.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.410 May I approve a participant's use of the services of an excluded person?**

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under §85.120.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?**

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under §85.120.

(c) *Title IV, HEA transactions.* If you are a title IV, HEA participant—

(1) You may not renew or extend the term of any contract or agreement for the services of an excluded person as a principal with respect to a title IV, HEA transaction; and

(2) You may not continue to use the services of that excluded person as a principal under this kind of an agreement or arrangement more than 90 days after you learn of the exclusion or after the close of the Federal fiscal year in which the exclusion takes effect, whichever is later.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.420 May I approve a transaction with an excluded or disqualified person at a lower tier?**

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under

§85.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.425 When do I check to see if a person is excluded or disqualified?**

As an agency official, you must check to see if a person is excluded or disqualified before you—

- (a) Enter into a primary tier covered transaction;
- (b) Approve a principal in a primary tier covered transaction;
- (c) Approve a lower tier participant if agency approval of the lower tier participant is required; or
- (d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.430 How do I check to see if a person is excluded or disqualified?**

You check to see if a person is excluded or disqualified in two ways:

- (a) You as an agency official must check the *EPLS* when you take any action listed in §85.425.
- (b) You must review information that a participant gives you, as required by §85.335, about its status or the status of the principals of a transaction.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.435 What must I require of a primary tier participant?**

You as an agency official must require each participant in a primary tier covered transaction to—

- (a) Comply with subpart C of this part as a condition of participation in the transaction; and
- (b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.440 What method do I use to communicate those requirements to participants?**

- (a) To communicate those requirements, you must include a term or condition in the transaction requiring each participant's compliance with subpart C of this part and requiring the participant to include a similar term or condition in lower-tier covered transactions.
- (b) The failure of a participant to include a requirement to comply with Subpart C of this part in the agreement with a lower tier participant does not affect the lower tier participant's responsibilities under this

part.

Authority: E.O. 12549 (3 CFR, 1985 Comp., p. 189); E.O. 12689 (3 CFR 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103–355, 108 Stat. 3243 at 3327.

[68 FR 66612, Nov. 26, 2003]

**§ 85.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?**

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.450 What action may I take if a primary tier participant fails to disclose the information required under §85.335?**

If you as an agency official determine that a participant failed to disclose information, as required by §85.335, at the time it entered into a covered transaction with you, you may—

- (a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or
- (b) Pursue any other available remedies, including suspension and debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.455 What may I do if a lower tier participant fails to disclose the information required under §85.355 to the next higher tier?**

If you as an agency official determine that a lower tier participant failed to disclose information, as required by §85.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**Subpart E—Excluded Parties List System**

**§ 85.500 What is the purpose of the Excluded Parties List System (EPLS)?**

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.505 Who uses the EPLS?

- (a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under §85.430.
- (b) Participants also may, but are not required to, use the *EPLS* to determine if—
- (1) Principals of their transactions are excluded or disqualified, as required under §85.320; or
  - (2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.
- (c) The *EPLS* is available to the general public.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### § 85.515 What specific information is in the EPLS?

- (a) At a minimum, the *EPLS* indicates—
- (1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if more than one name is involved in a single action;
  - (2) The type of action;
  - (3) The cause for the action;
  - (4) The scope of the action;
  - (5) Any termination date for the action;
  - (6) The agency and name and telephone number of the agency point of contact for the action; and
  - (7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.
- (b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.
- (2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.520 Who places the information into the EPLS?**

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS* :

- (a) Information required by §85.515(a);
- (b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if the number is available and may be disclosed under law;
- (c) Information about an excluded or disqualified person, generally within five working days, after—
  - (1) Taking an exclusion action;
  - (2) Modifying or rescinding an exclusion action;
  - (3) Finding that a person is disqualified; or
  - (4) Finding that there has been a change in the status of a person who is listed as disqualified.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.525 Whom do I ask if I have questions about a person in the EPLS?**

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.530 Where can I find the EPLS?**

- (a) You may access the *EPLS* through the Internet, currently at <http://epls.arnet.gov>.
- (b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783–3238.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**Subpart F—General Principles Relating to Suspension and Debarment Actions****§ 85.600 How do suspension and debarment actions start?**

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarring official for consideration, if appropriate.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.605 How does suspension differ from debarment?**

Suspension differs from debarment in that—

A suspending official . . .	A debaring official . . .
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings	Imposes debarment for a specified period as a final determination that a person is not presently responsible.
(b) Must— ..... (1) Have <i>adequate evidence</i> that there may be a cause for debarment of a person; and (2) Conclude that <i>immediate action</i> is necessary to protect the Federal interest	Must conclude, based on a <i>preponderance of the evidence</i> , that the person has engaged in conduct that warrants debarment.
(c) Usually imposes the suspension <i>first</i> , and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted	Imposes debarment <i>after</i> giving the respondent notice of the action and an opportunity to contest the proposed debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.610 What procedures does the Department of Education use in suspension and debarment actions?**

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

- (a) For suspension actions, we use the procedures in this subpart and subpart G of this part.
- (b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.611 What procedures do we use for a suspension or debarment action involving a title IV, HEA transaction?**

(a) If we suspend a title IV, HEA participant under Executive Order 12549, we use the following procedures to ensure that the suspension prevents participation in title IV, HEA transactions:

- (1) The notification procedures in §85.715.
- (2) Instead of the procedures in §85.720 through §85.760, the procedures in 34 CFR part 668, subpart G or 34 CFR part 682, subpart D or G as applicable.
- (3) In addition to the findings and conclusions required by 34 CFR part 668, subpart G or 34 CFR part 682, subpart D or G, the suspending official, and, on appeal, the Secretary determines whether there is

sufficient cause for suspension as explained in §85.700.

(b) If we debar a title IV, HEA participant under E.O. 12549, we use the following procedures to ensure that the debarment also precludes participation in title IV, HEA transactions:

(1) The notification procedures in §85.805 and §85.870.

(2) Instead of the procedures in §85.810 through §85.885, the procedures in 34 CFR part 668, subpart G or 34 CFR part 682, subpart D or G, as applicable.

(3) On appeal from a decision debaring a title IV, HEA participant, we issue a final decision after we receive any written materials from the parties.

(4) In addition to the findings and conclusions required by 34 CFR part 668, subpart G or 34 CFR part 682, subpart D or G, the debaring official, and, on appeal, the Secretary determines whether there is sufficient cause for debarment as explained in §85.800.

Authority: E.O. 12549 (3 CFR 1986 Comp., p. 189); E.O. 12689 (3 CFR Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103-355, 108 Stat. 3243 at 3327.

[68 FR 66612, Nov. 26, 2003]

### **§ 85.612 When does an exclusion by another agency affect the ability of the excluded person to participate in a title IV, HEA transaction?**

(a) If a title IV, HEA participant is debarred by another agency under E.O. 12549, using procedures described in paragraph (d) of this section, that party is not eligible to enter into title IV, HEA transactions for the duration of the debarment.

(b)(1) If a title IV, HEA participant is suspended by another agency under E.O. 12549 or under a proposed debarment under the Federal Acquisition Regulation (FAR) (48 CFR part 9, subpart 9.4), using procedures described in paragraph (d) of this section, that party is not eligible to enter into title IV, HEA transactions for the duration of the suspension.

(2)(i) The suspension of title IV, HEA eligibility as a result of suspension by another agency lasts for at least 60 days.

(ii) If the excluded party does not object to the suspension, the 60-day period begins on the 35th day after that agency issues the notice of suspension.

(iii) If the excluded party objects to the suspension, the 60-day period begins on the date of the decision of the suspending official.

(3) The suspension of title IV, HEA eligibility does not end on the 60th day if—

(i) The excluded party agrees to an extension; or

(ii) Before the 60th day we begin a limitation or termination proceeding against the excluded party under 34 CFR part 668, subpart G or part 682, subpart D or G.

(c)(1) If a title IV, HEA participant is debarred or suspended by another Federal agency—

(i) We notify the participant whether the debarment or suspension prohibits participation in title IV, HEA transactions; and

(ii) If participation is prohibited, we state the effective date and duration of the prohibition.

(2) If a debarment or suspension by another agency prohibits participation in title IV, HEA transactions, that prohibition takes effect 20 days after we mail notice of our action.

(3) If ED or another Federal agency suspends a title IV, HEA participant, we determine whether grounds exist for an emergency action against the participant under 34 CFR part 668, subpart G or part 682, subpart D or G, as applicable.

(4) We use the procedures in §85.611 to exclude a title IV, HEA participant excluded by another Federal agency using procedures that did not meet the standards in paragraph (d) of this section.

(d) If a title IV, HEA participant is excluded by another agency, we debar, terminate, or suspend the participant—as provided under this part, 34 CFR part 668, or 34 CFR part 682, as applicable—if that agency followed procedures that gave the excluded party—

- (1) Notice of the proposed action;
- (2) An opportunity to submit and have considered evidence and argument to oppose the proposed action;
- (3) An opportunity to present its objection at a hearing—
  - (i) At which the agency has the burden of persuasion by a preponderance of the evidence that there is cause for the exclusion; and
  - (ii) Conducted by an impartial person who does not also exercise prosecutorial or investigative responsibilities with respect to the exclusion action;
- (4) An opportunity to present witness testimony, unless the hearing official finds that there is no genuine dispute about a material fact;
- (5) An opportunity to have agency witnesses with personal knowledge of material facts in genuine dispute testify about those facts, if the hearing official determines their testimony to be needed, in light of other available evidence and witnesses; and
- (6) A written decision stating findings of fact and conclusions of law on which the decision is rendered.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189), E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103-355, 108 Stat. 3243 at 3327.

[68 FR 66613, Nov. 26, 2003]

#### **§ 85.615 How does the Department of Education notify a person of a suspension or debarment action?**

- (a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—
  - (1) You or your identified counsel; or
  - (2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.
- (b) The notice is effective if sent to any of these persons.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327.

#### **§ 85.620 Do Federal agencies coordinate suspension and debarment actions?**

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327.

#### **§ 85.625 What is the scope of a suspension or debarment?**

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

(1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or

(2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

(1) Officially names the affiliate in the notice; and

(2) Gives the affiliate an opportunity to contest the action.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.630 May the Department of Education impute conduct of one person to another?**

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.635 May the Department of Education settle a debarment or suspension action?**

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.640 May a settlement include a voluntary exclusion?**

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.645 Do other Federal agencies know if the Department of Education agrees to a voluntary exclusion?**

- (a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.
- (b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Subpart G—Suspension**

### **§ 85.700 When may the suspending official issue a suspension?**

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

- (a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under §85.800 (a), or
- (b) There exists adequate evidence to suspect any other cause for debarment listed under §85.800(b) through (d); and
- (c) Immediate action is necessary to protect the public interest.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.705 What does the suspending official consider in issuing a suspension?**

- (a) In determining the adequacy of the evidence to support the suspension, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.
- (b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.
- (c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.710 When does a suspension take effect?**

A suspension is effective when the suspending official signs the decision to suspend.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.711 When does a suspension affect title IV, HEA transactions?**

(a) A suspension under §85.611(a) takes effect immediately if the Secretary takes an emergency action under 34 CFR part 668, subpart G or 34 CFR part 682, subpart D or G at the same time the Secretary issues the suspension.

(b)(1) Except as provided under paragraph (a) of this section, a suspension under §85.611(a) takes effect 20 days after those procedures are complete.

(2) If the respondent appeals the suspension to the Secretary before the expiration of the 20 days under paragraph (b)(1) of this section, the suspension takes effect when the respondent receives the Secretary's decision.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189), E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455 of Pub. L. 103–355, 108 Stat. 3243 at 3327.

[68 FR 66613, Nov. 26, 2003]

**§ 85.715 What notice does the suspending official give me if I am suspended?**

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

(a) That you have been suspended;

(b) That your suspension is based on—

(1) An indictment;

(2) A conviction;

(3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or

(4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

(c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) upon which we relied under §85.700 for imposing suspension;

(e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

(f) Of the applicable provisions of this subpart, Subpart F of this part, and any other ED procedures governing suspension decision making; and

(g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.720 How may I contest a suspension?**

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.725 How much time do I have to contest a suspension?**

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the suspending official within 30 days after you receive the Notice of Suspension.

(b) We consider the notice to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.730 What information must I provide to the suspending official if I contest a suspension?**

(a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Department of Education may seek further criminal, civil or administrative action against you, as appropriate.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.735 Under what conditions do I get an additional opportunity to challenge the facts on which**

**the suspension is based?**

- (a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—
- (1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;
  - (2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;
  - (3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or
  - (4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.
- (b) You will have an opportunity to challenge the facts if the suspending official determines that—
- (1) The conditions in paragraph (a) of this section do not exist; and
  - (2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.
- (c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.740 Are suspension proceedings formal?**

- (a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.
- (b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.745 How is fact-finding conducted?**

- (a) If fact-finding is conducted—
- (1) You may present witnesses and other evidence, and confront any witness presented; and
  - (2) The fact-finder must prepare written findings of fact for the record.
- (b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Department of Education agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?**

- (a) The suspending official bases the decision on all information contained in the official record. The record includes—
- (1) All information in support of the suspending official's initial decision to suspend you;
  - (2) Any further information and argument presented in support of, or opposition to, the suspension; and
  - (3) Any transcribed record of fact-finding proceedings.
- (b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.755 When will I know whether the suspension is continued or terminated?**

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.760 How long may my suspension last?**

- (a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.
- (b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.
- (c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Subpart H—Debarment**

### **§ 85.800 What are the causes for debarment?**

We may debar a person for—

(a) Conviction of or civil judgment for—

- (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
- (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
- (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or
- (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

- (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
- (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
- (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

- (1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;
  - (2) Knowingly doing business with an ineligible person, except as permitted under §85.120;
  - (3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;
  - (4) Violation of a material provision of a voluntary exclusion agreement entered into under §85.640 or of any settlement of a debarment or suspension action; or
  - (5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or
- (d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327.

### **§ 85.805 What notice does the debarring official give me if I am proposed for debarment?**

After consideration of the causes in §85.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to §85.615, advising you—

- (a) That the debarring official is considering debarring you;
- (b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;
- (c) Of the cause(s) under §85.800 upon which the debarring official relied for proposing your debarment;
- (d) Of the applicable provisions of this subpart, Subpart F of this part, and any other ED procedures governing debarment; and
- (e) Of the governmentwide effect of a debarment from procurement and nonprocurement programs and activities.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C.

1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.810 When does a debarment take effect?**

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.811 When does a debarment affect title IV, HEA transactions?**

(a) A debarment under §85.611(b) takes effect 30 days after those procedures are complete.

(b) If the respondent appeals the debarment to the Secretary before the expiration of the 30 days under paragraph (a) of this section, the debarment takes effect when the respondent receives the Secretary's decision.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189) E.O. 12689 ( 3 CFR, Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e–3 and 3474; and Sec. 2455 of Pub. L. 103–355, 108 Stat. 3243 at 3327.

[68 FR 66613, Nov. 26, 2003]

### **§ 85.815 How may I contest a proposed debarment?**

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.820 How much time do I have to contest a proposed debarment?**

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C.

1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.825 What information must I provide to the debarring official if I contest a proposed debarment?**

- (a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—
- (1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in §85.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;
  - (2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;
  - (3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and
  - (4) All of your affiliates.
- (b) If you fail to disclose this information, or provide false information, the Department of Education may seek further criminal, civil or administrative action against you, as appropriate.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?**

- (a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—
- (1) Your debarment is based upon a conviction or civil judgment;
  - (2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or
  - (3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.
- (b) You will have an additional opportunity to challenge the facts if the debarring official determines that—
- (1) The conditions in paragraph (a) of this section do not exist; and
  - (2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.
- (c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.835 Are debarment proceedings formal?**

- (a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official

record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.840 How is fact-finding conducted?**

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Department of Education agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.845 What does the debarring official consider in deciding whether to debar me?**

(a) The debarring official may debar you for any of the causes in §85.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at §85.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.850 What is the standard of proof in a debarment action?**

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.855 Who has the burden of proof in a debarment action?**

- (a) We have the burden to prove that a cause for debarment exists.
- (b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103-355, 108 Stat. 3243 at 3327.

**§ 85.860 What factors may influence the debarring official's decision?**

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

- (a) The actual or potential harm or impact that results or may result from the wrongdoing.
- (b) The frequency of incidents and/or duration of the wrongdoing.
- (c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.
- (d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.
- (e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.
- (f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.
- (g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.
- (h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.
- (i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.
- (j) Whether the wrongdoing was pervasive within your organization.
- (k) The kind of positions held by the individuals involved in the wrongdoing.
- (l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.
- (m) Whether your principals tolerated the offense.
- (n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.
- (o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

- (p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.
- (q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.
- (r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.
- (s) Other factors that are appropriate to the circumstances of a particular case.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.865 How long may my debarment last?**

- (a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.
- (b) In determining the period of debarment, the debarring official may consider the factors in §85.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.
- (c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.870 When do I know if the debarring official debars me?**

- (a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.
- (b) The debarring official sends you written notice, pursuant to §85.615 that the official decided, either—
  - (1) Not to debar you; or
  - (2) To debar you. In this event, the notice:
    - (i) Refers to the Notice of Proposed Debarment;
    - (ii) Specifies the reasons for your debarment;
    - (iii) States the period of your debarment, including the effective dates; and
    - (iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.875 May I ask the debarring official to reconsider a decision to debar me?**

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to

reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.880 What factors may influence the debarring official during reconsideration?**

The debarring official may reduce or terminate your debarment based on—

- (a) Newly discovered material evidence;
- (b) A reversal of the conviction or civil judgment upon which your debarment was based;
- (c) A bona fide change in ownership or management;
- (d) Elimination of other causes for which the debarment was imposed; or
- (e) Other reasons the debarring official finds appropriate.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.885 May the debarring official extend a debarment?**

- (a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.
- (b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.
- (c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

## **Subpart I—Definitions**

### **§ 85.900 Adequate evidence.**

*Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.905 Affiliate.**

Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways we use to determine control include, but are not limited to—

- (a) Interlocking management or ownership;
- (b) Identity of interests among family members;
- (c) Shared facilities and equipment;
- (d) Common use of employees; or
- (e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.910 Agency.**

*Agency* means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered “agencies” for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.915 Agent or representative.**

*Agent or representative* means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.920 Civil judgment.**

*Civil judgment* means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.925 Conviction.**

*Conviction* means—

- (a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or
- (b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.930 Debarment.**

*Debarment* means an action taken by a debarring official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.935 Debarring official.**

(a) *Debarring official* means an agency official who is authorized to impose debarment. A debarring official is either—

- (1) The agency head; or
- (2) An official designated by the agency head.

(b) [Reserved]

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.940 Disqualified.**

*Disqualified* means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

- (a) The Davis-Bacon Act (40 U.S.C. 276(a));
- (b) The equal employment opportunity acts and Executive orders; or
- (c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.942 ED Deciding Official.**

The ED Deciding Official is an ED officer who has delegated authority under the procedures of the Department of Education to decide whether to affirm a suspension or enter a debarment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189), E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103–355, 108 Stat. 3243 at 3327.

[68 FR 66614, Nov. 26, 2003]

**§ 85.945 Excluded or exclusion.**

*Excluded or exclusion* means—

- (a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or
- (b) The act of excluding a person.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.950 Excluded Parties List System**

*Excluded Parties List System (EPLS)* means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, “List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs,” so long as published.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.952 HEA.**

HEA means the Higher Education Act of 1965, as amended.

[68 FR 66614, Nov. 26, 2003]

**§ 85.955 Indictment.**

*Indictment* means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.960 Ineligible or ineligibility.**

*Ineligible or ineligibility* means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

**§ 85.965 Legal proceedings.**

*Legal proceedings* means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.970 Nonprocurement transaction.**

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

- (1) Grants.
- (2) Cooperative agreements.
- (3) Scholarships.
- (4) Fellowships.
- (5) Contracts of assistance.
- (6) Loans.
- (7) Loan guarantees.
- (8) Subsidies.
- (9) Insurances.
- (10) Payments for specified uses.
- (11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.975 Notice.**

*Notice* means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See §85. 615.)

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.980 Participant.**

*Participant* means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.985 Person.**

*Person* means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.990 Preponderance of the evidence.**

*Preponderance of the evidence* means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.995 Principal.**

*Principal* means—

- (a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or
- (b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—
  - (1) Is in a position to handle Federal funds;
  - (2) Is in a position to influence or control the use of those funds; or,
  - (3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.
- (c) For the purposes of Department of Education title IV, HEA transactions—
  - (1) A third-party servicer, as defined in 34 CFR 668.2 or 682.200; or
  - (2) Any person who provides services described in 34 CFR 668.2 or 682.200 to a title IV, HEA participant, whether or not that person is retained or paid directly by the title IV, HEA participant.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.1000 Respondent.**

*Respondent* means a person against whom an agency has initiated a debarment or suspension action.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

### **§ 85.1005 State.**

(a) *State* means—

- (1) Any of the states of the United States;
- (2) The District of Columbia;
- (3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.1010 Suspending official.**

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.1015 Suspension.**

*Suspension* is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455, Pub. L. 103–355, 108 Stat. 3243 at 3327.

#### **§ 85.1016 Title IV, HEA participant.**

A *title IV, HEA participant* is—

(a) An institution described in 34 CFR 600.4, 600.5, or 600.6 that provides postsecondary education; or

(b) A lender, third-party servicer, or guaranty agency, as those terms are defined in 34 CFR 668.2 or 682.200.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103–355, 108 Stat. 3243 at 3327.

[68 FR 66614, Nov. 26, 2003]

#### **§ 85.1017 Title IV, HEA program.**

A *title IV, HEA program* includes any program listed in 34 CFR 668.1(c).

Authority: E.O. 12549 (3 CFR, 1986 Comp., p.1890; E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103-355, 108 Stat. 3243 at 3327.

[68 FR 66614, Nov. 26, 2003]

**§ 85.1018 Title IV, HEA transaction.**

A *title IV, HEA transaction* includes:

- (a) A disbursement or delivery of funds provided under a title IV, HEA program to a student or borrower;
- (b) A certification by an educational institution of eligibility for a loan under a title IV, HEA program;
- (c) Guaranteeing a loan made under a title IV, HEA program; and
- (d) The acquisition or exercise of any servicing responsibility for a grant, loan, or work study assistance under a title IV, HEA program.

Authority: E.O. 12549 (3 CFR, 1986 Comp., p. 189) E.O. 12689 (3 CFR, 1989 Comp., p. 235); 20 U.S.C. 1082, 1094, 1221e-3 and 3474; and Sec. 2455 of Pub. L. 103-355, 108 Stat. 3243 at 3327.

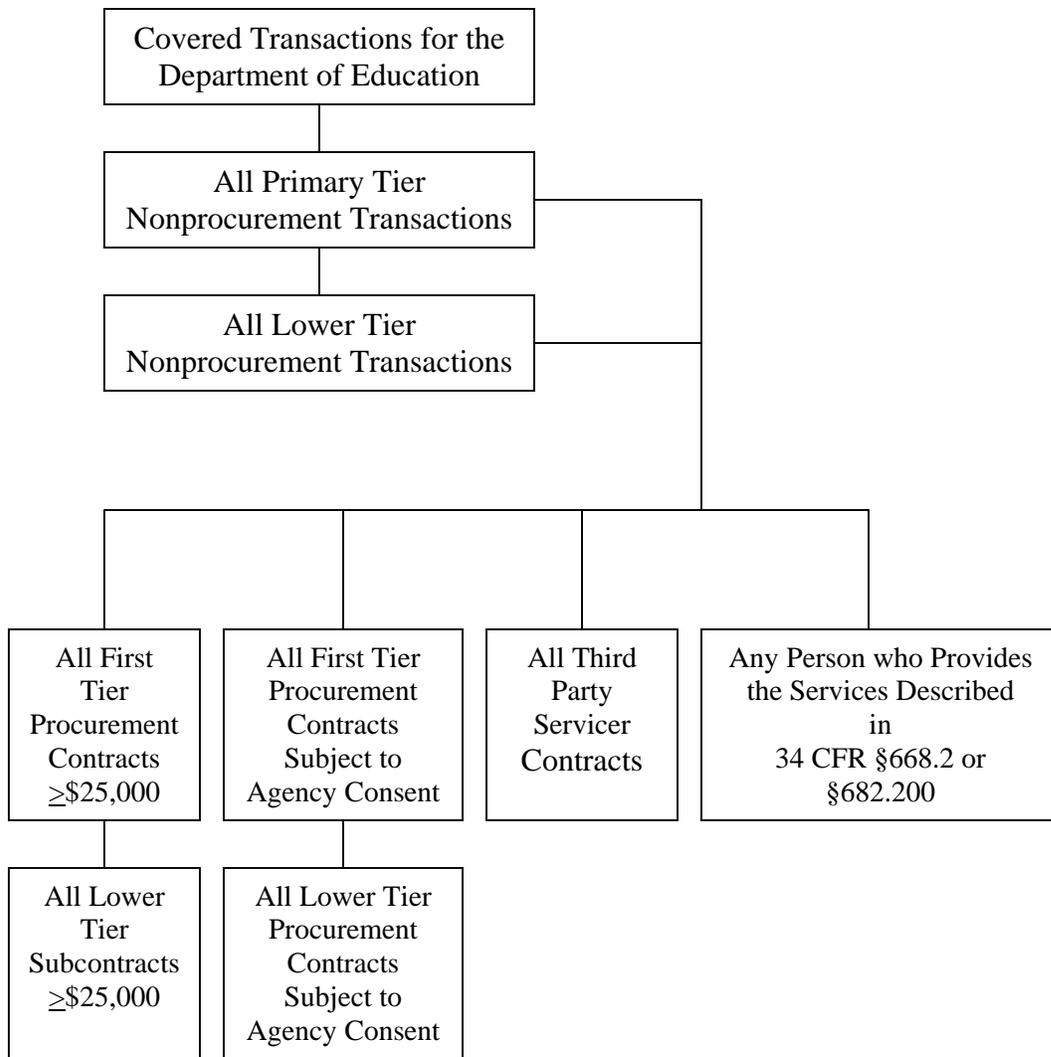
[68 FR 66614, Nov. 26, 2003]

**§ 85.1020 Voluntary exclusion or voluntarily excluded.**

- (a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.
- (b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

**Subpart J [Reserved]**

**Appendix to Part 85—Covered Transactions**



[68 FR 66614, Nov. 26, 2003]

**NOTE TO READER:** The content of this document is taken from the e-CFR version of Title 34 of the Code of Federal Regulations (CFR), as published by the Office of the Federal Register at the Government Printing Office web site, GPO ACCESS. The e-CFR is not an official version of the CFR. While the Department has made an effort to ensure the accuracy of the regulations contained in this electronic text, this CD-ROM is intended for information and educational purposes only. The official version of these regulations are those published by the Office of the Federal Register (OFR). Individuals relying on this CD-ROM for legal research should verify their results against the official editions of the CFR, Federal Register, and List of CFR Sections Affected (LSA), all available online at:

[www.gpoaccess.gov](http://www.gpoaccess.gov)

## PART 86—DRUG AND ALCOHOL ABUSE PREVENTION

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**Authority:** 20 U.S.C. 1145g, unless otherwise noted.

**Source:** 55 FR 33581, Aug. 16, 1990, unless otherwise noted.

### **Subpart A—General**

#### **§ 86.1 What is the purpose of the Drug and Alcohol Abuse Prevention regulations?**

The purpose of the Drug and Alcohol Abuse Prevention regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which added section 1213 to the Higher Education Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g)

[61 FR 66225, Dec. 17, 1996]

#### **§ 86.2 What Federal programs are covered by this part?**

The Federal programs covered by this part include—

(a) All programs administered by the Department of Education under which an IHE may receive funds or

any other form of Federal financial assistance; and

(b) All programs administered by any other Federal agency under which an IHE may receive funds or any other form of Federal financial assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.3 What actions shall an IHE take to comply with the requirements of this part?**

(a) An IHE shall adopt and implement a drug prevention program as described in §86.100 to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.

(b) An IHE shall provide a written certification that it has adopted and implemented the drug prevention program described in §86.100.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, 66226, Dec. 17, 1996]

### **§ 86.4 What are the procedures for submitting a drug prevention program certification?**

An IHE shall submit to the Secretary the drug prevention program certification required by §86.3(b).

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

### **§ 86.5 What are the consequences if an IHE fails to submit a drug prevention program certification?**

(a) An IHE that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.6 When must an IHE submit a drug prevention program certification?**

(a) After October 1, 1990, except as provided in paragraph (b) of this section, an IHE is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE has submitted a drug prevention program certification.

(b)(1) The Secretary may allow an IHE until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that—

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3) An IHE shall submit a request for an extension to the Secretary.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

## § 86.7 What definitions apply to this part?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR part 77:

Department

EDGAR

Secretary

(b) *Other definitions.* The following terms used in this part are defined as follows:

*Compliance agreement* means an agreement between the Secretary and an IHE that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part.

*Institution of higher education* means—

(1) An institution of higher education, as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education, as defined in 34 CFR 600.5;

(3) A postsecondary vocational institution, as defined in 34 CFR 600.6; and

(4) A vocational school, as defined in 34 CFR 600.7.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

## Subpart B—Institutions of Higher Education

### § 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

(a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of—

- (1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;
- (2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;
- (3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
- (4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and
- (5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(b) A biennial review by the IHE of its program to—

- (1) Determine its effectiveness and implement changes to the program if they are needed; and
- (2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

### **§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?**

The Secretary annually reviews a representative sample of IHE drug prevention programs.

(Authority: 20 U.S.C. 1145g)

### **§ 86.102 What is required of an IHE that the Secretary selects for annual review?**

If the Secretary selects an IHE for review under §86.101, the IHE shall provide the Secretary access to personnel, records, documents and any other necessary information requested by the Secretary to review the IHE's adoption and implementation of its drug prevention program.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

### **§ 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?**

(a) Each IHE that provides the drug prevention program certification required by §86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by §86.100(a) as well as the results of the biennial review required by §86.100(b).

(b)(1) An IHE shall retain the following records for three years after the fiscal year in which the record was

created:

- (i) The items described in paragraph (a) of this section.
  - (ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.
- (2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

### **Subpart C [Reserved]**

## **Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE**

### **§ 86.300 What constitutes a violation of this part by an IHE?**

An IHE violates this part by—

- (a) Receiving any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification in accordance with §86.3(b); or
- (b) Violating its certification. Violation of a certification includes failure of an IHE to—
  - (1) Adopt or implement its drug prevention program; or
  - (2) Consistently enforce its disciplinary sanctions for violations by students and employees of the standards of conduct adopted by an IHE under §86.100(a)(1).

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66226, Dec. 17, 1996]

### **§ 86.301 What actions may the Secretary take if an IHE violates this part?**

- (a) If an IHE violates its certification, the Secretary may issue a response to the IHE. A response may include, but is not limited to—
  - (1) Provision of information and technical assistance; and
  - (2) Formulation of a compliance agreement designed to bring the IHE into full compliance with this part as soon as feasible.
- (b) If an IHE receives any form of Federal financial assistance without having submitted a certification or violates its certification, the Secretary may impose one or more sanctions on the IHE, including—
  - (1) Repayment of any or all forms of Federal financial assistance received by the IHE when it was in violation of this part; and
  - (2) The termination of any or all forms of Federal financial assistance that—
    - (i)(A) Except as specified in paragraph (b)(2)(ii) of this section, ends an IHE's eligibility to receive any or all forms of Federal financial assistance. The Secretary specifies which forms of Federal financial assistance would be affected; and
    - (B) Prohibits an IHE from making any new obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

**§ 86.302 What are the procedures used by the Secretary for providing information or technical assistance?**

(a) The Secretary provides information or technical assistance to an IHE in writing, through site visits, or by other means.

(b) The IHE shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

**§ 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?**

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE in writing of—

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance; and

(2) The response the Secretary intends to issue.

(b) An IHE may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph (a)(2) of this section within 30 days after the date the IHE receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE in accordance with the procedures in §86.304.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

**§ 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's eligibility for any or all forms of Federal financial assistance?**

- (a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's eligibility for any or all forms of Federal financial assistance by sending the IHE a notice by certified mail with return receipt requested. This notice—
- (1) Informs the IHE of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;
  - (2) Specifies, as appropriate—
    - (i) The amount of Federal financial assistance that must be repaid and the date by which the IHE must repay the funds; and
    - (ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and
  - (3) Informs the IHE that the repayment of Federal financial assistance will not be required or that the termination will not be effective on the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE receives the notice of intent described in this paragraph—
    - (i) Written material indicating why the repayment of Federal financial assistance or termination should not take place; or
    - (ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE contends need not be repaid.
- (b) If the IHE does not request a hearing but submits written material—
- (1) The IHE receives no additional opportunity to request or receive a hearing; and
  - (2) The designated Department official, after considering the written material, notifies the IHE in writing whether—
    - (i) Any or all of the Federal financial assistance must be repaid; or
    - (ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

## **Subpart E—Appeal Procedures**

### **§ 86.400 What is the scope of this subpart?**

- (a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE to receive some or all forms of Federal financial assistance for violations of this part.
- (b) An Administrative Law Judge (ALJ) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.401 What are the authority and responsibility of the ALJ?**

- (a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and

takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to—

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether—

(1) The IHE received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE violated its certification.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

#### **§ 86.402 Who may be a party in a hearing under this subpart?**

(a) Only the designated Department official and the IHE that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

#### **§ 86.403 May a party be represented by counsel?**

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g)

#### **§ 86.404 How may a party communicate with an ALJ?**

(a) A party may not communicate with an ALJ on any fact at issue in the case or on any matter relevant to the merits of the case unless the other party is given notice and an opportunity to participate.

(b)(1) To obtain an order or ruling from an ALJ, a party shall make a motion to the ALJ.

(2) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with §86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in §86.405(d).

(Authority: 20 U.S.C. 1145g)

### **§ 86.405 What are the requirements for filing written submissions?**

- (a) Any written submission under this subpart must be filed by hand-delivery, by mail, or by facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.
- (b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail. If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.
- (c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.
- (d)(1) The filing date for a written submission is the date the document is—
  - (i) Hand-delivered;
  - (ii) Mailed; or
  - (iii) Sent by facsimile transmission.
- (2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.
- (e) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.
- (f) If a document is filed by facsimile transmission, the Secretary or the designated Department official, as applicable, may require the filing of a follow-up hard copy by hand-delivery or by mail within a reasonable period of time.

(Authority: 20 U.S.C. 1145g)

[57 FR 56795, Nov. 30, 1992]

### **§ 86.406 What must the ALJ do if the parties enter settlement negotiations?**

- (a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.
- (b) The following are not admissible in any proceeding under this part:
  - (1) Evidence of conduct during settlement negotiations.
  - (2) Statements made during settlement negotiations.
  - (3) Terms of settlement offers.
- (c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g)

### **§ 86.407 What are the procedures for scheduling a hearing?**

- (a) If the IHE requests a hearing by the time specified in §86.304(a)(3), the designated Department official sets the date and the place.

- (b)(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.
- (2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.
- (c) No termination takes effect until after a hearing is held and a decision is issued by the Department.
- (d) With the approval of the ALJ and the consent of the designated Department official and the IHE, any time schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.408 What are the procedures for conducting a pre-hearing conference?**

- (a)(1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by—
  - (i) The designated Department official; or
  - (ii) The IHE.
- (2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.
- (b) A pre-hearing conference may consist of—
  - (1) A conference telephone call;
  - (2) An informal meeting; or
  - (3) The submission and exchange of written material.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.409 What are the procedures for conducting a hearing on the record?**

- (a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.
- (b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—
  - (1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or
  - (2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.
- (c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE. Procedures to expedite may include, but are not limited to, the following:
  - (1) A restriction on the number or length of submissions.
  - (2) The conduct of the hearing by telephone conference call.
  - (3) A review limited to the written record.
  - (4) A certification by the parties to facts and legal authorities not in dispute.
- (d)(1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.
- (2) The designated Department official has the burden of persuasion in any proceeding under this subpart.
- (3)(i) The parties may agree to exchange relevant documents and information.
- (ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any

other exchange between the parties of documents or information.

(4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to—

(1) The designated Department official; and

(2) The IHE on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.410 What are the procedures for issuance of a decision?**

(a)(1) The ALJ issues a written decision to the IHE, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after—

(i) The last brief is filed;

(ii) The last day of the hearing if one is held; or

(iii) The date on which the ALJ terminates the hearing in accordance with §86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

(c)(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE does not take effect pending the Secretary's review.

(e)(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

### **§ 86.411 What are the procedures for requesting reinstatement of eligibility?**

(a)(1) An IHE whose eligibility to receive any or all forms of Federal financial assistance has been

terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment obligation imposed upon it under §86.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g)

[55 FR 33581, Aug. 16, 1990, as amended at 61 FR 66225, Dec. 17, 1996]

**NOTE TO READER:** The content of this document is taken from the e-CFR version of Title 34 of the Code of Federal Regulations (CFR), as published by the Office of the Federal Register at the Government Printing Office web site, GPO ACCESS. The e-CFR is not an official version of the CFR. While the Department has made an effort to ensure the accuracy of the regulations contained in this electronic text, this CD-ROM is intended for information and educational purposes only. The official version of these regulations are those published by the Office of the Federal Register (OFR). Individuals relying on this CD-ROM for legal research should verify their results against the official editions of the CFR, Federal Register, and List of CFR Sections Affected (LSA), all available online at:

[www.gpoaccess.gov](http://www.gpoaccess.gov)

## PART 97—PROTECTION OF HUMAN SUBJECTS

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**Authority:** 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; 42 U.S.C. 300v–1(b).

**Source:** 56 FR 28012, 28021, June 18, 1991, unless otherwise noted.

### **Subpart A—Federal Policy for the Protection of Human Subjects (Basic ED Policy for Protection of Human Research Subjects)**

#### **§ 97.101 To what does this policy apply?**

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(1) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in §97.102(e), must comply with all sections of this policy.

(2) Research that is neither conducted nor supported by a federal department or agency but is subject to regulation as defined in §97.102(e) must be reviewed and approved, in compliance with §§97.101, 97.102, and §§97.107 through 97.117 of this policy, by an institutional review board (IRB) that operates in

accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and

(ii) Any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not exempt under paragraph (b) (2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or

(ii) Federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs;

(ii) Procedures for obtaining benefits or services under those programs;

(iii) Possible changes in or alternatives to those programs or procedures; or

(iv) Possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies,

(i) If wholesome foods without additives are consumed or

(ii) If a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. (An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.) In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the Federal Register or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Human Research Protections, Department of Health and Human Services (HHS), or any successor office, and shall also publish them in the Federal Register or in such other manner as provided in department or agency procedures.<sup>1</sup>

<sup>1</sup> Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A–D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR 46.101(b) do not apply to research involving prisoners, subpart C. The exemption at 45 CFR 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

## § 97.102 Definitions.

(a) *Department or agency head* means the head of any federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or agency (including federal, state, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure (s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation*, and similar terms are intended to encompass those research activities for which a federal department or agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration).

It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains

(1) Data through intervention or interaction with the individual, or

(2) Identifiable private information.

*Intervention* includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. *Interaction* includes communication or interpersonal contact between investigator and subject. "Private information" includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(j) *Certification* means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.**

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Human Research Protections, HHS, or any successor office, and approved for federalwide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Human Research Protections, (HHS), or any successor office.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

- (1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of whether the research is subject to federal regulation. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under §97.101 (b) or (i).
- (2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.
- (3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with §97.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Human Research Protections, HHS, or any successor office.
- (4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to eliminate apparent immediate hazards to the subject.
- (5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.
- (c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.
- (d) The department or agency head will evaluate all assurances submitted in accordance with this policy through such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.
- (e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.
- (f) Certification is required when the research is supported by a federal department or agency and not otherwise exempted or waived under §97.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by §97.103 of this Policy has been reviewed and approved by the IRB. Such certification must be submitted with the

application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by §97.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

(Approved by the Office of Management and Budget under Control Number 0990–0260.)

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991; 56 FR 29756, June 28, 1991, as amended at 70 FR 36328, June 23, 2005]

## **§§ 97.104-97.106 [Reserved]**

### **§ 97.107 IRB membership.**

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution's consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.108 IRB functions and operations.**

In order to fulfill the requirements of this policy each IRB shall:

- (a) Follow written procedures in the same detail as described in §97.103(b)(4) and, to the extent required by, §97.103(b)(5).
- (b) Except when an expedited review procedure is used (see §97.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.109 IRB review of research.**

- (a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.
- (b) An IRB shall require that information given to subjects as part of informed consent is in accordance with §97.116. The IRB may require that information, in addition to that specifically mentioned in §97.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.
- (c) An IRB shall require documentation of informed consent or may waive documentation in accordance with §97.117.
- (d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.
- (e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

(Approved by the Office of Management and Budget under Control Number 0990–0260.)

[56 FR 28012, 28021, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.**

- (a) The Secretary, HHS, has established, and published as a Notice in the Federal Register, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with other departments and agencies, through periodic republication by the Secretary, HHS, in the Federal Register. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.
- (b) An IRB may use the expedited review procedure to review either or both of the following:
  - (1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk,
  - (2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in §97.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals which have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### **§ 97.111 Criteria for IRB approval of research.**

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized:

(i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and

(ii) Whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by §97.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by §97.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.112 Review by institution.**

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.113 Suspension or termination of IRB approval of research.**

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

(Approved by the Office of Management and Budget under Control Number 0990–0260.)

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### **§ 97.114 Cooperative research.**

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.115 IRB records.**

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

- (3) Records of continuing review activities.
  - (4) Copies of all correspondence between the IRB and the investigators.
  - (5) A list of IRB members in the same detail as described in §97.103(b)(3).
  - (6) Written procedures for the IRB in the same detail as described in §97.103(b)(4) and §97.103(b)(5).
  - (7) Statements of significant new findings provided to subjects, as required by §97.116(b)(5).
- (b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of the research. All records shall be accessible for inspection and copying by authorized representatives of the department or agency at reasonable times and in a reasonable manner.

(Approved by the Office of Management and Budget under Control Number 0990–0260.)

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### **§ 97.116 General requirements for informed consent.**

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) *Basic elements of informed consent.* Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

- (1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;
- (2) A description of any reasonably foreseeable risks or discomforts to the subject;
- (3) A description of any benefits to the subject or to others which may reasonably be expected from the research;
- (4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;
- (5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;
- (6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;
- (7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and
- (8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

- (b) *Additional elements of informed consent.* When appropriate, one or more of the following elements of information shall also be provided to each subject:
- (1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;
  - (2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;
  - (3) Any additional costs to the subject that may result from participation in the research;
  - (4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;
  - (5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and
  - (6) The approximate number of subjects involved in the study.
- (c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:
- (1) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine:
    - (i) Public benefit of service programs;
    - (ii) Procedures for obtaining benefits or services under those programs;
    - (iii) Possible changes in or alternatives to those programs or procedures; or
    - (iv) Possible changes in methods or levels of payment for benefits or services under those programs; and
  - (2) The research could not practicably be carried out without the waiver or alteration.
- (d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:
- (1) The research involves no more than minimal risk to the subjects;
  - (2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;
  - (3) The research could not practicably be carried out without the waiver or alteration; and
  - (4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.
- (e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.
- (f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

(Approved by the Office of Management and Budget under Control Number 0990–0260.)

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### **§ 97.117 Documentation of informed consent.**

- (a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.
- (b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by §97.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by §97.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the short form.

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

(Approved by the Office of Management and Budget under Control Number 0990–0260.)

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

[56 FR 28012, 28021, June 18, 1991, as amended at 70 FR 36328, June 23, 2005]

### **§ 97.118 Applications and proposals lacking definite plans for involvement of human subjects.**

Certain types of applications for grants, cooperative agreements, or contracts are submitted to departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subject's involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research exempted or waived under §97.101 (b) or (i), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the department or agency.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.119 Research undertaken without the intention of involving human subjects.**

In the event research is undertaken without the intention of involving human subjects, but it is later

proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted, by the institution, to the department or agency, and final approval given to the proposed change by the department or agency.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.**

(a) The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.121 [Reserved]**

**§ 97.122 Use of Federal funds.**

Federal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.123 Early termination of research support: Evaluation of applications and proposals.**

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.124 Conditions.**

With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

## Subparts B–C [Reserved]

## Subpart D—Additional ED Protections for Children Who Are Subjects in Research

**Source:** 62 FR 63221, Nov. 26, 1997, unless otherwise noted.

### § 97.401 To what do these regulations apply?

(a) This subpart applies to all research involving children as subjects conducted or supported by the Department of Education.

(1) This subpart applies to research conducted by Department employees.

(2) This subpart applies to research conducted or supported by the Department of Education outside the United States, but in appropriate circumstances the Secretary may, under §97.101(i), waive the applicability of some or all of the requirements of the regulations in this subpart for that research.

(b) Exemptions in §97.101(b)(1) and (b)(3) through (b)(6) are applicable to this subpart. The exemption in §97.101(b)(2) regarding educational tests is also applicable to this subpart. The exemption in §97.101(b)(2) for research involving survey or interview procedures or observations of public behavior does not apply to research covered by this subpart, except for research involving observation of public behavior when the investigator or investigators do not participate in the activities being observed.

(c) The exceptions, additions, and provisions for waiver as they appear in §97.101(c) through (i) are applicable to this subpart.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b)).

### § 97.402 Definitions.

The definitions in §97.102 apply to this subpart. In addition, the following definitions also apply to this subpart:

(a) *Children* are persons who have not attained the legal age for consent to treatments or procedures involved in the research, under the applicable law of the jurisdiction in which the research will be conducted.

(b) *Assent* means a child's affirmative agreement to participate in research. Mere failure to object should not, absent affirmative agreement, be construed as assent.

(c) *Permission* means the agreement of parent(s) or guardian to the participation of their child or ward in research.

(d) *Parent* means a child's biological or adoptive parent.

(e) *Guardian* means an individual who is authorized under applicable State or local law to consent on behalf of a child to general medical care.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b)).

**§ 97.403 IRB duties.**

In addition to other responsibilities assigned to IRBs under this part, each IRB shall review research covered by this subpart and approve only research that satisfies the conditions of all applicable sections of this subpart.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b)).

**§ 97.404 Research not involving greater than minimal risk.**

ED conducts or funds research in which the IRB finds that no greater than minimal risk to children is presented, only if the IRB finds that adequate provisions are made for soliciting the assent of the children and the permission of their parents or guardians, as set forth in §97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.405 Research involving greater than minimal risk but presenting the prospect of direct benefit to the individual subjects.**

ED conducts or funds research in which the IRB finds that more than minimal risk to children is presented by an intervention or procedure that holds out the prospect of direct benefit for the individual subject, or by a monitoring procedure that is likely to contribute to the subject's well-being, only if the IRB finds that—

- (a) The risk is justified by the anticipated benefit to the subjects;
- (b) The relation of the anticipated benefit to the risk is at least as favorable to the subjects as that presented by available alternative approaches; and
- (c) Adequate provisions are made for soliciting the assent of the children and permission of their parents or guardians, as set forth in §97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.406 Research involving greater than minimal risk and no prospect of direct benefit to individual subjects, but likely to yield generalizable knowledge about the subject's disorder or condition.**

ED conducts or funds research in which the IRB finds that more than minimal risk to children is presented by an intervention or procedure that does not hold out the prospect of direct benefit for the individual subject, or by a monitoring procedure which is not likely to contribute to the well-being of the subject, only if the IRB finds that—

- (a) The risk represents a minor increase over minimal risk;
- (b) The intervention or procedure presents experiences to subjects that are reasonably commensurate with those inherent in their actual or expected medical, dental, psychological, social, or educational situations;
- (c) The intervention or procedure is likely to yield generalizable knowledge about the subjects' disorder or condition that is of vital importance for the understanding or amelioration of the subjects' disorder or condition; and
- (d) Adequate provisions are made for soliciting assent of the children and permission of their parents or

guardians, as set forth in §97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.407 Research not otherwise approvable which presents an opportunity to understand, prevent, or alleviate a serious problem affecting the health or welfare of children.**

ED conducts or funds research that the IRB does not believe meets the requirements of §97.404, §97.405, or §97.406 only if—

- (a) The IRB finds that the research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; and
- (b) The Secretary, after consultation with a panel of experts in pertinent disciplines (for example: science, medicine, education, ethics, law) and following opportunity for public review and comment, has determined either that—
  - (1) The research in fact satisfies the conditions of §97.404, §97.405, or §97.406, as applicable; or
  - (2)(i) The research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children;
  - (ii) The research will be conducted in accordance with sound ethical principles; and
  - (iii) Adequate provisions are made for soliciting the assent of children and the permission of their parents or guardians, as set forth in §97.408.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

**§ 97.408 Requirements for permission by parents or guardians and for assent by children.**

(a) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine that adequate provisions are made for soliciting the assent of the children, if in the judgment of the IRB the children are capable of providing assent. In determining whether children are capable of assenting, the IRB shall take into account the ages, maturity, and psychological state of the children involved. This judgment may be made for all children to be involved in research under a particular protocol, or for each child, as the IRB deems appropriate. If the IRB determines that the capability of some or all of the children is so limited that they cannot reasonably be consulted or that the intervention or procedure involved in the research holds out a prospect of direct benefit that is important to the health or well-being of the children and is available only in the context of the research, the assent of the children is not a necessary condition for proceeding with the research. Even if the IRB determines that the subjects are capable of assenting, the IRB may still waive the assent requirement under circumstances in which consent may be waived in accord with §97.116.

(b) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine, in accordance with and to the extent that consent is required by §97.116, that adequate provisions are made for soliciting the permission of each child's parent(s) or guardian(s). If parental permission is to be obtained, the IRB may find that the permission of one parent is sufficient for research to be conducted under §97.404 or §97.405. If research is covered by §§97.406 and 97.407 and permission is to be obtained from parents, both parents must give their permission unless one parent is deceased, unknown, incompetent, or not reasonably available, or if only one parent has legal responsibility for the care and custody of the child.

(c) In addition to the provisions for waiver contained in §97.116, if the IRB determines that a research protocol is designed for conditions or for a subject population for which parental or guardian permission is

not a reasonable requirement to protect the subjects (for example, neglected or abused children), it may waive the consent requirements in subpart A of this part and paragraph (b) of this section, provided an appropriate mechanism for protecting the children who will participate as subjects in the research is substituted, and provided further that the waiver is not inconsistent with Federal, State, or local law. The choice of an appropriate mechanism depends upon the nature and purpose of the activities described in the protocol, the risk and anticipated benefit to the research subjects, and their age, maturity, status, and condition.

(d) Permission by parents or guardians must be documented in accordance with and to the extent required by §97.117.

(e) If the IRB determines that assent is required, it shall also determine whether and how assent must be documented.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

### **§ 97.409 Wards.**

(a) Children who are wards of the State or any other agency, institution, or entity may be included in research approved under §97.406 or §97.407 only if that research is—

(1) Related to their status as wards; or

(2) Conducted in schools, camps, hospitals, institutions, or similar settings in which the majority of children involved as subjects are not wards.

(b) If research is approved under paragraph (a) of this section, the IRB shall require appointment of an advocate for each child who is a ward, in addition to any other individual acting on behalf of the child as guardian or *in loco parentis*. One individual may serve as advocate for more than one child. The advocate must be an individual who has the background and experience to act in, and agrees to act in, the best interest of the child for the duration of the child's participation in the research and who is not associated in any way (except in the role as advocate or member of the IRB) with the research, the investigator or investigators, or the guardian organization.

(Authority: 5 U.S.C. 301; 20 U.S.C. 1221e–3, 3474; and 42 U.S.C. 300v–1(b))

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## PART 98—STUDENT RIGHTS IN RESEARCH, EXPERIMENTAL PROGRAMS, AND TESTING

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**Authority:** Sec. 514(a) of Pub. L. 93–380, 88 Stat. 574 (20 U.S.C. 1232h(a)); sec. 1250 of Pub. L. 95–561, 92 Stat. 2355–2356 (20 U.S.C. 1232h(b)); and sec. 408(a)(1) of Pub. L. 90–247, 88 Stat. 559–560, as amended (20 U.S.C. 1221e–3(a)(1)); sec. 414(a) of Pub. L. 96–88, 93 Stat. 685 (20 U.S.C. 3474(a)), unless otherwise noted.

**Source:** 49 FR 35321, Sept. 6, 1984, unless otherwise noted.

### § 98.1 Applicability of part.

This part applies to any program administered by the Secretary of Education that:

- (a)(1) Was transferred to the Department by the Department of Education Organization Act (DEOA); and
- (2) Was administered by the Education Division of the Department of Health, Education, and Welfare on

the day before the effective date of the DEOA; or

(b) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.

(c) The following chart lists the funded programs to which part 98 does not apply as of February 16, 1984.

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96–374) 20 U.S.C. 1070d–2)	part 206.
2. Programs administered by the Commissioner of the Rehabilitative Services Administration	The Rehabilitation Act of 1973 as amended by Pub. L. 95–602 (29 U.S.C. 700, et seq.)	parts 351–356, 361, 362, 365, 366, 369–375, 378, 379, 385–390, and 395.
3. College housing	Title IV of the Housing Act of 1950 as amended (12 U.S.C. 1749, et seq.)	part 614.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1230, 1232h, 3487, 3507)

## § 98.2 Definitions.

(a) The following terms used in this part are defined in 34 CFR part 77; “Department,” “Recipient,” “Secretary.”

(b) The following definitions apply to this part:

*Act* means the General Education Provisions Act.

*Office* means the information and investigation office specified in §98.5.

(Authority: 20 U.S.C. 1221e–3(a)(1))

## § 98.3 Access to instructional material used in a research or experimentation program.

(a) All instructional material—including teachers' manuals, films, tapes, or other supplementary instructional material—which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.

(b) For the purpose of this part *research or experimentation program or project* means any program or project in any program under §98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.

(c) For the purpose of the section *children* means persons not above age 21 who are enrolled in a program under §98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h(a))

## § 98.4 Protection of students' privacy in examination, testing, or treatment.

(a) No student shall be required, as part of any program specified in §98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following:

- (1) Political affiliations;
- (2) Mental and psychological problems potentially embarrassing to the student or his or her family;
- (3) Sex behavior and attitudes;
- (4) Illegal, anti-social, self-incriminating and demeaning behavior;
- (5) Critical appraisals of other individuals with whom the student has close family relationships;
- (6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or
- (7) Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

(b) As used in paragraph (a) of this section, *prior consent* means:

- (1) Prior consent of the student, if the student is an adult or emancipated minor; or
- (2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section:

- (1) *Psychiatric or psychological examination or test* means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and
- (2) *Psychiatric or psychological treatment* means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

(Authority: 20 U.S.C. 1232h(b))

### **§ 98.5 Information and investigation office.**

(a) The Secretary has designated an office to provide information about the requirements of section 439 of the Act, and to investigate, process, and review complaints that may be filed concerning alleged violations of the provisions of the section.

(b) The following is the name and address of the office designated under paragraph (a) of this section: Family Educational Rights and Privacy Act Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1231e–3(a)(1), 1232h)

### **§ 98.6 Reports.**

The Secretary may require the recipient to submit reports containing information necessary to resolve complaints under section 439 of the Act and the regulations in this part.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

### **§ 98.7 Filing a complaint.**

(a) Only a student or a parent or guardian of a student directly affected by a violation under Section 439 of

the Act may file a complaint under this part. The complaint must be submitted in writing to the Office.

(b) The complaint filed under paragraph (a) of this section must—

(1) Contain specific allegations of fact giving reasonable cause to believe that a violation of either §98.3 or §98.4 exists; and

(2) Include evidence of attempted resolution of the complaint at the local level (and at the State level if a State complaint resolution process exists), including the names of local and State officials contacted and significant dates in the attempted resolution process.

(c) The Office investigates each complaint which the Office receives that meets the requirements of this section to determine whether the recipient or contractor failed to comply with the provisions of section 439 of the Act.

(Approved by the Office of Management and Budget under control number 1880–0507)

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

### **§ 98.8 Notice of the complaint.**

(a) If the Office receives a complaint that meets the requirements of §98.7, it provides written notification to the complainant and the recipient or contractor against which the violation has been alleged that the complaint has been received.

(b) The notice to the recipient or contractor under paragraph (a) of this section must:

(1) Include the substance of the alleged violation; and

(2) Inform the recipient or contractor that the Office will investigate the complaint and that the recipient or contractor may submit a written response to the complaint.

(Authority: 20 U.S.C. 1221e–3(A)(1), 1232h)

### **§ 98.9 Investigation and findings.**

(a) The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigations, the Office provides to the complainant and recipient or contractor written notice of its findings and the basis for its findings.

(c) If the Office finds that the recipient or contractor has not complied with section 439 of the Act, the Office includes in its notice under paragraph (b) of this section:

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

### **§ 98.10 Enforcement of the findings.**

(a) If the recipient or contractor does not comply during the period of time set under §98.9(c), the Secretary may either:

(1) For a recipient, take an action authorized under 34 CFR part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

- (ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or
  - (iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or
- (2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:
- (i) Issuing a notice to suspend operations under 48 CFR 12.5; or
  - (ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.
- (b) If, after an investigation under §98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

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## PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

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**Authority:** 20 U.S.C. 1232g, unless otherwise noted.

**Source:** 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

## Subpart A—General

### § 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in §99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

- (1) The educational institution provides educational services or instruction, or both, to students; or
- (2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this

section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000]

### **§ 99.2 What is the purpose of these regulations?**

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

Note: 34 CFR 300.560–300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996]

### **§ 99.3 What definitions apply to these regulations?**

The following definitions apply to this part:

*Act* means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

*Attendance* includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

*Dates of attendance.* (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status ( e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

*Disciplinary action or proceeding* means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

*Disclosure* means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

*Educational agency or institution* means any public or private agency or institution to which this part applies under §99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

*Education records.* (a) The term means those records that are:

- (1) Directly related to a student; and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

- (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- (2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of §99.8.
- (3)(i) Records relating to an individual who is employed by an educational agency or institution, that:
  - (A) Are made and maintained in the normal course of business;
  - (B) Relate exclusively to the individual in that individual's capacity as an employee; and
  - (C) Are not available for use for any other purpose.
- (ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.
- (4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:
  - (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
  - (ii) Made, maintained, or used only in connection with treatment of the student; and
  - (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment"

does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and  
(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

*Eligible student* means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

*Institution of postsecondary education* means an institution that provides education to students beyond the secondary school level; “secondary school level” means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

*Parent* means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

*Party* means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

*Personally identifiable information* includes, but is not limited to:

- (a) The student's name;
- (b) The name of the student's parent or other family member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

*Record* means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

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

(Authority: 20 U.S.C. 1232g)

*Student*, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains

education records.

(Authority: 20 U.S.C. 1232g(a)(6))

[53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000]

#### **§ 99.4 What are the rights of parents?**

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

#### **§ 99.5 What are the rights of students?**

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C. 1232g(d))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993; 65 FR 41853, July 6, 2000]

#### **§ 99.6 [Reserved]**

#### **§ 99.7 What must an educational agency or institution include in its annual notification?**

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and §99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

- (i) The procedure for exercising the right to inspect and review education records.
  - (ii) The procedure for requesting amendment of records under §99.20.
  - (iii) If the educational agency or institution has a policy of disclosing education records under §99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.
- (b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.
- (1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.
  - (2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g (e) and (f))

[61 FR 59295, Nov. 21, 1996]

### **§ 99.8 What provisions apply to records of a law enforcement unit?**

- (a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—
- (i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or
  - (ii) Maintain the physical security and safety of the agency or institution.
- (2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.
- (b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—
- (i) Created by a law enforcement unit;
  - (ii) Created for a law enforcement purpose; and
  - (iii) Maintained by the law enforcement unit.
- (2) Records of a law enforcement unit does not mean—
- (i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or
  - (ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.
- (c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.
- (2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of §99.30, while in the possession of the law enforcement unit.
- (d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[60 FR 3469, Jan. 17, 1995]

## **Subpart B—What Are the Rights of Inspection and Review of Education Records?**

### **§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?**

(a) Except as limited under §99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

- (1) Any educational agency or institution; and
- (2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

- (1) Provide the parent or eligible student with a copy of the records requested; or
- (2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in §99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

### **§ 99.11 May an educational agency or institution charge a fee for copies of education records?**

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

### **§ 99.12 What limitations exist on the right to inspect and review records?**

- (a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.
- (b) A postsecondary institution does not have to permit a student to inspect and review education records that are:
  - (1) Financial records, including any information those records contain, of his or her parents;
  - (2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and
  - (3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:
    - (i) The student has waived his or her right to inspect and review those letters and statements; and
    - (ii) Those letters and statements are related to the student's:
      - (A) Admission to an educational institution;
      - (B) Application for employment; or
      - (C) Receipt of an honor or honorary recognition.
- (c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:
  - (i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and
  - (ii) The waiver is made in writing and signed by the student, regardless of age.
- (2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:
  - (i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and
  - (ii) Use the letters and statements of recommendation only for the purpose for which they were intended.
- (3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.
- (ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

### **Subpart C—What Are the Procedures for Amending Education Records?**

#### **§ 99.20 How can a parent or eligible student request amendment of the student's education records?**

- (a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.
- (b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.
- (c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under §99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

**§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?**

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

**§ 99.22 What minimum requirements exist for the conduct of a hearing?**

The hearing required by §99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under §99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

## Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

### § 99.30 Under what conditions is prior consent required to disclose information?

- (a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in §99.31.
- (b) The written consent must:
- (1) Specify the records that may be disclosed;
  - (2) State the purpose of the disclosure; and
  - (3) Identify the party or class of parties to whom the disclosure may be made.
- (c) When a disclosure is made under paragraph (a) of this section:
- (1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and
  - (2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.
- (d) "Signed and dated written consent" under this part may include a record and signature in electronic form that—
- (1) Identifies and authenticates a particular person as the source of the electronic consent; and
  - (2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 69 FR 21671, Apr. 21, 2004]

### § 99.31 Under what conditions is prior consent not required to disclose information?

- (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions:
- (1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
  - (2) The disclosure is, subject to the requirements of §99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.
  - (3) The disclosure is, subject to the requirements of §99.35, to authorized representatives of—
    - (i) The Comptroller General of the United States;
    - (ii) The Attorney General of the United States;
    - (iii) The Secretary; or
    - (iv) State and local educational authorities.
  - (4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:
    - (A) Determine eligibility for the aid;
    - (B) Determine the amount of the aid;
    - (C) Determine the conditions for the aid; or
    - (D) Enforce the terms and conditions of the aid.
  - (ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an

individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of §99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(iv) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in §99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in

## §99.36.

(11) The disclosure is information the educational agency or institution has designated as “directory information”, under the conditions described in §99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in §99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in §99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b)(1), (b)(2)(B), (b)(6), (h), and (i))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996; 65 FR 41853, July 6, 2000]

### § 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education

record with the understanding authorized under §99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under §99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in §99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under §99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

### **§ 99.33 What limitations apply to the redisclosure of information?**

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of §99.31; and

(2) The educational agency or institution has complied with the requirements of §99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under §99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under §99.31(a)(9), to disclosures of directory information under §99.31(a)(11), to disclosures made to a parent or student under §99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under §99.31(a)(14), or to disclosures made to parents under §99.31(a)(15).

(d) Except for disclosures under §99.31(a) (9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of §99.33(a) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least

five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 65 FR 41853, July 6, 2000]

**§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?**

- (a) An educational agency or institution that discloses an education record under §99.31(a)(2) shall:
- (1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:
    - (i) The disclosure is initiated by the parent or eligible student; or
    - (ii) The annual notification of the agency or institution under §99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;
  - (2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and
  - (3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.
- (b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:
- (1) The student is enrolled in or receives services from the other agency or institution; and
  - (2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

**§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?**

- (a) The officials listed in §99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.
- (b) Information that is collected under paragraph (a) of this section must:
- (1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and
  - (2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.
- (c) Paragraph (b) of this section does not apply if:
- (1) The parent or eligible student has given written consent for the disclosure under §99.30; or
  - (2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

**§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?**

- (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary

to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

- (1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;
  - (2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or
  - (3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.
- (c) Paragraphs (a) and (b) of this section will be strictly construed.

(Authority: 20 U.S.C. 1232g (b)(1)(l) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

### **§ 99.37 What conditions apply to disclosing directory information?**

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

- (1) The types of personally identifiable information that the agency or institution has designated as directory information;
- (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
- (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

### **§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?**

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under §99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

[61 FR 59297, Nov. 21, 1996]

**§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?**

As used in this part:

*Alleged perpetrator of a crime of violence* is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

*Alleged perpetrator of a nonforcible sex offense* means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

*Final results* means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

*Sanction imposed* means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

*Violation committed* means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

[65 FR 41853, July 6, 2000]

**Subpart E—What Are the Enforcement Procedures?**

**§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?**

(a) For the purposes of this subpart, *Office* means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

**§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?**

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

**§ 99.62 What information must an educational agency or institution submit to the Office?**

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

**§ 99.63 Where are complaints filed?**

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4605.

(Authority: 20 U.S.C. 1232g(g))

[65 FR 41854, July 6, 2000]

**§ 99.64 What is the complaint procedure?**

- (a) A complaint filed under §99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.
- (b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.
- (c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.
- (d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(f))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 65 FR 41854, July 6, 2000]

**§ 99.65 What is the content of the notice of complaint issued by the Office?**

- (a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under §99.64(b). The notice to the educational agency or institution—
- (1) Includes the substance of the alleged violation; and
  - (2) Asks the agency or institution to submit a written response to the complaint.
- (b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of §99.64.

(Authority: 20 U.S.C. 1232g(g))

[58 FR 3189, Jan. 7, 1993]

### **§ 99.66 What are the responsibilities of the Office in the enforcement process?**

- (a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.
- (b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.
- (c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:
- (1) Includes a statement of the specific steps that the agency or institution must take to comply; and
  - (2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

### **§ 99.67 How does the Secretary enforce decisions?**

- (a) If the educational agency or institution does not comply during the period of time set under §99.66(c), the Secretary may, in accordance with part E of the General Education Provisions Act—
- (1) Withhold further payments under any applicable program;
  - (2) Issue a complaint to compel compliance through a cease-and-desist order; or
  - (3) Terminate eligibility to receive funding under any applicable program.
- (b) If, after an investigation under §99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(Note: 34 CFR part 78 contains the regulations of the Education Appeal Board)

(Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234)

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

## **Appendix A to Part 99—Crimes of Violence Definitions**

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

### Assault Offenses

An unlawful attack by one person upon another.

Note: By definition there can be no “attempted” assaults, only “completed” assaults.

(a) *Aggravated Assault*. An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) *Simple Assault*. An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) *Intimidation*. To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

Note: This offense includes stalking.

### Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide—Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide—Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

### Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

### Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

Note: Kidnapping/Abduction includes hostage taking.

### Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

Note: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

## Sex Offenses, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) *Forcible Rape* (Except "Statutory Rape"). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) *Forcible Sodomy*. Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) *Sexual Assault With An Object*. To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: An "object" or "instrument" is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.

(d) *Forcible Fondling*. The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: Forcible Fondling includes "Indecent Liberties" and "Child Molesting."

## Nonforcible Sex Offenses (Except "Prostitution Offenses")

Unlawful, nonforcible sexual intercourse.

(a) *Incest*. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) *Statutory Rape*. Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[65 FR 41854, July 6, 2000]

Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about the rule or any policy or action of the Coast Guard.

#### Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

#### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

#### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

#### Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### Environment

We have analyzed this rule under Commandant Instruction M16475.ID which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2-1, paragraph (32)(e), of the

Instruction, from further environmental documentation.

#### List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

#### PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05-1(g); Department of Homeland Security Delegation No. 0170.1

■ 2. From 7 a.m. on December 7, 2007, through sunset on April 30, 2008, § 117.261(qq) is suspended and § 117.261(uu) is added to read as follows:

#### § 117.261 Atlantic Intracoastal Waterway.

\* \* \* \* \*

(uu) Jewfish Creek Bridge, mile 1134, Key Largo. The draw shall open on signal, except that from 7 a.m. to sunset, the bridge shall open on the hour and half-hour.

\* \* \* \* \*

Dated: November 23, 2007.

**William Lee,**

*Capt. USCG, District Commander, Seventh Coast Guard District, Acting.*

[FR Doc. E7-23600 Filed 12-6-07; 8:45 am]

**BILLING CODE 4910-15-P**

#### DEPARTMENT OF EDUCATION

#### 34 CFR Part 75

RIN 1890-AA15

[Docket ID ED-2007-OCFO-0132]

#### Direct Grant Programs

**AGENCY:** Office of the Chief Financial Officer, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the Department's regulations governing the determination and recovery of indirect costs by grantees. These amendments address procedural aspects related to the establishment of temporary indirect cost rates, specify the temporary rate that will apply to grants generally, and clarify how indirect costs are determined for a group of applicants that apply for a single training grant.

**DATES:** These regulations are effective January 7, 2008.

**FOR FURTHER INFORMATION CONTACT:** Richard Mueller, U.S. Department of Education, 830 First Street, NE., room

21C7, Washington, DC 20202-4450. Telephone: (202) 377-3838 or via the Internet: *Richard.Mueller@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** On May 24, 2007, the Secretary published a notice of proposed rulemaking (NPRM) for these amendments in the **Federal Register** (72 FR 29097). In the preamble to the NPRM, the Secretary discussed on pages 29098 and 29099 the major changes proposed to the current regulations. These changes are summarized as follows:

- Amending § 75.560(c) and (d) to specify the procedures used to establish a temporary indirect cost rate for any grantee that does not have a federally recognized indirect cost rate.
- Amending § 75.562(c) to clarify that a grantee cannot include the amount of a sub-award<sup>1</sup> that exceeds \$25,000 in the modified total direct cost base used to determine and charge its indirect cost rate.
- Amending § 75.564(e) to clarify the determination of indirect costs for a training grant in the context of a grant to a group of organizations that apply together for a grant under the procedures in §§ 75.127 through 75.129.

These final regulations provide a temporary indirect cost rate to a grantee that does not have a federally recognized indirect cost rate on the date the Department awards its first grant. The temporary rate for such a grantee will be 10 percent of the direct salaries and wages of the project. These regulations permit the use of a temporary indirect cost rate under the grant award for the first 90 days after the date the Department issues the Grant Award Notification. A grantee may continue to charge indirect costs at the temporary rate after the first 90 days if the grantee submits a formal indirect cost proposal to its cognizant agency within those 90 days. If, after the 90-day period, a grantee has not submitted an indirect cost proposal to its cognizant

<sup>1</sup> The term "sub-award," as used in the final regulations, covers both subgrants and contracts made under a grant. However, as explained in the NPRM, because virtually all of the Department's discretionary grant programs do not authorize grantees to award subgrants, we describe the effect of the final regulations only on contracts awarded by grantees.

agency, it must stop using the temporary rate. After that period, the grantee will not be allowed to charge any indirect costs to its grant until it obtains a federally recognized indirect cost rate from its cognizant agency.

These regulations make the Department's practice consistent with the practice of other Federal agencies and reduce the number of improper payments that result when applicants budget indirect costs that are greater than the actual indirect costs the applicant can expect to recover under Federal cost principles. As explained in the NPRM, under the Department's prior practice, new grantees of the Department were not recovering any indirect costs until they negotiated an indirect cost rate with their cognizant agencies. These regulations now enable a new grantee to recover indirect costs at the temporary rate until it negotiates a rate with its cognizant agency or for 90 days if it does not submit its indirect cost rate proposal to its cognizant agency within the 90-day period.

The regulations also clarify how the modified total direct cost base is determined when a grant is subject to the eight percent indirect cost rate limitation for training grants and specify how to treat sub-awards (contracts) if the indirect cost rate is applied to a grant made to a group under the procedures in §§ 75.127 through 75.129.

#### **Analysis of Comments and Changes**

In the NPRM we invited comments on the proposed regulations. We did not receive any comments. There are no substantive differences between the NPRM and these final regulations. However, we have reviewed the regulations since publication of the NPRM and have made the following technical changes:

- We revised § 75.560(d)(3)(i) by deleting the words "after the date the indirect cost proposal was submitted to the cognizant agency" because this description of the period during which a grantee may recover costs at the negotiated rate is stated in paragraph (d)(3). The revised paragraph (d)(3)(i) simply states that the total amount of funds recovered by the grantee under the federally recognized indirect cost rate is reduced by the amount of indirect costs "previously recovered under the temporary indirect cost rate." We believe these changes make the paragraph easier to understand.

- We added a note following § 75.562(c)(1) to clarify that, for any grantee that did not have a federally recognized indirect cost rate on the date its training grant was awarded, the indirect costs recovered under the

training grant limitation in § 75.562(c)(1) are also subject to the limitations in § 75.560(d)(3).

Also, as a result of our internal review, we have concluded that changes similar to those reflected in these final regulations also should be made to 34 CFR part 76, which applies to State-administered programs of the Department. Therefore, soon we intend to propose changes to part 76 that are consistent with the changes in these regulations.

#### **Transition Issues**

Because the regulations authorizing a specified temporary indirect cost rate confer a benefit on new grantees, the Secretary has discretion to apply the regulations to grants made before the effective date of these regulations. Under the final regulations, a grantee must submit a formal indirect cost proposal to its cognizant agency within 90 days after the date the Department issues the Grant Award Notification (GAN). However, we are aware that some new grantees are currently in the first budget period of their grants and do not have Federally recognized indirect cost rates. These grantees would benefit from being able to use the temporary indirect cost rate as soon as these regulations become effective in 30 days. Accordingly, any grantee that was or is issued a GAN before these regulations become effective on January 7, 2008, is in the first budget period of its grant, and did not have a federally recognized indirect cost rate on the date the GAN was issued, may begin using the temporary indirect cost rate starting on the effective date of these regulations and will have until April 7, 2008 (90 days after the effective date of these final regulations) to submit a formal indirect cost proposal to its cognizant agency. If a grantee submits an indirect cost proposal within the 90 days after the regulations become effective, it may continue charging at the temporary rate until it obtains a federally recognized indirect cost rate. The Secretary takes this action so that new grantees may benefit from these amendments as soon as possible.

Finally, § 75.562(c)(2) requires grantees to exclude all contract costs in excess of \$25,000 from the base used to calculate the total indirect cost recovery under a training grant. This exclusion will apply to the first training grant (new or continuation) made to a grantee after the date these regulations become effective.

#### **Executive Order 12866**

We have reviewed these final regulations in accordance with

Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering the Department's Direct Grant programs effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs.

### Summary of potential costs and benefits.

These regulations impose no additional burdens on applicants for discretionary grants or recipients of those grants. The regulations merely specify the rate at which grantees can recover indirect costs during a temporary period when the grantee does not have an indirect cost rate recognized by the Federal Government and establish procedural requirements regarding temporary indirect cost rates. While these final regulations prohibit a grantee from recovering indirect costs if the grantee has not submitted its indirect cost proposal within the 90 days after the date the Department issues the GAN, the burden and timing of submitting an indirect cost rate proposal under the procedures in the Federal cost principles do not change at all.

### Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

### Intergovernmental Review

These regulations affect Direct Grant programs of the Department that are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and to strengthen federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for these programs.

### Assessment of Educational Impact

In the NPRM we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number does not apply.)

### List of Subjects in 34 CFR Part 75

Administrative practice and procedure, Education Department, Grant programs—education, Grant administration, Performance reports, Reporting and recordkeeping requirements, Unobligated funds.

Dated: December 4, 2007.

**Margaret Spellings**,  
*Secretary of Education.*

■ For the reasons discussed in the preamble, the Secretary amends part 75 of title 34 of the Code of Federal Regulations as follows:

### PART 75—DIRECT GRANT PROGRAMS

■ 1. The authority citation for part 75 continues to read as follows:

**Authority:** 20 U.S.C. 1221e-3 and 3474, unless otherwise noted.

■ 2. Section 75.560 is amended by revising paragraphs (b) and (c), redesignating paragraph (d) as paragraph (e), and adding a new paragraph (d) to read as follows:

**§ 75.560 General indirect cost rates; exceptions.**

\* \* \* \* \*

(b) A grantee must have obtained a current indirect cost rate agreement from its cognizant agency, to charge indirect costs to a grant. To obtain an

indirect cost rate, a grantee must submit an indirect cost proposal to its cognizant agency within 90 days after the date the Department issues the Grant Award Notification (GAN).

(c) If a grantee does not have a federally recognized indirect cost rate agreement, the Secretary may permit the grantee to charge its grant for indirect costs at a temporary rate of 10 percent of budgeted direct salaries and wages.

(d)(1) If a grantee fails to submit an indirect cost rate proposal to its cognizant agency within the required 90 days, the grantee may not charge indirect costs to its grant from the end of the 90-day period until it obtains a federally recognized indirect cost rate agreement applicable to the grant.

(2) If the Secretary determines that exceptional circumstances warrant continuation of a temporary indirect cost rate, the Secretary may authorize the grantee to continue charging indirect costs to its grant at the temporary rate specified in paragraph (c) of this section even though the grantee has not submitted its indirect cost rate proposal within the 90-day period.

(3) Once a grantee obtains a federally recognized indirect cost rate that is applicable to the affected grant, the grantee may use that indirect cost rate to claim indirect cost reimbursement for expenditures made on or after the date the grantee submitted its indirect cost proposal to its cognizant agency or the start of the project period, whichever is later. However, this authority is subject to the following limitations:

(i) The total amount of funds recovered by the grantee under the federally recognized indirect cost rate is reduced by the amount of indirect costs previously recovered under the temporary indirect cost rate.

(ii) The grantee must obtain prior approval from the Secretary to shift direct costs to indirect costs in order to recover indirect costs at a higher negotiated indirect cost rate.

(iii) The grantee may not request additional funds to recover indirect costs that it cannot recover by shifting direct costs to indirect costs.

\* \* \* \* \*

■ 3. Section 75.562 is amended by revising paragraph (c) to read as follows:

**§ 75.562 Indirect cost rates for educational training projects.**

\* \* \* \* \*

(c)(1) Indirect cost reimbursement on a training grant is limited to the recipient's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less.

Note to paragraph (c)(1): If the grantee did not have a federally recognized indirect cost rate agreement on the date the training grant was awarded, indirect cost recovery is also limited to the amount authorized under § 75.560(d)(3).

(2) For the purposes of this section, a modified total direct cost base consists of total direct costs minus the following:

- (i) The amount of each sub-award in excess of \$25,000.
- (ii) Stipends.
- (iii) Tuition and related fees.
- (iv) Equipment, as defined in 34 CFR 74.2 and 80.3, as applicable.

Note to paragraph (c)(2)(iv): If the grantee has established a threshold for equipment that is lower than \$5,000 for other purposes, it must use that threshold to exclude equipment under the modified total direct cost base for the purposes of this section.

(3) The eight percent indirect cost reimbursement limit specified in paragraph (c)(1) of this section also applies to sub-awards that fund training, as determined by the Secretary under paragraph (b) of this section.

(4) The eight percent limit does not apply to agencies of State or local governments, including federally recognized Indian tribal governments, as defined in 34 CFR 80.3.

(5) Indirect costs in excess of the eight percent limit may not be charged directly, used to satisfy matching or cost-sharing requirements, or charged to another Federal award.

\* \* \* \* \*

■ 4. Section 75.564 is amended by revising paragraph (e) to read as follows:

**§ 75.564 Reimbursement of indirect costs.**

\* \* \* \* \*

(e)(1) Indirect costs for a group of eligible parties (See §§ 75.127 through 75.129) are limited to the amount derived by applying the rate of the applicant, or a restricted rate when applicable, to the direct cost base for the grant in keeping with the terms of the applicant's federally recognized indirect cost rate agreement.

(2) If a group of eligible parties applies for a training grant under the group application procedures in §§ 75.127 through 75.129, the grant funds allocated among the members of the group are not considered sub-awards for the purposes of applying the indirect cost rate in § 75.562(c).

\* \* \* \* \*

[FR Doc. E7-23817 Filed 12-6-07; 8:45 am]

BILLING CODE 4000-01-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R04-OAR-2007-1059-200748a; FRL-8503-1]

**Approval and Promulgation of Implementation Plans Georgia: Enhanced Inspection and Maintenance Plan**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to the Georgia State Implementation Plan (SIP), submitted by the Georgia Department of Natural Resources (GA DNR), through the Georgia Environmental Protection Division (GA EPD), on September 26, 2007. The revisions include modifications to Georgia's Air Quality Rules found at Chapter 391-3-20-.21, pertaining to rules for Enhanced Inspection and Maintenance (I/M). Enhanced I/M was required for 1-hour nonattainment areas classified as serious and above, under the Clean Air Act (CAA) as amended in 1990. The I/M program is a way to ensure that vehicles are maintained properly and verify that the emission control system is operating correctly, in order to reduce vehicle-related emissions. This action is being taken pursuant to section 110 of the CAA.

DATES: This direct final rule is effective February 5, 2008 without further notice, unless EPA receives adverse comment by January 7, 2008. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number, "EPA-R04-OAR-2007-1059," by one of the following methods:

1. *www.regulations.gov*: Follow the on-line instructions for submitting comments.
2. *E-mail*: [harder.stacy@epa.gov](mailto:harder.stacy@epa.gov).
3. *Fax*: 404-562-9019.
4. *Mail*: "EPA-R04-OAR-2007-1059," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.
5. *Hand Delivery or Courier*: Stacy Harder, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such

deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

Instructions: Direct your comments to Docket ID Number, "EPA-R04-OAR-2007-1059." EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through [www.regulations.gov](http://www.regulations.gov) or e-mail, information that you consider to be CBI or otherwise protected. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW.,



# Federal Register

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Tuesday,  
December 9, 2008

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**Part II**

## **Department of Education**

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**34 CFR Part 99  
Family Educational Rights and Privacy;  
Final Rule**

## DEPARTMENT OF EDUCATION

## 34 CFR Part 99

RIN 1855-AA05

[Docket ID ED-2008-OPEPD-0002]

## Family Educational Rights and Privacy

**AGENCY:** Office of Planning, Evaluation, and Policy Development, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends our regulations implementing the Family Educational Rights and Privacy Act (FERPA), which is section 444 of the General Education Provisions Act. These amendments are needed to implement a provision of the USA Patriot Act and the Campus Sex Crimes Prevention Act, which added new exceptions permitting the disclosure of personally identifiable information from education records without consent. The amendments also implement two U.S. Supreme Court decisions interpreting FERPA, and make necessary changes identified as a result of the Department's experience administering FERPA and the current regulations.

These changes clarify permissible disclosures to parents of eligible students and conditions that apply to disclosures in health and safety emergencies; clarify permissible disclosures of student identifiers as *directory information*; allow disclosures to contractors and other outside parties in connection with the outsourcing of institutional services and functions; revise the definitions of *attendance*, *disclosure*, *education records*, *personally identifiable information*, and other key terms; clarify permissible redisclosures by State and Federal officials; and update investigation and enforcement provisions.

**DATES:** These regulations are effective January 8, 2009.

**FOR FURTHER INFORMATION CONTACT:** Frances Moran, U.S. Department of Education, 400 Maryland Avenue, SW., room 6W243, Washington, DC 20202-8250. Telephone: (202) 260-3887.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** On March 24, 2008, the U.S. Department of

Education (the Department or we) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (73 FR 15574). In the preamble to the NPRM, the Secretary discussed the major changes proposed in that document that are necessary to implement statutory changes made to FERPA, to implement two U.S. Supreme Court decisions, to respond to changes in information technology, and to address other issues identified through the Department's experience in administering FERPA.

We believe that the regulatory changes adopted in these final regulations provide clarification on many important issues that have arisen over time with regard to how FERPA affects decisions that school officials have to make on an everyday basis. Educational agencies and institutions face considerable challenges, especially with regard to maintaining safe campuses, protecting personally identifiable information in students' education records, and responding to requests for data on student progress. These final regulations, as well as the discussion on various provisions in the preamble, will assist school officials in addressing these challenges in a manner that complies with FERPA and protects the privacy of students' education records.

**Notice of Proposed Rulemaking**

In the NPRM, we proposed regulations to implement section 507 of the USA Patriot Act (Pub. L. 107-56), enacted October 26, 2001, and the Campus Sex Crimes Prevention Act, section 1601(d) of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106-386), enacted October 28, 2000. Other major changes proposed in the NPRM included the following:

- Amending § 99.5 to clarify the conditions under which an educational agency or institution may disclose personally identifiable information from an eligible student's education records to a parent without the prior written consent of the eligible student;
- Amending § 99.31(a)(1) to authorize the disclosure of education records without consent to contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions;
- Amending § 99.31(a)(1) to ensure that teachers and other school officials only gain access to education records in which they have legitimate educational interests;
- Amending § 99.31(a)(2) to permit educational agencies and institutions to

disclose education records, without consent, to another institution even after the student has enrolled or transferred so long as the disclosure is for purposes related to the student's enrollment or transfer;

- Amending § 99.31(a)(6) to require that an educational agency or institution may disclose personally identifiable information under this section only if it enters into a written agreement with the organization specifying the purposes of the study and the use and destruction of the data;

- Amending § 99.31 to include a new subsection to provide standards for the release of information from education records that has been de-identified;

- Amending § 99.35 to permit State and local educational authorities and Federal officials listed in § 99.31(a)(3) to make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution; and

- Amending § 99.36 to remove the language requiring strict construction of this exception and add a provision stating that if an educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individual, it may disclose the information to any person, including parents, whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

**Significant Changes From the NPRM**

These final regulations contain several significant changes from the NPRM as follows:

- Amending the definition of *personally identifiable information* in § 99.3 to provide a definition of *biometric record*;
- Removing the proposed definition of *State auditor* in § 99.3 and provisions in § 99.35(a)(3) related to State auditors and audits;
- Revising § 99.31(a)(6) to clarify the specific types of information that must be contained in the written agreement between an educational agency or institution and an organization conducting a study for the agency or institution;
- Removing the statement from § 99.31(a)(16) that FERPA does not require or encourage agencies or institutions to collect or maintain information concerning registered sex offenders;
- Requiring a State or local educational authority or Federal official or agency that rediscloses personally identifiable information from education records to record that disclosure if the

educational agency or institution does not do so under § 99.32(b); and

- Revising § 99.32(b) to require an educational agency or institution that makes a disclosure in a health or safety emergency to record information concerning the circumstances of the emergency.

These changes are explained in greater detail in the following *Analysis of Comments and Changes*.

### Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 121 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

We group major issues according to subject, with applicable sections of the regulations referenced in parentheses. We discuss other substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical and other minor changes, or suggested changes that the law does not authorize the Secretary to make. We also do not address comments pertaining to issues that were not within the scope of the NPRM.

### Definitions (§ 99.3)

#### (a) Attendance

*Comment:* We received no comments objecting to the proposed changes to the definition of the term *attendance*. Three commenters expressed support for the changes because the availability and use of alternative instructional formats are not clearly addressed by the current regulations. One commenter suggested that the definition could avoid obsolescence by referring to the receipt of instruction leading to a diploma or certificate instead of listing the types of instructional formats.

*Discussion:* We proposed to revise the definition of *attendance* because we received inquiries from some educational agencies and institutions asking whether FERPA was applicable to the records of students receiving instruction through the use of new technology methods that do not require a physical presence in a classroom. Because the definition of *attendance* is key to determining when an individual's records at a school are education records protected by FERPA, it is essential that schools and institutions understand the scope of the term. To prevent the regulations from becoming out of date as new formats and methods are developed, the definition provides that attendance may also include "other electronic

information and telecommunications technologies."

While most schools are aware of the various formats distance learning may take, we believe it is informative to list the different communications media that are currently used. Also, we believe that parents, eligible students, and other individuals and organizations that use the FERPA regulations may find the listing of formats useful.

We do not agree that the definition of *attendance* should be limited to receipt of instruction leading to a diploma or certificate, because this would improperly exclude many instructional formats.

*Changes:* None.

#### (b) Directory Information (§§ 99.3 and 99.37)

##### (1) Definition (§ 99.3)

*Comment:* We received a number of comments on our proposal to revise the definition of *directory information* to provide that an educational agency or institution may not designate as directory information a student's social security number (SSN) or other student identification (ID) number. The proposed definition also provided that a student's user ID or other unique identifier used by the student to access or communicate in electronic systems could be considered directory information but only if the electronic identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the student's identity.

All commenters agreed that student SSNs should not be disclosed as directory information. Several commenters strongly supported the definition of *directory information* as proposed, noting that failure to curtail the use of SSNs and student ID numbers as directory information could facilitate identity theft and other fraudulent activities.

One commenter said that the proposed regulations did not go far enough to prohibit the use of students' SSNs as a student ID number, placing SSNs on academic transcripts, and using SSNs to search an electronic database. Another commenter expressed concern that the proposed regulations could prohibit reporting needed to enforce students' financial obligations and other routine business practices. According to this commenter, restrictions on the use of SSNs in FERPA and elsewhere demonstrate the need for a single student identifier that can be tied to the SSN and other identifying information to use for grade transcripts, enrollment verification,

default prevention, and other activities that depend on sharing student information. Another commenter stated that institutions should not be allowed to penalize students who opt out of directory information disclosures by denying them access to benefits, services, and required activities.

Several commenters said that the definition in the proposed regulations was confusing and unnecessarily restrictive because it treats a student ID number as the functional equivalent of an SSN. They explained that when providing access to records and services, many institutions no longer use an SSN or other single identifier that both identifies and authenticates identity. As a result, at many institutions, the condition specified in the regulations for treating electronic identifiers as directory information, *i.e.*, that the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, often applies to student ID numbers as well because they cannot be used to gain access to education records without a personal identification number (PIN), password, or some other factor to authenticate the user's identity. Some commenters suggested that our nomenclature is the problem and that regardless of what it is called, an identifier that does not allow access to education records without the use of authentication factors should be treated as directory information. According to one commenter, allowing institutions to treat student ID numbers as directory information in these circumstances would improve business practices and enhance student privacy by encouraging institutions to require additional authentication factors when using student ID numbers to provide access to education records.

One commenter strongly opposed allowing institutions to treat a student's electronic identifier as directory information if the identifier could be made available to parties outside the school system. This commenter noted that electronic identifiers may act as a key, offering direct access to the student's entire file, and that PINs and passwords alone do not provide adequate security for education records. Another commenter said that if electronic identifiers and ID numbers can be released as directory information, then password requirements need to be more stringent to guard against unauthorized access to information and identity theft.

Some commenters recommended establishing categories of directory information, with certain information

made available only within the educational community. One commenter expressed concern about Internet safety because the regulations allow publication of a student's e-mail address. Another said that FERPA should not prevent institutions from printing the student's ID number on an ID card or otherwise restrict its use on campus but that publication in a directory should not be allowed.

Two commenters asked the Department to confirm that the regulations allow institutions to post grades using a code known only by the teacher and the student.

*Discussion:* We share commenters' concerns about the use of students' SSNs. In general, however, there is no statutory authority under FERPA to prohibit an educational agency or institution from using SSNs as a student ID number, on academic transcripts, or to search an electronic database so long as the agency or institution does not disclose the SSN in violation of FERPA requirements. As discussed elsewhere in this preamble, FERPA does prohibit using a student's SSN, without consent, to search records in order to confirm directory information.

Some States prohibit the use of SSNs as a student ID number, and some institutions have voluntarily ceased using SSNs in this manner because of concerns about identity theft. Students are required to provide their SSNs in order to receive Federal financial aid, and the regulations do not prevent an agency or institution from using SSNs for this purpose. We note that FERPA does not address, and we do not believe that there is statutory authority under FERPA to require, creation of a single student identifier to replace the SSN. In any case, the Department encourages educational agencies and institutions, as well as State educational authorities, to follow best practices of the educational community with regard to protecting students' SSNs.

We agree that students should not be penalized for opting out of directory information disclosures. Indeed, an educational agency or institution may not require parents and students to waive their rights under FERPA, including the right to opt out of directory information disclosures. On the other hand, we do not interpret FERPA to require educational agencies and institutions to ensure that students can remain anonymous to others in the school community when using an institution's electronic communications systems. As a result, parents and students who opt out of directory information disclosures may not be able to use electronic communications

systems that require the release of the student's name or electronic identifier within the school community. (As discussed later in this notice in our discussion of the comments on § 99.37(c), the right to opt out of directory information disclosures may not be used to allow a student to remain anonymous in class.)

The regulations allow an educational agency or institution to designate a student's user ID or other electronic identifier as directory information if the identifier functions essentially like the student's name, and therefore, disclosure would not be considered harmful or an invasion of privacy. That is, the identifier cannot be used to gain access to education records except when combined with one or more factors that authenticate the student's identity.

We have historically advised that student ID numbers may not be disclosed as directory information because they have traditionally been used like SSNs, *i.e.*, as both an identifier and authenticator of identity. We agree, however, that the proposed definition was confusing and unnecessarily restrictive because it failed to recognize that many institutions no longer use student ID numbers in this manner. If a student identifier cannot be used to access records or communicate electronically without one or more additional factors to authenticate the user's identity, then the educational agency or institution may treat it as directory information under FERPA regardless of what the identifier is called. We have revised the definition of *directory information* to provide this flexibility.

We share the commenters' concerns about the use of PINs and passwords. In the preamble to the NPRM, we explained that PINs or passwords, and single-factor authentication of any kind, may not be reasonable for protecting access to certain kinds of information (73 FR 15585). We also recognize that user IDs and other electronic identifiers may provide greater access and linking to information than does a person's name. Therefore, we remind educational agencies and institutions that disclose student ID numbers, user IDs, and other electronic identifiers as directory information to examine their recordkeeping and data sharing practices and ensure that, when these identifiers are used, the methods they select for authenticating identity provide adequate protection against the unauthorized disclosure of information in education records.

We also share the concern of commenters who stated that students' e-mail addresses and other identifiers

should be disclosed as directory information only within the school system and should not be made available outside the institution. The disclosure of directory information is permissive under FERPA, and, therefore, an agency or institution is not required to designate and disclose any student identifier (or any other item) as directory information. Further, while FERPA does not expressly recognize different levels or categories of directory information, an agency or institution is not required to make student directories and other directory information available to the general public just because the information is shared within the institution. For example, under FERPA, an institution may decide to make students' electronic identifiers and e-mail addresses available within the institution but not release them to the general public as directory information. In fact, the preamble to the NPRM suggested that agencies and institutions should minimize the public release of student directories to mitigate the risk of re-identifying information that has been de-identified (73 FR 15584).

With regard to student ID numbers in particular, an agency or institution may print an ID number on a student's ID card whether or not the number is treated as directory information because under FERPA simply printing the ID number on a card, without more, is not a disclosure and, therefore, is not prohibited. See 20 U.S.C. 1232g(b)(2). If the student ID number is not designated as directory information, then the agency or institution may not disclose the card, or require the student to disclose the card, except in accordance with one of the exceptions to the consent requirement, such as to school officials with legitimate educational interests. If the student ID number is designated as directory information in accordance with these regulations, then it may be disclosed. However, the agency or institution may still decide against making a directory of student ID numbers available to the general public.

We discuss codes used by teachers to post grades in our discussion of the definition of *personally identifiable information* elsewhere in this preamble.

*Changes:* We have revised the definition of *directory information* in § 99.3 to provide that directory information includes a student ID number if it cannot be used to gain access to education records except when used with one or more other factors to authenticate the user's identity.

## (2) Conditions for Disclosing Directory Information

## (i) 99.37(b)

*Comment:* All comments on this provision supported our proposal to clarify that an educational agency or institution must continue to honor a valid request to opt out of directory information disclosures even after the student no longer attends the institution. One commenter stated that the proposed regulations appropriately provided former students with the continuing ability to control the release of directory information and remarked that this will benefit students and families. One commenter asked how long an opt out from directory information disclosures must be honored. Another commenter said that students may object if their former schools do not disclose directory information without their specific written consent because the school is unable to determine whether the student previously opted out. This could occur, for example, if a school declined to disclose that a student had received a degree to a prospective employer.

*Discussion:* The regulations clarify that once a parent or eligible student opts out of directory information disclosures, the educational agency or institution must continue to honor that election after the student is no longer in attendance. While this is not a new interpretation, school districts and postsecondary institutions have been unclear about its application and have not administered it consistently. The inclusion in the regulations of this longstanding interpretation is necessary to ensure that schools clearly understand their obligation to continue to honor a decision to opt out of the disclosure of directory information after a student stops attending the school, until the parent or eligible student rescinds it.

Educational agencies and institutions are not required under FERPA to disclose directory information to any party. Therefore, parents and students have no basis for objecting if an agency or institution does not disclose directory information because it is not certain whether the parent or student opted out. The regulations provide an educational agency or institution with the flexibility to determine the process it believes is best suited to serve its population as long as it honors prior elections to opt out of directory information disclosures.

*Changes:* None.

## (ii) § 99.37(c)

*Comment:* We received two comments in support of our proposal to clarify in this section that parents and students may not use the right to opt out of directory information disclosures to prevent disclosure of the student's name or other identifier in the classroom.

*Discussion:* We appreciate the commenters' support.

*Changes:* None.

## (iii) § 99.37(d)

*Comment:* Two commenters supported the prohibition on using a student's SSN to disclose or confirm directory information unless a parent or eligible student provides written consent. One of these commenters questioned the statutory basis for this interpretation.

Several commenters asked whether, under the proposed regulations, a school must deny a request for directory information if the requester supplies the student's SSN. One commenter asked whether a request for directory information that contains a student's SSN may be honored so long as the school does not use the SSN to locate the student's records. One commenter stated that the regulations could more effectively protect students' SSNs but was concerned that denying a request for directory information that contains an SSN may inadvertently confirm the SSN.

One commenter expressed concern that the prohibition on using a student's SSN to verify directory information would leave schools with large student populations unable to locate the appropriate record because they will need to rely solely on the student's name and other directory information, if any, provided by the requester, which may be duplicated in their databases. This commenter said that students would object if institutions were unable to respond quickly to requests by banks or landlords for confirmation of enrollment because the request contained the student's SSN.

One commenter suggested that the regulations require an educational agency or institution to notify a requester that the release or confirmation of directory information does not confirm the accuracy of the SSN or other non-directory information submitted with the request. Another commenter asked whether the regulations apply to confirmation of student enrollment and other directory information by outside service providers such as the National Student Clearinghouse.

*Discussion:* The provision in the proposed regulations prohibiting an

educational agency or institution from using a student's SSN when disclosing or verifying directory information is based on the statutory prohibition on disclosing personally identifiable information from education records without consent in 20 U.S.C. 1232g(b). The prohibition applies also to any party outside the agency or institution providing degree, enrollment, or other confirmation services on behalf of an educational agency or institution, such as the National Student Clearinghouse.

A school is not required to deny a request for directory information about a student, such as confirmation whether a student is enrolled or has received a degree, if the requester supplies the student's SSN (or other non-directory information) along with the request. However, in releasing or confirming directory information about a student, the school may not use the student's SSN (or other non-directory information) supplied by the requester to identify the student or locate the student's records unless a parent or eligible student has provided written consent. This is because confirmation of information in education records is considered a disclosure under FERPA. See 20 U.S.C. 1232g(b). A school's use of a student's SSN (or other non-directory information) provided by the requester to confirm enrollment or other directory information implicitly confirms and, therefore, discloses, the student's SSN (or other non-directory information). This is true even if the requester also provides the school with the student's name, date of birth, or other directory information to help identify the student.

A school may choose to deny a request for directory information, whether or not it contains a student's SSN, because only a parent or eligible student has a right to obtain education records under FERPA. Denial of a request for directory information that contains a student's SSN is not an implicit confirmation or disclosure of the SSN.

These regulations will not adversely affect the ability of institutions to respond quickly to requests by parties such as banks and landlords for confirmation of enrollment that contain the student's SSN because students generally provide written consent for schools to disclose information to the inquiring party in order to obtain banking and housing services. We note, however, that if a school wishes to use the student's SSN to confirm enrollment or other directory information about the student, it must ensure that the written consent provided by the student includes consent for the school to

disclose the student's SSN to the requester.

There is no authority in FERPA to require a school to notify requesters that it is not confirming the student's SSN (or other non-directory information) when it discloses or confirms directory information. However, when a party submits a student's SSN along with a request for directory information, in order to avoid confusion, unless a parent or eligible student has provided written consent for the disclosure of the student's SSN, the school may indicate that it has not used the SSN (or other non-directory information) to locate the student's records and that its response may not and does not confirm the accuracy of the SSN (or other non-directory information) supplied with the request.

We recognize that with a large database of student information, there may be some loss of ability to identify students who have common names if SSNs are not used to help identify the individual. However, schools that do not use SSNs supplied by a party requesting directory information, either because the student has not provided written consent or because the school is not certain that the written consent includes consent for the school to disclose the student's SSN, generally may use the student's address, date of birth, school, class, year of graduation, and other directory information to identify the student or locate the student's records.

*Changes:* None.

(c) *Disclosure (§ 99.3)*

*Comment:* Two commenters said that the proposal to revise the definition of *disclosure* to exclude the return of a document to its source was too broad and could lead to improper release of highly sensitive documents, such as an individualized education program (IEP) contained in a student's special education records, to anyone claiming to be the creator of a record. One of the commenters stated that changing the definition was unnecessary, as schools already have a means of verifying documents by requesting additional copies from the source. Both commenters also expressed concern that, because recordation is not required, a parent or eligible student will not be aware that the verification occurred.

We also received comments of strong support for the proposed change to the definition of *disclosure*. The commenters stated that this change, targeted to permit the release of records back to the institution that presumably created them, will enhance an

institution's ability to identify and investigate suspected fraudulent records in a timely manner.

*Discussion:* For several years now, school officials have advised us that problems related to fraudulent records typically involve a transcript or letter of recommendation that has been altered by someone other than the responsible school official. Under the current regulations, an educational agency or institution may ask for a copy of a record from the presumed source when it suspects fraudulent activity. However, simply asking for a copy of a record may not be adequate, for example, if the original record no longer exists at the sending institution. In these circumstances, an institution will need to return a record to its identified source to be able to verify its authenticity. The final regulations permit a targeted release of records back to the stated source for verification purposes in order to provide schools with the flexibility needed for this process while preserving a more general prohibition on the release of information from education records.

We do not agree that the term *disclosure* as proposed in the NPRM is too broad and could lead to the improper release of highly sensitive documents to anyone claiming to be the creator of the record. School officials have not advised us that they have had problems receiving IEP records and other highly sensitive materials from parties who did not in fact create or provide the record. Therefore, we do not believe that the proposed definition of *disclosure* is too broad.

The commenters are correct that the return of an education record to its source does not have to be recorded, because it is not a disclosure. We do not consider this problematic, however, because the information is merely being returned to the party identified as its source. This is similar to the situation in which a school is not required under the regulations to record disclosures of education records made to school officials with legitimate educational interests. As in that instance, there is no direct notice to a parent or student of either the disclosure of the record or the information in the record. We also believe that if a questionable document is deemed to be inauthentic by the source, the student will be informed of the results of the authentication process by means other than seeing a record of the disclosure in the student's file. There appears to be little value in notifying a parent or student that a document was suspected of being fraudulent if the document is found to be genuine and accurate.

Finally, we note that a transcript or other document does not lose its protection under FERPA, including the written consent requirements, when an educational agency or institution returns it to the source. The document and the information in it remains an "education record" under FERPA when it is returned to its source. As an education record, it may not be redisclosed except in accordance with FERPA requirements, including § 99.31(a)(1), which allows the source institution to disclose the information to teachers and other school officials with legitimate educational interests, such as persons who need to verify the accuracy or authenticity of the information. If the source institution makes any further disclosures of the record or information, it must record them.

*Changes:* None.

**Additional Changes to the Definition of Disclosure**

*Comment:* Several commenters requested additional changes to the definition of *disclosure*. One commenter requested that any transfer of education records to a State's longitudinal data system not be considered a disclosure. Several commenters requested that additional changes be made so that a school could provide current education records of students back to the students' former schools or districts. A commenter recommended excluding from the definition of *disclosure* statistical information that is personally identifiable because of small cell sizes when the recipient agrees to maintain the confidentiality of the information.

*Discussion:* The revised definition of *disclosure*, which excludes the return of a document to its stated source, clarifies that information provided by school districts or postsecondary institutions to State educational authorities, including information maintained in a consolidated student records system, may be provided back to the original district or institution without consent. There is no statutory authority, however, to exclude from the definition of *disclosure* a school district's or institution's release or transfer of personally identifiable information from education records to its State longitudinal data system. (We discuss the *disclosure* of education records in connection with the development of consolidated, longitudinal data systems in our response to comments on redisclosure and recordkeeping requirements elsewhere in this preamble.) Likewise, there is no statutory authority to exclude from the definition of *disclosure* the release of personally identifiable information from

education records to parties that agree to keep the information confidential. (See our discussion of personally identifiable information and de-identified records and information elsewhere in this preamble.)

The revised regulations do not authorize the disclosure of education records to third parties who are not identified as the provider or creator of the record. For example, a college may not send a student's current college records to a student's high school under the revised definition of *disclosure* because the high school is not the stated source of those records. (We discuss this issue elsewhere in the preamble under *Disclosure of Education Records to Students' Former Schools*.)

*Changes:* None.

#### (d) Education Records

##### (1) Paragraph (b)(5)

*Comment:* Several commenters supported our proposal to clarify the existing exclusion from the definition of *education records* for records that only contain information about an individual after he or she is no longer a student, which we referred to as "alumni records" in the NPRM, 73 FR 15576. One commenter suggested that the term "directly related," which is used in the amended definition in reference to a student's attendance, is inconsistent with the use of the term "personally identifiable" in other sections of the regulations and could cause confusion.

One commenter asked whether a postsecondary school could provide a student's education records from the postsecondary school to a secondary school that the student attended previously.

Several commenters objected to the proposed regulations because, according to the commenters, the regulations would expand the records subject to FERPA's prohibition on disclosure of education records without consent. A journalist stated that the settlement agreement cited in the NPRM is an example of a record that should be excluded from the definition and that schools already are permitted to protect too broad a range of documents from public review because the documents are education records. The commenter stated that information from education records such as a settlement agreement is newsworthy, unlikely to contain confidential information, and that disclosure of such information provides a benefit to the public. Another commenter expressed concern that the regulations allow schools to collect negative information about a former student without giving the individual an

opportunity to challenge the content because the information is not an education record under FERPA.

*Discussion:* It has long been the Department's interpretation that records created or received by an educational agency or institution on a former student that are directly related to the individual's attendance as a student are not excluded from the definition of *education records* under FERPA, and that records created or received on a former student that are not directly related to the individual's attendance as a student are excluded from the definition and, therefore, are not "education records." The proposed regulations in paragraph (b)(5) were intended to clarify the use of this exclusion, not to change or expand its scope.

Our use of the phrase "directly related to the individual's attendance as a student" to describe records that do not fall under this exclusion from the definition of *education records* is not inconsistent with the term "personally identifiable" as used in other parts of the regulations and should not be confused. The term "personally identifiable information" is used in the statute and regulations to describe the kind of information from education records that may not be disclosed without consent. See 20 U.S.C. 1232g(b); 34 CFR 99.3, 99.30. While "personally identifiable information" maintained by an agency or institution is generally considered an "education record" under FERPA, personally identifiable information does not fall under this exclusion from the definition of education records if the information is not directly related to the student's attendance as a student. For example, personally identifiable information related solely to a student's activities as an alumnus of an institution is excluded from the definition of education records under this provision. We think that the term "directly related" is clear in this context and will not be confused with "personally identifiable."

A postsecondary institution may not disclose a student's postsecondary education records to the secondary school previously attended by the student under this provision because these records are directly related to the student's attendance as a student at the postsecondary institution. (We discuss this issue further under *Disclosure of Education Records to Students' Former Schools*.)

We do not agree that documents such as settlement agreements are unlikely to contain confidential information. Our experience has been that these documents often contain highly

confidential information, such as special education diagnoses, educational supports, or mental or physical health and treatment information. Our changes to the definition were intended to clarify that schools may not disclose this information to the media or other parties, without consent, simply because a student is no longer in attendance at the school at the time the record was created or received. A parent or eligible student who wishes to share the student's own records with the media or other parties is free to do so.

Neither FERPA nor the regulations contains a provision for a parent or eligible student to challenge information that is not contained in an education record. FERPA does not prohibit a parent or student from using other venues to seek redress for collection and release of information in non-education records.

*Changes:* None.

##### (2) Paragraph (b)(6)

*Comment:* We received several comments supporting the proposed changes to the definition of *education records* that would exclude from the definition grades on peer-graded papers before they are collected and recorded by a teacher. These commenters expressed appreciation that this revision would be consistent with the U.S. Supreme Court's decision on peer-graded papers in *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) (*Owasso*). Two commenters asked how the provision would be applied to the use of group projects and group grading within the classroom.

*Discussion:* The proposed changes to the definition of *education records* in paragraph (b)(6) are designed to implement the U.S. Supreme Court's 2002 decision in *Owasso*, which held that peer grading does not violate FERPA. As noted in the NPRM, 73 FR 15576, the Court held in *Owasso* that peer grading does not violate FERPA because "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book." 534 U.S. at 436.

As suggested by the Supreme Court in *Owasso*, 534 U.S. at 435, FERPA is not intended to interfere with a teacher's ability to carry out customary practices, such as group grading of team assignments within the classroom. Just as FERPA does not prevent teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though the grade may eventually become an education record,

FERPA does not prohibit the discussion of group or individual grades on classroom group projects, so long as those individual grades have not yet been recorded by the teacher. The process of assigning grades or grading papers falls outside the definition of *education records* in FERPA because the grades are not “maintained” by an educational agency or institution at least until the teacher has recorded the grades.

*Changes:* None.

*(e) Personally Identifiable Information*

Comments on the proposed definition of *personally identifiable information* are discussed elsewhere in this preamble under the heading *Personally Identifiable Information and De-identified Records and Information*.

*(f) State Auditors and Audits (§§ 99.3 and Proposed 99.35(a)(3))*

*Comment:* Several commenters supported the clarification in proposed § 99.35(a)(3) that State auditors may have access to education records, without consent, in connection with an “audit” of Federal or State supported education programs under the exception to the written consent requirement for authorized representatives of “State and local educational authorities.” All but one of the commenters, however, disagreed strongly with the proposed definition of *audit* in § 99.35(a)(3), which was limited to testing compliance with applicable laws, regulations, and standards and did not include the broader concept of evaluations.

In general, the commenters said that the proposed definition of *audit* was too narrow and would prevent State auditors from conducting performance audits and other services that they routinely provide in accordance with professional auditing standards, including the U.S. Comptroller’s Government Auditing Standards. See [www.gao.gov/govaud/ybk01.htm](http://www.gao.gov/govaud/ybk01.htm). A State legislative auditor noted, for example, that 45 State legislatures have established legislative program evaluation offices whose express purpose is to provide research and evaluation for legislative decision making, and that these offices regularly use personally identifiable information from education records for their work. Some of the commenters also questioned whether financial audits and attestation engagements would be excluded under the proposed definition.

One commenter said that the State auditor provisions in proposed §§ 99.3 and 99.35(a)(3) should be expanded to apply to other non-education State officials responsible for evaluating

publicly funded programs. Another commenter recommended that the regulations include examination of education records by health department officials to improve compliance with mandated immunization schedules.

The majority of the comments we received with respect to the inclusion of local auditors in the proposed definition of *State auditor* in § 99.3 supported permitting local auditors to have access to personally identifiable information for purposes of auditing Federal or State supported education programs. One commenter said that local auditors should not be included in the definition, while another commenter stated that auditors for the city health department need access to FERPA-protected information to determine the accuracy of claims for payment and asked for further clarification on the issue.

*Discussion:* We explained in the preamble to the NPRM that the statute allows disclosure of personally identifiable information from education records without consent to authorized representatives of “State educational authorities” in connection with an audit or evaluation of Federal or State supported education programs. 73 FR 15577. Legislative history indicates that Congress amended the statute in 1979 to “correct an anomaly” in which the existing exception to the consent requirement in 20 U.S.C. 1232g(b)(3) was interpreted to preclude State auditors from obtaining access to education records for audit purposes. See H.R. Rep. No. 338, 96th Cong., 1st Sess. at 10 (1979), reprinted in 1979 U.S. Code Cong. & Admin. News 819, 824. However, because the amended statutory language in 20 U.S.C. 1232g(b)(5) refers only to “State and local educational officials,” the proposed regulations sought to clarify that this included “State auditors” or auditors with authority and responsibility under State law for conducting audits. Due to the breadth of this inclusion, however, the proposed regulations also sought to limit access to education records by State auditors by narrowing the definition of *audit*.

The Secretary has carefully reviewed the comments and, based upon further intradepartmental review, has decided to remove from the final regulations the provisions related to State auditors and audits in §§ 99.3 and 99.35(a)(3). We share the commenters’ concerns about preventing State auditors from conducting activities that they routinely perform under applicable auditing standards. However, because our focus was on the narrow definition of *audit*, we proposed a very broad definition of

*State auditor* in § 99.3 and did not examine which of the various types of officials, offices, committees, and staff in executive and legislative branches of State government should be included in the definition. We are concerned that without the narrow definition of *audit* as proposed in § 99.35(a)(3), the proposed definition of *State auditor* may allow non-consensual disclosures of education records to a variety of officials for purposes not supported by the statute. The Department will study the matter further and may issue new regulations or guidance, as appropriate. In the interim, the Department will provide guidance on a case-by-case basis.

*Changes:* We are not including the definition of *State auditor* in § 99.3 and the provisions related to State auditors and audits in § 99.35(a)(3) in these final regulations.

**Disclosures to Parents (§§ 99.5 and 99.36)**

*Comment:* A majority of commenters approved of the Secretary’s efforts to clarify that, even after a student has become an eligible student, an educational agency or institution may disclose education records to the student’s parents, without the consent of the student, if certain conditions are met. Those commenters stated that the clarification was especially helpful, particularly in light of issues that arose after the April 2007 shootings at the Virginia Polytechnic Institute and State University (Virginia Tech). A commenter stated that the clarification will assist emergency management officials on college and university campuses and help school officials know when they can properly share student information with parents and students. One commenter expressed support for the proposed regulations, because it has been her experience that colleges do not share information with parents on their children’s financial aid or academic status.

Some commenters disagreed with the proposed changes. One stated that, due to varying family dynamics, disclosures should not be limited only to parents, but should also include other appropriate family members. Another commenter objected to the phrase in § 99.5(a)(2) that would permit disclosure to a parent without the student’s consent if the disclosure meets “any other provision in § 99.31(a).” The commenter stated that this “catch-all phrase” exceeded statutory authority.

Noting the sensitivity of financial information included in income tax returns, a few commenters raised concerns about the discussion in the

NPRM in which we explained that an institution can determine that a parent claimed a student as a dependent by asking the parent to supply a copy of the parent's most recent Federal tax return. Another commenter stated that the NPRM did not go far enough and recommended specifically requiring an institution to rely on a copy of a parent's most recent Federal tax return to determine a student's dependent status, while another commenter recommended that we change the regulations to indicate that only the parent who has claimed the student as a dependent may have access to the student's education records.

A commenter noted that some States have high school students who are concurrently enrolled in secondary schools and postsecondary institutions as early as ninth grade and supported the clarification that postsecondary institutions may disclose information to parents of students who are tax dependents.

*Discussion:* Parents' rights under FERPA transfer to a student when the student reaches age 18 or enters a postsecondary institution. 20 U.S.C. 1232g(d). However, under § 99.31(a)(8), an educational agency or institution may disclose education records to an eligible student's parents if the student is a dependent as defined in section 152 of the Internal Revenue Code of 1986. Under § 99.31(a)(8), neither the age of a student nor the parent's status as custodial parent is relevant to the determination whether disclosure of information from an eligible student's education records to that parent without written consent is permissible under FERPA. If a student is claimed as a dependent for Federal income tax purposes by either parent, then under the regulations, either parent may have access to the student's education records without the student's consent.

The statutory exception to the consent requirement in FERPA for the disclosure of records of dependent students applies only to the parents of the student. 20 U.S.C. 1232g(b)(1)(H). Accordingly, the Secretary does not have statutory authority to apply § 99.31(a)(8) to any other family members. However, under § 99.30(b)(3), an eligible student may provide consent for the school to disclose information from his or her education records to another family member. In some situations, such as when there is no parent in the student's life or the student is married, a spouse or other family member may be considered an appropriate party to whom a disclosure may be made, without consent, in connection with a

health or safety emergency under § 99.31(a)(10) and 99.36.

In most cases, when an educational agency or institution discloses education records to parents of an eligible student, we expect the disclosure to be made under the dependent student provision (§ 99.31(a)(8)), in connection with a health or safety emergency (§§ 99.31(a)(10) and 99.36), or if a student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance (§ 99.31(a)(15)). This is the reason we mention these provisions specifically in the regulations. However, inclusion of the phrase "of any other provision in § 99.31(a)" in § 99.5(a)(2) is necessary and within our statutory authority because there may be other exceptions to FERPA's general consent requirement under which an agency or institution might disclose education records to a parent of an eligible student, such as the directory information provision in § 99.31(a)(11) and the provision permitting disclosure in compliance with a court order or lawfully issued subpoena in § 99.31(a)(9).

As we explained in the NPRM, institutions can determine that a parent claims a student as a dependent by asking the parent to submit a copy of the parent's most recent Federal income tax return. However, we do not think it is appropriate to require an agency or institution to rely only on the most recent tax return to determine the student's dependent status because institutions should have flexibility in how to reach this determination. For instance, institutions may rely instead on a student's assertion that he or she is not a dependent unless the parent provides contrary evidence. We agree that financial information on a Federal tax return is sensitive information and, for that reason, in providing technical assistance and compliance training to school officials, we have advised that parents may redact all financial and other unnecessary information that appears on the form, as long as the tax return clearly shows the parent's or parents' names and the fact that the student is claimed as a dependent.

In addition, in the fall of 2007, we developed two model forms that appear on the Department's Family Policy Compliance Office (FPCO or the Office) Web site that institutions may adapt and provide to students at orientation to indicate whether they are a dependent and, if not, obtaining consent from the student for disclosure of information to parents: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/>

[modelform.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html) and <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>.

With regard to the comment about high school students who are concurrently enrolled in postsecondary institutions as early as ninth grade, FERPA not only permits those postsecondary institutions to disclose information to parents of the high school students who are dependents for Federal income tax purposes, it also permits high schools and postsecondary institutions who have dually-enrolled students to share information. Where a student is enrolled in both a high school and a postsecondary institution, the two schools may share education records without the consent of either the parents or the student under § 99.34(b). If the student is under 18, the parents still retain the right under FERPA to inspect and review any education records maintained by the high school, including records that the college or university disclosed to the high school, even though the student is also attending the postsecondary institution.

*Changes:* None.

#### **Outsourcing (§ 99.31(a)(1)(i)(B))**

##### *(a) Outside Parties Who Qualify as School Officials*

*Comment:* A few commenters disagreed with the proposal to expand the "school officials" exception in § 99.31(a)(1)(i)(B) to include contractors, consultants, volunteers, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions it would otherwise use employees to perform. They believed that the modifications undermined the plain language of the statute and congressional intent. Several other commenters supported the proposed regulations, saying that it was helpful to include in the regulations what has historically been the Department's interpretation of the "school officials" exception. A majority of commenters, while not agreeing or disagreeing with the proposed changes in § 99.31(a)(1)(i)(B), raised a number of issues concerning the proposal.

Several commenters expressed concern that the requirement that an outside party must perform an institutional service or function for which the agency or institution would otherwise use employees is too restrictive and impractical. One commenter noted that some functions that a contractor performs could not be performed by a school official.

Some commenters said we should clarify the regulations to explain the

circumstances under which volunteers may serve as school officials and have access to personally identifiable information from education records in connection with their services or responsibilities to the school. One commenter noted that this clarification was needed especially for parent-volunteers working at a school attended by their own children where they are likely to know other students and their families.

Several commenters asked that we clarify in the regulations that § 99.31(a)(1) also applies to school transportation officials, school bus drivers, and school bus attendants who need access to education records in order to safely and efficiently transport students. Another commenter asked for clarification whether, under the proposed regulations, practicum students, fieldwork students, and unpaid interns in schools would be considered "school officials." One commenter asked whether § 99.31(a)(1) permits outsourced medical providers to be considered "school officials."

One commenter asked how proposed § 99.31(a)(1) would apply to parties other than educational agencies and institutions. The commenter was concerned about permitting SEAs to disclose personally identifiable information to outside parties under § 99.31(a)(1)(i)(B) because SEAs are not subject to § 99.7, which requires educational agencies and institutions to annually notify parents and eligible students of their rights under FERPA, including a specific requirement in § 99.7(a)(3)(iii) that an educational agency or institution that has a policy of disclosing information under § 99.31(a)(1) must include in its annual notice a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. A number of commenters requested clarification about the applicability of § 99.31(a)(1)(i)(B) to State authorities that operate State longitudinal data systems that maintain records of local educational agencies (LEAs) or institutions and are responsible for certain reporting requirements under the No Child Left Behind Act. Some of these commenters believe that State authorities operating these systems are "school officials" under § 99.31(a)(1) who should be able to disclose education records for the purpose of outsourcing under § 99.31(a)(1)(i)(B).

One commenter recommended that the regulations permit the disclosure of education records to non-educational State agencies for evaluation purposes under § 99.31(a)(1). Another commenter

asked that we revise the regulations to permit representatives of the Centers for Disease Control and Prevention to access education records for the purpose of public health surveillance under the "school officials" exception.

Another commenter requested further guidance on how § 99.31(a)(1) would apply to local law enforcement officers who work in collaboration with schools in various capacities and whether education records could be shared with these officers in order to ensure safe campuses.

*Discussion:* The Secretary does not agree that the proposed changes to § 99.31(a)(1) go beyond the plain reading of the statute and congressional intent. As we explained in the NPRM, FERPA's broad definition of *education records* includes records that are maintained by "a person acting for" an educational agency or institution. 20 U.S.C. 1232g(a)(4)(A)(ii); see 34 CFR 99.3. (In floor remarks describing the meaning of the definition of *education records*, Senators James Buckley and Claiborne Pell, principal sponsors of the December 1974 FERPA amendments, specifically referred to materials that are maintained by a school "or by one of its agents." See "Joint Statement in Explanation of Buckley/Pell Amendment" (Joint Statement), 120 Cong. Rec. S21488 (Dec. 13, 1974).) Although the Secretary is concerned that educational agencies and institutions not misapply § 99.31(a)(1), the changes to the regulations are necessary to clarify the scope of the "school officials" exception in FERPA.

We disagree with commenters that the requirement in § 99.31(a)(1)(i)(B)(1) that the outside party must perform an institutional service or function for which the agency or institution would otherwise use employees is too restrictive or unworkable. The requirement serves to ensure that the "school officials" exception does not expand into a general exception to the consent requirement in FERPA that would allow disclosure any time a vendor or other outside party wants access to education records to provide a product or service to schools, parents, and students. As explained in the preceding paragraphs and in the NPRM, 73 FR 15578–15579, the statutory basis for expanding the "school officials" exception to outside service providers is that they are "acting for" the agency or institution, not selling products and services. This means, for example, that a school may not use the "school officials" exception to disclose personally identifiable information from a student's education record, such as the student's SSN or student ID number,

without consent, to an insurance company that wishes to offer students a discount on auto insurance because the school is not outsourcing an institutional service or function for which it would otherwise use its own employees.

Further, the requirement that the outside party must be performing services or functions an employee would otherwise perform does not mean that a school employee must be able to perform the outsourced service in order for the outside party to be considered a school official under § 99.31(a)(1)(i)(B)(1). For example, many school districts outsource their legal services on an as-needed basis. Even though these school districts may have never hired an attorney as an employee, they may still disclose personally identifiable information from education records to outside legal counsel to whom they have outsourced their legal services. FERPA does not otherwise restrict whether a school may outsource institutional services and functions; it only addresses to whom and under what conditions personally identifiable information from students' education records may be disclosed.

Once a school has determined that an outside party is a "school official" with a "legitimate educational interest" in viewing certain education records, that party may have access to the education records, without consent, in order to perform the required institutional services and functions for the school. These outside parties may include parents and other volunteers who assist schools in various capacities, such as serving on official committees, serving as teachers' aides, and working in administrative offices, where they need access to students' education records to perform their duties.

The disclosure of education records under any of the conditions listed in § 99.31, including the "school officials" exception, is permissive and not required. (Only parents and eligible students have a right under FERPA to inspect and review their education records.) Therefore, schools should always use good judgment in determining the extent to which volunteers, as well as other school officials, need to have access to education records and to ensure that school officials, including volunteers, do not improperly disclose information from students' education records.

We decline to adopt commenters' suggestion that we include in § 99.31(a)(1)(i)(B) a list of the types of parties who may serve as school officials and receive personally identifiable information from education

records in connection with the institutional services and functions outsourced by the school. We think it would be impossible to provide a comprehensive listing and believe that agencies and institutions are in the best position to make these determinations. At the discretion of a school, school officials may include school transportation officials (including bus drivers), school nurses, practicum and fieldwork students, unpaid interns, consultants, contractors, volunteers, and other outside parties providing institutional services and performing institutional functions, provided that each of the requirements in § 99.31(a)(1)(i)(B) has been met.

Under § 99.31(a)(1), a university could outsource the practical training of students. The information disclosed to the hospital, clinic, or business conducting the practical training may only be used for the purposes for which it was disclosed. In the NPRM, we discuss in more detail the types of services and functions covered under § 99.31(a)(1)(i)(B). (73 FR 15578–15580.)

In response to the comment about the applicability of § 99.31(a)(1)(i)(B) to State educational authorities that operate State longitudinal data systems, such officials are not “school officials” under FERPA. Rather, these officials are generally considered authorized representatives of a State educational authority, and LEAs typically disclose information from students’ education records to a longitudinal data system maintained by an SEA or other State educational authorities under the exception to the consent requirement for disclosures to authorized representatives of State and local educational authorities, § 99.31(a)(3)(iv)), not the “school officials” exception. This issue is explained in more detail elsewhere in this preamble under *Educational research* (§§ 99.31(a)(6), 99.31(a)(3)). We also discuss disclosures to non-educational agencies, such as to public health agencies, in the section of this preamble entitled *Disclosure of Education Records to Non-Educational Agencies*.

Members of a school’s law enforcement unit, as defined in § 99.8 of the regulations, who are employed by the agency or institution qualify as school officials under § 99.31(a)(1)(i)(A) if the school has complied with the notification requirements in § 99.7(a)(3)(iii). As school officials, they may be given access to personally identifiable information from those students’ education records in which the school has determined they have legitimate educational interests. The

school’s law enforcement unit must protect the privacy of education records it receives and may disclose them only with consent or under one of the exceptions to consent listed in § 99.31. For that reason, it is advisable that officials of a law enforcement unit maintain education records separately from law enforcement unit records, which are not subject to FERPA requirements. As we explained in *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools*, investigative reports and other records created by an institution’s law enforcement unit are excluded from the definition of *education records* under § 99.3 and, therefore, are not subject to FERPA requirements. Accordingly, schools may disclose information from law enforcement unit records to anyone, including local police and other outside law enforcement authorities, without consent. This brochure can be found on FPCO’s “Safe Schools & FERPA” Web page: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html>.

Outside police officers or other non-employees to whom the school has outsourced its safety and security functions do not qualify as “school officials” under FERPA unless they meet each of the requirements of § 99.31(a)(1)(i)(B). If these police officers or other outside parties do not meet the requirements for being a school official under FERPA, they may not have access to students’ education records without consent, unless there is a health or safety emergency, a lawfully issued subpoena or court order, or some other exception to FERPA’s general consent requirement under which the disclosure falls.

With respect to our amendment to the “school officials” exception, we note that § 99.32(d) excludes from the recordation requirements disclosures of education records that educational agencies and institutions make to school officials. This exclusion from the recordation requirement will apply as well to disclosures to contractors, consultants, volunteers, and other outside parties to whom an agency or institution discloses education records under § 99.31(a)(1)(i)(B). The Department has long recognized that FERPA does not prevent schools from outsourcing institutional services and functions; to require schools to record disclosures to these outside parties serving as school officials would be overly burdensome and unworkable.

An educational agency or institution that complies with the notification requirements in § 99.7(a)(3)(iii) by

specifying its policy regarding the disclosure of education records to contractors and other outside parties serving as school officials provides legally sufficient notice to parents and students regarding these disclosures. We have posted model notifications on our Web site, one for postsecondary institutions and one for LEAs. See <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html> and <http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>.

Changes: None.

#### (b) Direct Control

*Comment:* Some commenters asked the Department to clarify what the term “direct control” means as used in § 99.31(a)(1)(i)(B)(2). This section provides that in order to be considered a “school official” an outside party must be under the direct control of the agency or institution. Some commenters asked if this term means that the school must monitor the operations of the outside party, and how it affects an agency’s or institution’s relationship with subcontractors or third- or fourth-party database hosting companies. One commenter stated that the regulations should not distinguish between whether the education records are hosted in a vendor’s offsite network or within the institution’s local network servers, while another commenter asked for clarification of how § 99.31(a)(1)(i)(B) applies to outsourcing electronic mail (e-mail) services to third parties such as Microsoft or Google.

One commenter stated that institutions should be required to verify that parties to whom they outsource services have the necessary resources to safeguard education records provided to them.

A commenter suggested that, instead of the proposed “direct control” standard, the Department adopt language similar to the safeguarding standard found in the Gramm-Leach-Bliley Act (GLB) (Pub. L. 106–102, November 12, 1999). The commenter suggested that, as adapted in FERPA, the standard would require that for an outside party, acting on behalf of an educational institution, to be considered a “school official,” the institution would have to: (1) Take reasonable steps to select and retain contractors, consultants, volunteers, or other outside parties that are capable of maintaining appropriate safeguards with respect to education records; and (2) mandate by contract that the outside party implement and maintain such safeguards.

*Discussion:* The term “direct control” in § 99.31(a)(1)(i)(B)(2), is intended to

ensure that an educational agency or institution does not disclose education records to an outside service provider unless it can control that party's maintenance, use, and redisclosure of education records. This could mean, for example, requiring a contractor to maintain education records in a particular manner and to make them available to parents upon request. We are revising the regulations, however, to provide this clarification.

Neither the statute nor the FERPA regulations specifically requires that educational agencies and institutions verify that outside parties to whom schools outsource services have the necessary resources to safeguard education records provided to them. However, as discussed in the NPRM, educational agencies and institutions are responsible under FERPA for ensuring that they themselves do not have a policy or practice of releasing, permitting the release of, or providing access to personally identifiable information from education records, except in accordance with FERPA. This includes ensuring that outside parties that provide institutional services or functions as "school officials" under § 99.31(a)(1)(i)(B) do not maintain, use, or redisclose education records except as directed by the agency or institution that disclosed the information.

The "direct control" requirement is intended to apply only to the outside party's provision of specific institutional services or functions that have been outsourced and the education records provided to that outside party to perform the services or function. It is not intended to affect an outside service provider's status as an independent contractor or render that party an employee under State or Federal law.

We believe that the use of the "direct control" standard strikes an appropriate balance in identifying the necessary and proper relationship between the school and its outside parties that are serving as "school officials." The recommendation that we adopt a standard more closely aligned with the GLB standard does not appear workable, especially with regard to requiring that schools enter into formal contracts with each outside party performing services, including parent-volunteers. However, one way in which schools can ensure that parties understand their responsibilities under FERPA with respect to education records is to clearly describe those responsibilities in a written agreement or contract.

Exercising direct control could prove more challenging in some situations than in others. Schools outsourcing information technology services, such as

web-based and e-mail services, should make clear in their service agreements or contracts that the outside party may not use or allow access to personally identifiable information from education records, except in accordance with the requirements established by the educational agency or institution that discloses the information.

*Changes:* We have revised § 99.31(a)(1)(B)(2) to clarify that the outside party must be under the direct control of the agency or institution with respect to the use and maintenance of information from education records.

*(c) Protection of Records by Outside Parties Serving as School Officials*

*Comment:* We received several comments on proposed § 99.31(a)(1)(i)(B)(3), which provides that an outside party serving as a "school official" is subject to the requirement in § 99.33(a), regarding the use and redisclosure of personally identifiable information from education records. One commenter stated that, while he supported and welcomed this clarification, the proposed regulations did not go far enough to clarify that these outside third parties could not use education records of multiple institutions for which they serve as a contractor to engage in activities not associated with the service or function they were providing.

Some commenters suggested that the regulations should require all school officials who handle education records, including parties to whom institutional services and functions are outsourced, to participate in annual training and to undergo fingerprint and background investigations.

Another commenter stated that any disclosures associated with the outsourcing of institutional services and functions should include a record that will serve as an audit trail. The commenter noted that both the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act of 1974 require the maintenance of audit trails or an accounting of disclosures of records.

*Discussion:* An agency or institution must ensure that an outside party providing institutional services or functions does not use or allow access to education records except in strict accordance with the requirements established by the educational agency or institution that discloses the information. Section 99.33(a)(2) of the FERPA regulations applies to employees and outside service providers alike and prohibits the recipient from using education records for any purpose other than the purposes for which the

disclosure was made. This includes ensuring that outside parties do not use education records in their possession for purposes other than those specified by the institution that disclosed the records.

FERPA does not specifically require that educational agencies and institutions provide annual training to school officials that handle education records, and we decline to establish such a requirement in these regulations. Educational agencies and institutions should have flexibility in determining the best way to ensure that school officials are made aware of the requirements of FERPA. However, for entities subject to the Individuals with Disabilities Education Act (IDEA), 34 CFR 300.623(c) provides that all persons collecting or using personally identifiable information must receive training or instruction regarding their State's policies and procedures under 34 CFR 300.123 (Confidentiality of personally identifiable information) and 34 CFR Part 99, the FERPA regulations. We note that while schools are certainly free to implement a policy requiring school officials and parties to whom services have been outsourced to undergo fingerprint and background investigations, there is no statutory authority in FERPA to include such a requirement in the regulations.

We note also that the Department routinely provides compliance training on FERPA for school officials. Typically, presentations are made throughout the year to national, regional, or State educational association conference workshops with numerous institutions in attendance. Training sessions are also scheduled for State departments of education and local school districts in the vicinity of any conference.

For a discussion of the comment that recommended that the regulations require that schools maintain an audit trail or an accounting of disclosures to school officials, including outside providers, see the discussion under the following section entitled *Control of Access to Education Records by School Officials*.

*Changes:* None.

**Control of Access to Education Records by School Officials (§ 99.31(a)(1)(ii))**

*Comment:* Many commenters supported proposed § 99.31(a)(1)(ii), which requires an educational agency or institution to use reasonable methods to ensure that school officials have access to only those education records in which the official has a legitimate educational interest. In this section, we also proposed that an educational

agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the "legitimate educational interest" requirement.

One commenter who supported the proposed regulations expressed concern that not all districts and institutions have the financial or technological resources to create or purchase an electronic system that provides fully automated access control and that an institution using only administrative controls would be required to demonstrate that each school official who accessed education records possessed a legitimate educational interest in the education records to which the official gained access. According to the commenter, the regulations seem to omit the "reasonable methods" concept for those schools that utilize administrative controls rather than physical or technological controls. The commenter was concerned that smaller schools that lack resources to create or purchase a system that fully monitors record access would be disadvantaged by having to meet a higher standard of ensuring a legitimate educational interest on the part of the school officials that access the records.

One commenter expressed concern that the standard in § 99.31(a)(1)(ii) is too restrictive and asked whether the Department would use flexibility and deference in taking into consideration an institution's efforts in compliance with the requirement.

Another commenter requested that we include in the regulations a requirement that contractors hosting data at offsite locations must institute effective access control measures. The commenter stated that many schools and contractors are uncertain as to whether the school or the contractor is responsible for ensuring that access controls are applied to data hosted by contractors.

One commenter stated that the regulations created an unnecessary burden, as school districts already do their best to comply with FERPA and an occasional mistake should be excused. The commenter, however, was pleased that the regulations do not require the use of technological controls. The commenter was concerned that schools are unable to pre-assign risk levels to categories of records in order to determine appropriate methods to mitigate improper access. The commenter supported the use of effective administrative controls as determined by a district to ensure that

information is available only to those with a legitimate educational interest.

One commenter expressed concern that the requirement to use reasonable methods to ensure appropriate access was not sufficiently restrictive, because under the regulations, all volunteers would be designated as school officials. The commenter believed that the regulations would enable volunteers to gain access more easily to confidential and sensitive information in education records.

A commenter who is a parent of a special education student also expressed concern that the language in the regulations was not adequate. The commenter described a software package used by her district that permits all school officials unrestricted access to the IEPs of all special education students.

*Discussion:* Section 99.30 requires that a parent or eligible student provide written consent for a disclosure of personally identifiable information from education records unless the circumstances meet one of the exceptions to consent, such as the release of information to a school official with a legitimate educational interest. Thus, a district or institution that makes a disclosure solely on the basis that the individual is a school official violates FERPA if it does not also determine that the school official has a legitimate educational interest. The regulations in § 99.31(a)(1)(ii) are designed to clarify the responsibility of the educational agency or institution to ensure that access to education records by school officials is limited to circumstances in which the school official possesses a legitimate educational interest.

We believe that the standard of "reasonable methods" is sufficiently flexible to permit each educational agency or institution to select the proper balance of physical, technological, and administrative controls to effectively prevent unauthorized access to education records, based on their resources and needs. In order to establish a system driven by physical or technological access controls, a school would generally first determine when a school official has a legitimate educational interest in education records and then determine which physical or technological access controls are necessary to ensure that the official can access only those records. The regulations require a school that uses only administrative controls to ensure that its administrative policy for controlling access to education records is effective and that the school is in compliance with the legitimate

educational interest requirement in § 99.31(a)(1)(i)(A). However, the "reasonable methods" standard applies whether the control is physical, technological, or administrative.

The regulations permit the use of a variety of methods to protect education records, in whatever format, from improper access. The Department expects that educational agencies and institutions will generally make appropriate choices in designing records access controls, but the Department reserves the right to evaluate the effectiveness of those efforts in meeting statutory and regulatory requirements.

The additional language that one commenter requested concerning outsourcing is already included in the regulations in § 99.31(a)(1). That section specifically provides that contractors are subject to the same conditions governing the access and use of records that apply to other school officials. As long as those conditions are met, the physical location in which the contractor provides the service is not relevant.

Because the regulations permit the use of a variety of methods to effectively reduce the risk of unauthorized access to education records, we do not believe the requirement to establish "reasonable methods" for controlling access is unduly burdensome. Schools have the flexibility to decide the method or methods best suited to their own circumstances. For the many schools, districts, and institutions that already meet the standard, no operational changes should be necessary.

The regulations do not designate all volunteers as school officials. Rather, the regulations clarify that schools may designate volunteers as school officials who may be provided access to education records only when the volunteer has a legitimate educational interest. Schools can and should carefully assess and limit access by any school official, including volunteers. This issue is discussed in more detail previously in this preamble under the section entitled *Outsourcing*.

With regard to the parent who expressed concern that the language in the regulations was not adequate to address the problem of software that permits all school officials to access the IEPs of all special education students, we believe that the language in § 99.31(a)(1)(ii) is sufficient. As previously noted, FERPA prohibits school officials from having access to education records unless they have a legitimate educational interest. The commenter's point illustrates the need for educational agencies and institutions to ensure that adequate controls are in

place to restrict access to education records only to a school official with a legitimate educational interest.

*Changes:* None.

**Transfer of Education Records to Student's New School (§§ 99.31(a)(2) and 99.34(a))**

*Comment:* All of the comments we received on proposed §§ 99.31(a)(2) and 99.34(a) supported the clarification that an educational agency or institution may disclose a student's education records to officials of another school, school system, or institution of postsecondary education not just when the student seeks or intends to enroll, but after the student is already enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. Some commenters noted that this clarification reduces legal uncertainty about how long a school may continue to send records or information to a student's new school; other commenters noted that this clarification will be helpful in serving students who are homeless or in foster care because these students are often already enrolled in a new school system while waiting for records from a previous enrollment.

A few commenters asked us to clarify the requirement that the disclosure must be for purposes related to the student's enrollment or transfer. The commenters asked whether this meant that only records specifically related to the new school's decision to admit the student or records related to the transfer of course credit could be disclosed, or whether the agency or institution could also disclose information about previously undisclosed disciplinary actions related to the student's ongoing attendance at the new institution. One commenter suggested that we remove the requirement that the disclosure must be for purposes of the student's enrollment or transfer because it was confusing and unnecessary. Some commenters asked the Department to provide guidance about the types of records that may be sent under the regulations to a student's new school, noting that the preamble to the NPRM stated that the regulations allow school officials to disclose any and all education records, including health and disciplinary records, to the new school (73 FR 15581).

One commenter asked us to clarify that any school, not just the school the student attended most recently, may disclose information from education records to the institution that the student currently attends. Another commenter asked whether the amended regulations would permit the disclosure of education records to an institution in

which a student seeks information or services but not enrollment, such as when a charter school student requests an evaluation under the IDEA from the student's home school district.

Two commenters asked whether mental health and other treatment records of postsecondary students, which are excluded from the definition of *education records* under FERPA, could be disclosed to the new school. Other commenters asked whether FERPA places any limits on the transfer of information about student disciplinary actions to colleges and universities and what information a postsecondary institution may ask for and receive regarding a student's disciplinary actions. A few commenters asked us to address the relationship between these regulations and guidance issued by the Department's Office for Civil Rights (OCR) prohibiting the pre-admission release of information about a student's disability under section 504 of the Rehabilitation Act of 1973, as amended, and Title II of the Americans with Disabilities Act of 1990, as amended.

*Discussion:* The regulations are intended to eliminate uncertainty about whether, under § 99.31(a)(2), an educational agency or institution may send education records to a student's new school even after the student is already enrolled and attending the new school. The requirement that the disclosure must be for purposes related to the student's enrollment or transfer is not intended to limit the kind of records that may be disclosed under this exception. Instead, the regulations are intended to clarify that, after a student has already enrolled in a new school, the student's former school may disclose any records or information, including health records and information about disciplinary proceedings, that it could have disclosed when the student was seeking or intending to enroll in the new school.

These regulations apply to any school that a student previously attended, not just the school that the student attended most recently. For example, under § 99.31(a)(2), a student's high school may send education records directly to a graduate school in which the student seeks admission, or is already enrolled. Section 99.34(b), which explains the conditions that apply to the disclosure of information to officials of another school, school system, or postsecondary institution, allows a public charter school or other agency or institution to disclose the education records of one of its students in attendance to the student's home school district if the student receives or seeks to receive

services from the home school district, including an evaluation under the IDEA. We note, however, that the confidentiality of information regulations under Part B of the IDEA contain additional consent requirements that may also apply in these circumstances.

Under section 444(a)(4)(B)(iv) of FERPA, 20 U.S.C. 1232g(a)(4)(B)(iv), medical and psychological treatment records of eligible students are excluded from the definition of *education records* if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment, including treatment providers at the student's new school. (While the comment concerned records of postsecondary students, we note that the treatment records exception to the definition of *education records* applies also to any student who is 18 years of age or older, including 18 year old high school students.) An educational agency or institution may disclose an eligible student's treatment records to the student's new school for purposes other than treatment provided that the records are disclosed under one of the exceptions to written consent under § 99.31(a), including § 99.31(a)(2), or with the student's written consent under § 99.30. If an educational agency or institution discloses an eligible student's treatment records for purposes other than treatment, the treatment records are no longer excluded from the definition of *education records* and are subject to all other FERPA requirements, including the right of the eligible student to inspect and review the records and to seek to have them amended under certain conditions. In practical terms, this means that an agency or institution may disclose an eligible student's treatment records to the student's new school either with the student's written consent, or under one of the exceptions in § 99.31(a), including § 99.31(a)(2), which permits disclosure to a school where a student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

FERPA does not contain any particular restrictions on the disclosure of a student's disciplinary records. Further, Congress has enacted legislation to ensure that schools transfer disciplinary records to a student's new school in certain circumstances. In particular, section 444(h) of the statute, 20 U.S.C. 1232g(h), and the implementing regulations in § 99.36(b) provide that nothing in FERPA prevents an educational agency

or institution from including in a student's records and disclosing to teachers and school officials, including those in other schools, appropriate information about disciplinary actions taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. This authority is in addition to any other authority in FERPA for the disclosure of education records without consent, including the authority under § 99.36(a) to disclose education records in connection with a health or safety emergency. In addition, section 4155 of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 7165, as amended by the No Child Left Behind Act of 2001 (NCLB), requires a State that receives funds under the ESEA to have a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by LEAs to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full-or part-time basis, in the school.

There are, however, other Federal laws, such as the IDEA, section 504 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and Title II of the Americans with Disabilities Act of 1990, as amended (ADA), with different requirements that may affect the release of student information. For example, educational agencies and institutions that are "public agencies" or "participating agencies" under the IDEA must comply with the requirements in the Part B confidentiality of information regulations. See, e.g., 34 CFR 300.622(b)(2) and (3). By way of further illustration, because educational agencies and institutions receive Federal financial assistance, they must comply with the regulations implementing section 504 of the Rehabilitation Act, which generally prohibit postsecondary institutions from making pre-admission inquiries about an applicant's disability status. See 34 CFR 104.42(b)(4) and (c). However, after admission, in connection with an emergency and if necessary to protect the health or safety of a student or other persons as defined under FERPA and its implementing regulations, section 504 of the Rehabilitation Act and Title II of the ADA do not prohibit postsecondary institutions from obtaining information and education records concerning a current student, including those with disabilities, from any school previously attended by the student. See the

discussion in the section entitled *Health or Safety Emergency (§ 99.36)*.

*Changes:* None.

#### **Ex Parte Court Orders Under the USA Patriot Act (§ 99.31(a)(9))**

*Comment:* Two commenters expressed support for the proposed regulations, which incorporate statutory changes that allow an educational agency or institution to comply with an *ex parte* court order issued under the USA Patriot Act. One commenter said that it would be helpful to add to the regulations a statement from the preamble to the NPRM that an institution is not responsible for determining the relevance of the information sought or the merits of the underlying claim for the court order.

Several commenters opposed § 99.31(a)(9). One commenter said that the USA Patriot Act is unconstitutional and that its provisions will sunset in 2009. Another commenter said that the regulations harm its ability to preserve the confidentiality of education records, particularly those of foreign students. The commenter asked us to change the regulations to permit institutions to notify students when records are requested, unless the *ex parte* court order specifically states that the student should not be notified. Another commenter said that schools should be required to notify parents when records are requested and to record the disclosure.

*Discussion:* The USA Patriot Act amendments to FERPA have not been ruled unconstitutional, and its provisions relevant to FERPA do not sunset in 2009. Therefore, we are implementing these provisions in our regulations at this time.

Under the USA Patriot Act, the U.S. Attorney General, or a designee in a position not lower than an Assistant Attorney General, may apply for an *ex parte* court order to collect, retain, disseminate, and use certain education records in the possession of an educational agency or institution without regard to any other FERPA requirements, including in particular the recordkeeping requirements. 20 U.S.C. 1232g(j)(3) and (4). The USA Patriot Act amendments to FERPA also provide that an educational agency or institution that complies in good faith with the court order is not liable to any person for producing the information. Nothing in these amendments, including the "good faith" requirement, requires an educational agency or institution to evaluate the underlying merits or legal sufficiency of the court order before disclosing the requested information without consent. As with

any court order or subpoena that forms the basis of a disclosure without consent under § 99.31(a)(9), the agency or institution must simply determine whether the *ex parte* court order is facially valid. We see no reason to include this general requirement in the regulations.

Section 99.31(a)(9)(ii) requires an agency or institution to make a reasonable effort to notify a parent or eligible student of a judicial order or lawfully issued subpoena in advance of compliance, except for certain law enforcement subpoenas if the court has ordered the agency or institution not to disclose the existence or contents of the subpoena or information disclosed. An *ex parte* order is by definition an order issued without notice to or argument from the other party, including the party whose education records are sought, and the USA Patriot Act amendments provide that the Attorney General may collect and use the records without regard to any FERPA requirements, including the recordation requirements. Under this statutory authority, the regulations properly provide that the agency or institution is not required to notify the parent or eligible student before complying with the order or to record the disclosure.

We do not agree with the commenter's request that we amend the regulations to allow agencies and institutions to notify parents and students and record these disclosures. We note that FERPA does not prohibit an educational agency or institution from notifying a parent or student or recording a disclosure made in compliance with an *ex parte* court order under the USA Patriot Act. However, an agency or institution that does so may violate the terms of the court order itself and may also fail to meet the good faith requirements in the USA Patriot Act for avoiding liability for the disclosure. We would also recommend that agencies and institutions consult with legal counsel before notifying a parent or student or recording a disclosure of education records made in compliance with an *ex parte* court order under the USA Patriot Act.

*Changes:* None.

#### **Registered Sex Offenders (§ 99.31(a)(16))**

*Comment:* One commenter asked for clarification whether the proposed regulations authorizing the disclosure of personally identifiable information from education records concerning registered sex offenders authorize only the disclosure of information that is received from local law enforcement officials, or whether disclosure could

also include other information from a student's education records, such as campus of attendance. A second commenter expressed appreciation that the regulations clarify that school districts are not required or encouraged to collect or maintain information on registered sex offenders and that these disclosures are permissible but not required.

*Discussion:* The Campus Sex Crimes Prevention Act (CSCPA) amendments to FERPA allow educational agencies and institutions to disclose any information concerning registered sex offenders provided to the agency or institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, commonly known as the Wetterling Act. Since publication of the NPRM, we have determined that the proposed regulations were confusing, because they limited these disclosures to information that was obtained and disclosed by an agency or institution in compliance with a State community notification program. In fact, the CSCPA amendments to FERPA cover any information provided to an educational agency or institution under the Wetterling Act, including not only information provided under general State community notification programs, which are required under subsection (e) of the Wetterling Act, 42 U.S.C. 14071(e), but also information provided under the more specific campus community notification programs for institutions of higher education, which are required under subsection (j), 42 U.S.C. 14071(j).

The Wetterling Act requires States to release relevant information about persons required to register as sex offenders that is necessary to protect the public, including specific State reporting requirements for law enforcement agencies having jurisdiction over institutions of higher education. The exception to the consent requirement in FERPA allows educational agencies and institutions to make available to the school community any information provided to it under the Wetterling Act. We interpret this to also include any additional information about the student that is relevant to the purpose for which the information was provided to the educational agency or institution—protecting the public. This could include, for example, the school or campus at which the student is enrolled.

The proposed regulations included a sentence stating that FERPA does not require or encourage agencies or institutions to collect or maintain information about registered sex

offenders. We have determined through further review, however, that this sentence could be confusing and should be removed. Participating institutions are required under section 485(f)(1) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1092(f)(1), to advise the campus community where it may obtain law enforcement agency information provided by the State under 42 U.S.C. 14071(j) concerning registered sex offenders. Further, the Department does not wish to discourage educational agencies and institutions from disclosing relevant information about a registered sex offender in appropriate circumstances.

*Changes:* We have revised the regulations to remove the reference to the disclosure of information obtained by the educational agency or institution in compliance with a State community notification program. The regulations now simply allow disclosure without consent of any information concerning registered offenders provided to an educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines. We also have removed the sentence stating that neither FERPA nor the regulations requires or encourages agencies or institutions to collect or maintain information about registered sex offenders.

**Redisclosure of Education Records and Recordkeeping by State and Local Educational Authorities and Federal Officials and Agencies (§§ 99.31(a)(3); 99.32(b); 99.33(b); 99.35(a)(2); 99.35(b))**

*(a) Redisclosure*

*Comment:* We received a number of comments on the proposed changes in § 99.35(b) that would permit State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) to redisclose personally identifiable information from education records on behalf of educational agencies and institutions without parental consent under the existing redisclosure authority in § 99.33(b). (Section 99.33(b) allows an educational agency or institution to disclose personally identifiable information from education records with the understanding that the recipient may make further disclosures of the information on behalf of the agency or institution if the disclosure falls under one of the exceptions in § 99.31(a) and the agency or institution has complied with the recordation requirements in § 99.32(b).) Many commenters said that the proposed change would ease administrative burdens on State and local educational authorities, agencies, and institutions. For example, under the

proposed regulations, a student's new school district or institution would be able to obtain the student's prior education records from a single State agency instead of contacting and waiting for records from separate districts or institutions. Commenters noted, however, that certain issues had not been addressed in the proposed regulations and that further clarification was required. Commenters also supported the new redisclosure authority to the extent that it facilitates the exchange of education records among State educational authorities, educational agencies and institutions, and educational researchers through consolidated, statewide systems or separate data sharing arrangements.

Two commenters expressed substantial concerns that the regulations inappropriately expanded the situations in which personally identifiable information could be redisclosed without parental or student consent. One commenter noted that the theoretical benefits of maintaining large, consolidated data systems, which allow users to track individual students over time, do not outweigh the need to protect individual privacy. Another commenter stated that the regulations should not allow State and local educational authorities and the Federal officials and agencies listed in § 99.31(a)(3) to set up and operate record systems containing personally identifiable information that parents and students have no right to review or amend, and may not even know about. Barring the withdrawal of these regulations, these commenters urged the Department to strengthen or at least preserve the safeguards and protections that accompany this new data sharing authority. One commenter asked us to require any State or Federal entity that maintains education records to provide parents and students with annual notification and the right to review and amend the students' records.

Many commenters indicated their strong support for allowing State educational authorities to respond to requests for information from education records and redisclose personally identifiable information, whether for data sharing systems, transferring records to a student's new school, or other purposes authorized under § 99.31(a), without involving school districts and postsecondary institutions. These commenters generally thought that State educational authorities and Federal officials listed in § 99.31(a)(3) should not be required to consult with educational agencies and institutions when redisclosing information from education records. One commenter

asked us to clarify the role of the SEA or other State educational authority as the custodian of education records and its authority to act for educational agencies and institutions. Several commenters urged us to revise the regulations to make clear that the redisclosing official is authorized to make further disclosures under § 99.31(a) without approval from, or further consultation with, the original source of the records and maintain the appropriate record related to the redisclosure.

One commenter said that the regulations must allow State educational authorities to transfer records on behalf of LEAs and postsecondary institutions. One commenter strongly supported the changes in § 99.35(b) because they would allow the State McKinney-Vento coordinator to control transfer of education records of abused and homeless students to their new schools and prevent potential abusers from locating the student.

Some commenters believed that current regulations impede the ability of States to establish and operate data sharing systems and that regulatory changes must allow all educational agencies, institutions, SEAs, and other State educational authorities to exchange data among themselves and work with researchers. One commenter recommended that we create a specific exception in § 99.31(a) that would allow data sharing across State educational authorities in order to establish and operate consolidated, longitudinal data systems.

Several commenters asked for clarification of the requirement in § 99.35(a)(2) that authority for an agency or official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by FERPA or the regulations and must be established under other Federal, State, or local law, including valid administrative regulations. One commenter supported data sharing among pre-school, K-12, and postsecondary institutions, provided that appropriate legal authority for the underlying audit, evaluation, or compliance and enforcement activity is established as required under § 99.35(a)(2). One commenter asked whether citation to a specific law or regulations will be required, or whether general State laws that provide joint authority to evaluate programs at all levels are sufficient for parties to enter into data sharing agreements under the regulations.

One commenter indicated that its State has no laws or regulations that

specifically allow the State-level advisory council to audit or evaluate education programs, or that allow a K-12 school district to audit or evaluate the programs offered by postsecondary institutions, and vice versa, and the commenter asked whether general authority for these entities to act under State law would be sufficient. Two commenters whose States do not house their K-12 and postsecondary systems within the same agency expressed concern whether they will be able to develop consolidated databases under the regulations if their K-12 and postsecondary agencies do not have appropriate authority to audit or evaluate each other's programs.

*Discussion:* We continue to believe that State and local educational authorities and Federal officials that receive education records under §§ 99.31(a)(3) and 99.35 should be permitted to redisclose education records on behalf of educational agencies and institutions in accordance with the existing regulations governing the redisclosure of information in § 99.33(b). We agree with the commenters that this change will ease administrative burdens at all levels and facilitate the creation and operation of statewide data sharing systems that support the student achievement, program accountability, transfer of records, and other objectives of Federal and State education programs while protecting the privacy rights of parents and students in students' education records.

We respond first to commenters' concerns about the requirement in § 99.33(b) that any redisclosure of personally identifiable information from education records must be made on behalf of the educational agency or institution that disclosed the information to the receiving party, including any requirement for consulting with or obtaining approval from the educational agency or institution that disclosed the information. The statutory prohibitions on the redisclosure of education records apply to education records that SEAs, State higher educational authorities, the Department, and other Federal officials receive under an exception to the written consent requirement in FERPA, such as §§ 99.31(a)(3) and 99.35 (for audit, evaluation, compliance and enforcement purposes) and § 99.31(a)(4) (for financial aid purposes). As explained in the preamble to the NPRM, § 99.33(b) allows an educational agency or institution to disclose education records with the understanding that the recipient may make further disclosures on its behalf under one of the

exceptions in § 99.31 (73 FR 15586-15587). In that case, the disclosing agency or institution must record the names of the additional parties to which the receiving party may redisclose the information on behalf of the educational agency or institution and their legitimate interests under § 99.31.

Under the regulatory framework for redisclosing education records in § 99.33(b), educational agencies and institutions retain primary responsibility for disclosing and authorizing redisclosure of their education records without consent. (We note again that the only disclosures of education records that are mandatory under FERPA are those made to parents and eligible students.) The purpose of § 99.33(b), which allows redisclosure of education records notwithstanding the general statutory restrictions, has always been to ease administrative burdens on educational agencies and institutions that disclose education records. The legal basis for this accommodation is that the recipient is acting "on behalf of" the agency or institution from which it received information from education records and making a further disclosure that the agency or institution would otherwise make itself under § 99.31(a). Section 99.33(b) does not confer on any recipient of education records independent authority to redisclose those records apart from acting "on behalf of" the disclosing educational agency or institution.

The Department recognizes that the State and local educational authorities and Federal officials that receive education records without consent under § 99.31(a)(3) are responsible for supervising and monitoring educational agencies and institutions and that many of them also maintain centralized data systems that constitute a valuable resource of information from education records. The proposed changes to § 99.35(b) would allow these State and Federal authorities and officials to redisclose information received under § 99.31(a)(3) under any of the exceptions in § 99.31(a), including transferring education records to a student's new school under § 99.31(a)(2), sharing information among other State and local educational authorities and Federal officials for audit or evaluation purposes under § 99.31(a)(3), and using researchers to conduct evaluations and studies under § 99.31(a)(3) or § 99.31(a)(6), without violating the statutory prohibitions on redisclosing education records provided certain conditions have been met. In the event that an educational agency or institution objects to the redisclosure of information it has provided, the State or

local educational authority or Federal official or agency may rely instead on any independent legal authority it has to further disclose the information.

We agree that current regulations were unclear about the ability of States to establish and operate data sharing systems with educational agencies and institutions, which is why we amended § 99.35(b). As explained in the NPRM (73 FR 15587), §§ 99.35(a)(2) and 99.35(b) allow SEAs, higher education authorities, and educational agencies and institutions, including local school districts and postsecondary institutions, to share education records in personally identifiable form with one another, provided that Federal, State, or local law authorizes the recipient to conduct the audit, evaluation, or compliance or enforcement activity in question. Accordingly, data sharing arrangements among State and local educational authorities and educational agencies and institutions generally must meet these requirements to be permissible under FERPA. (Data sharing with educational researchers is discussed below under *Educational research*.)

With respect to the comments recommending that we create a specific exception in § 99.31(a) to allow data sharing across State educational authorities in order to establish and operate consolidated, longitudinal data systems and other data sharing arrangements, there is no provision in FERPA that allows disclosure or redisclosure of education records, without consent, for the specific purpose of establishing and operating consolidated databases and data sharing systems, and, therefore, we are without authority to establish one in these regulations.

In response to the questions concerning the need for Federal, state, or local legal authority to disclose education records for audit or evaluation purposes, we note that, in general, FERPA allows educational agencies and institutions to disclose (and authorized recipients to redisclose) education records without consent in accordance with the exceptions listed in § 99.31(a), including for audit or evaluation purposes under §§ 99.31(a)(3) and 99.35. It does not, however, provide the underlying authority for individuals and organizations to conduct the various activities that may allow them to receive education records without consent under these exceptions. For example, § 99.31(a)(7) does not authorize an organization to accredit educational institutions; it allows educational institutions to disclose personally identifiable information from education

records, without consent, to an organization to carry out its accrediting functions. If that organization is not, in fact, an accreditation authority for that particular institution, then disclosure under § 99.31(a)(7) is invalid and violates FERPA. Likewise, § 99.31(a)(9) does not authorize a court or Federal grand jury to issue an order or subpoena; it allows an educational agency or institution to comply with a facially valid order or subpoena, without consent.

We added the requirement in § 99.35(a)(2) that the recipient have authority under Federal, State, or local law to conduct the activity for which the disclosure was made because there was significant confusion in the educational community about who may receive education records without consent for audit and evaluation purposes under § 99.35. For example, in 2005 the Pennsylvania Department of Education (PDE) asked the Department whether, in the absence of parental consent, a charter school LEA responsible under State law for providing a free appropriate public education to students with disabilities enrolled in the charter school could send the local school district of residence the IEP of each student with a disability. The school districts of residence claimed that they needed this information to substantiate the charter school's invoices for higher payments based on the student's special education status under the IDEA.

Our January 2006 response to PDE explained that in order to meet the requirements for disclosure of education records under §§ 99.31(a)(3) and 99.35, Federal, State, or local law (including valid administrative regulations) must authorize the relevant State or local educational authority to conduct the audit, evaluation, or compliance or enforcement activity in question. In particular, we noted that charter schools in Pennsylvania could disclose the IEP cover sheet under §§ 99.31(a)(3) and 99.35 of the regulations if the State law in question authorized a local school district to "audit or evaluate" a charter school's request for payment of State funds at the special education rate and the school district needed personally identifiable information for that purpose, and that we would defer to the State Attorney General's interpretation of State law on the matter. We also explained that there appeared to be no legal authority that would allow charter schools in the State to disclose a student's entire IEP to the resident school district, as requested by the resident school districts.

The Department has always interpreted §§ 99.31(a)(3) and 99.35 to allow educational agencies and institutions to disclose personally identifiable information from education records to the SEA or State higher education board or commission responsible for their supervision based on the understanding that those entities are authorized to audit or evaluate (or enforce Federal legal requirements related to) the education programs provided by the agencies and institutions whose records are disclosed. Under this reasoning, a K-12 school district (LEA) may disclose personally identifiable information from education records to another LEA, or to a State higher education board or commission, without consent, if that LEA, board, or commission has legal authority to conduct the audit, evaluation, or compliance or enforcement activity with regard to the disclosing district's programs. States do not have to house their K-12 or P-12 and postsecondary systems within the same agency in order to take advantage of this provision. However, they may need to review and modify the supervisory and oversight responsibilities of various State and local educational authorities to ensure that there is valid legal authority for LEAs, postsecondary institutions, SEAs, and higher education authorities to disclose or redisclose personally identifiable information from education records to one another under § 99.35(a) before information is released.

It is not our intention in § 99.35(a)(2) to require educational agencies and institutions and other parties to identify specific statutory authority before they disclose or redisclose education records for audit or evaluation purposes but to ensure that some local, State, or Federal legal authority exists for the audit or evaluation, including for example an Executive Order or administrative regulation. The Department encourages State and local educational authorities and educational agencies and institutions to seek guidance from their State attorney general on their legal authority to conduct a particular audit or evaluation. The Department may also provide additional guidance, as appropriate.

*Changes:* None.

*(b) Recordation Requirements*

*Comment:* In the NPRM, 73 FR 15587, we invited public comment on whether an SEA, the Department, or other official or agency listed in § 99.31(a)(3) should be allowed to maintain the record of the redisclosures it makes on behalf of an educational agency or

institution as a means of relieving any administrative burdens associated with recording disclosures of education records. One commenter urged the Department not to delegate responsibility for recordkeeping to State and local educational authorities and Federal agencies and officials that redisclose education records under § 99.33(b). Another said that if a State or local educational authority or Federal agency or official rediscloses information "on behalf of" an educational agency or institution under § 99.35(b), these further disclosures should be included in the student's record at the educational agency or institution. All other comments on this issue supported revising the regulations to allow State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) to record any redisclosures they make under § 99.33(b).

Several commenters suggested that the recordation requirements in § 99.32(b) would place an undue burden on State and local officials when State educational authorities redisclose education records because the State authority would need to return to each original source of the records to record the redisclosure. Some commenters noted that compliance with § 99.32(b) is practically impossible if an LEA or postsecondary institution is required to record all authorized redisclosures at the time of the initial disclosure of information to the State or Federal authority. Two commenters suggested that we eliminate the recordation problem by redefining the term *disclosure* so that it does not include disclosing information under § 99.31(a)(3) for audit, evaluation, or compliance and enforcement purposes. Another commenter suggested that we define "educational agency or institution" to include State educational authorities so that disclosures to State educational authorities would not be considered a *disclosure* under FERPA.

One commenter said that the regulations should permit State educational authorities to record redisclosures as they are made and without having to identify each student by name. Another commenter asked for clarification whether the recordation requirements apply to redisclosures that SEAs make to education researchers and other parties that are not authorized to make any further disclosures, and what level of detail is required in the record regarding who accessed the data and what specific information was viewed.

One commenter stated that if State educational authorities and Federal officials are authorized to record their

own redisclosures of information, then the educational agency or institution should be required to retrieve these records in response to a request to review education records by parents and eligible students who would otherwise not know about the redisclosures. Other commenters suggested that the State educational authority or Federal official could either make the redisclosure record available directly to parents and students or send it to the LEA or postsecondary institution for this purpose.

*Discussion:* We agree with commenters that in order to facilitate the operation of State data systems and ease administrative burdens on all parties, the regulations should allow State educational authorities and Federal officials and agencies to record further disclosures they make on behalf of educational agencies and institutions under § 99.33(b). We are revising the provisions of § 99.32 to address commenters' concerns and ensure that these changes will not expand the redisclosure authority of a State or local educational authority or Federal official or agency under § 99.35(b) and that parents and students will have notice of and access to any State or Federal record of further disclosures that is created.

In response to the commenter's suggestion that we define "educational agency or institution" and the term *disclosure* to address recordation issues associated with the new redisclosure authority in § 99.35(b), we note that an educational agency or institution is required by statute to maintain with each student's education records a record of each request for access to and each disclosure of personally identifiable information from the education records of the student, including the parties who have requested or received information and their legitimate interests in the information. 20 U.S.C. 1232g(b)(4)(A); 34 CFR 99.32(a). This includes each disclosure of personally identifiable information from education records that an educational agency or institution makes to an SEA or other State educational authority and to Federal officials and agencies, including the Department, for audit, evaluation, or compliance and enforcement purposes under §§ 99.31(a)(3) and 99.35, and under most other FERPA exceptions, such as the financial aid exception in § 99.31(a)(4). (Regulatory exceptions to the statutory recordation requirements, which are set forth in § 99.32(d), cover disclosures that a parent or eligible student would generally know about without the recordation or for which

notice is prohibited under court order; the exceptions do not include disclosures made to parties outside the agency or institution for audit, evaluation, or compliance and enforcement purposes.)

An educational agency or institution is required under FERPA to record its disclosures of personally identifiable information from education records even when it discloses information to another educational agency or institution, such as occurs under § 99.31(a)(2) when a school district transfers education records to a student's new school. See 20 U.S.C. 1232g(b)(4)(A); 34 CFR 99.32(a). Therefore, even if a State educational authority were considered an "educational agency or institution" under § 99.1, a school district or postsecondary institution would still be required to record its own disclosures to that State educational authority; defining a State educational authority as an educational agency or institution would not eliminate this requirement. Therefore, a school district or postsecondary institution is required to record its disclosures to any State educational authority.

The term *disclosure* is defined in § 99.3 to mean to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means. This includes releasing or making a student's education records available to school officials within the agency or institution, for which an exception to the consent requirement exists under § 99.31(a)(1). We see no legal basis for redefining the term *disclosure* to exclude the release of personally identifiable information to third parties outside the educational agency or institution under the audit, evaluation, or compliance and enforcement exception to the consent requirement in §§ 99.31(a)(3) and 99.35.

With regard to the level of detail required in the record of redisclosures, current § 99.32(b) requires an educational agency or institution to record the "names of the additional parties to which the receiving party may disclose the information" on its behalf and their legitimate interests under § 99.31. This means the name of the individual (if an organization is not involved) or the organization and the exception under § 99.31(a) that would allow the redisclosure to be made without consent. Under current § 99.33(a)(2), the officers, employees, and agents of a party that receives

information from education records may use the information for the purposes for which the disclosure was made without violating the limitations on redisclosure in § 99.33(a)(1). Therefore, we interpret the recordation requirement in § 99.32(b) to mean that an educational agency or institution may record the name of an organization, including a research organization, to which a recipient may make further disclosures under § 99.33(b) and is not required to record the name of each individual within the organization who is authorized to use that information in accordance with § 99.33(a)(2).

We also recognize that sometimes an educational agency or institution does not know at the time of its disclosure of education records that the receiving party may wish to make further disclosures on its behalf. Therefore, we interpret § 99.32(b) to allow a receiving party to ask an educational agency or institution to record further disclosures made on its behalf after the initial receipt of the records or information.

These same policies apply to further disclosures made by State and local educational authorities and Federal officials listed in § 99.31(a)(3) that redisclose information on behalf of educational agencies and institutions under the new authority in § 99.35(b). Educational agencies and institutions that disclose education records under § 99.31(a)(3) with the understanding that the State or Federal authority or official may make further disclosures may continue to record those further disclosures as provided in § 99.32(b)(1). Like any other recipient of education records, a State or Federal authority or official may also ask an educational agency or institution to record further disclosures made on its behalf after the initial receipt of the records or information. It is incumbent upon a State or Federal authority or official that makes further disclosures on behalf of an educational agency or institution under § 99.33(b) to determine whether the educational agency or institution has recorded those further disclosures. If the educational agency or institution does not do so, then under the revisions to § 99.32(b)(2)(i) in the final regulations, the State and local educational authority or Federal official or agency that makes further disclosures must maintain the record of those disclosures.

We have also revised § 99.32(a) to ensure that educational agencies and institutions maintain a listing in each student's record of the State and local educational authorities and Federal officials and agencies that may make further disclosures of the student's

education records without consent under § 99.33(b). This will help ensure that parents and students know that the record of disclosures maintained by an educational agency or institution as required under § 99.32(a) may not contain all further disclosures made on behalf of the agency or institution by a State or Federal authority or official and alert parents and students to the need to ask for access to this additional information. We have also revised § 99.32(a) to require an educational agency or institution to obtain a copy of the record of further disclosures maintained at the State or Federal level and make it available for parents and students to inspect and review upon request.

In response to commenters' suggestions, the regulations in new § 99.32(b)(2)(ii) allow a State or local educational authority or Federal official or agency to identify the redisclosure by the student's class, school, district, or other appropriate grouping rather than by the name of each student whose record was redisclosed. For example, an SEA may record that it disclosed to the State higher education authority the scores of each student in grades nine through 12 on the State mathematics assessment for a particular year. We believe that this procedure eases administrative burdens while ensuring that a parent or student may access information about the redisclosure.

We note that the recordation requirements under § 6401(c)(i)(IV) of the America COMPETES Act, Public Law 110-69, 20 U.S.C. 9871(c)(i)(IV), are more detailed and stringent than those required under FERPA. In particular, a State that receives a grant to establish a statewide P-16 education data system under § 6401(c)(2), 20 U.S.C. 9871(c)(2), is required to keep an accurate accounting of the date, nature, and purpose of each disclosure of personally identifiable information in the statewide P-16 education data system; a description of the information disclosed; and the name and address of the person, agency, institution, or entity to whom the disclosure is made. The State must also make this accounting available on request to parents of any student whose information has been disclosed. The Department will issue further guidance on these requirements if the program is funded and implemented.

*Changes:* We have made several changes to § 99.32, as follows:

- New § 99.32(b)(2)(i) provides that a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from

education records must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests under § 99.31 in the information if the information was received from an educational agency or institution that has not recorded the further disclosures itself or from another State or local official or Federal official or agency listed in § 99.31(a)(3).

- New § 99.32(b)(2)(ii) provides that a State or local educational authority or Federal official or agency that records further disclosures of information may maintain the record by the student's class, school, district or other appropriate grouping rather than by the name of the student.

- New § 99.32(b)(2)(iii) provides that upon request of an educational agency or institution, a State or local educational authority or Federal official or agency that maintains a record of further disclosures must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

- Revised § 99.32(a)(1) requires educational agencies and institutions to list in each student's record of disclosures the names of the State and local educational authorities and Federal officials or agencies that may make further disclosures of the information on behalf of the educational agency or institution under § 99.33(b).

- New § 99.32(a)(4) requires an educational agency or institution to obtain a copy of the record of further disclosures maintained by a State or local educational authority or Federal official or agency and make it available in response to a parent's or student's request to review the student's record of disclosures.

#### **Educational Research (§§ 99.31(a)(6) and 99.31(a)(3))**

*Comment:* We received a number of comments on proposed § 99.31(a)(6)(ii). In this section, we proposed that an educational agency or institution that discloses personally identifiable information without consent to an organization conducting studies for, or on behalf of, the educational agency or institution must enter into a written agreement with the organization specifying the purposes of the study and containing certain other elements. This exception to the consent requirement is often referred to as the "studies exception." While all of the comments on this provision generally supported the changes, many of the commenters raised concerns about the scope and

applicability of the studies exception and requested clarification on some of the proposed changes, particularly with regard to the provisions relating to written agreements.

*Discussion:* We address commenters' specific concerns about the key portions of these regulations in the following sections.

*Changes:* None.

*(a) Scope and Applicability of § 99.31(a)(6)*

*Comment:* Several commenters stated that the proposed regulations did not clearly indicate that the studies exception applies to State educational authorities. Some commenters, assuming that § 99.31(a)(6) applied to State educational authorities, noted that the proposed regulations did not provide clear authority for State educational authorities such as an SEA, or a State longitudinal data system using State generated data (such as State assessment results), to enter into research agreements on behalf of educational agencies and institutions. One commenter stated that § 99.31(a)(6) should not be interpreted to require that research agreements be entered into by individual schools or that any resulting redisclosures be recorded by the individual schools.

One commenter asked for clarification regarding whether § 99.31(a)(6) permitted a school to disclose a student's education records to his or her previous school for the purpose of evaluating Federal or State-supported education programs or for improving instruction.

Another commenter stated that the Department should further revise the regulations to provide that only individuals in the organization conducting the study who have a legitimate interest in the information disclosed be given access to the information. The commenter also stated that the Department should specifically limit § 99.31(a)(6) to bona fide research projects by prohibiting organizations conducting studies under this exception from using record-level data for other operational or commercial purposes. The commenter also expressed concern about the duration of research projects, noting that significantly more restrictive access should be required for studies that track personally identifiable information for long periods of time. The commenter stated further that the Department should consider imposing a time limit on how long information obtained through longitudinal studies can be retained.

*Discussion:* FERPA permits an educational agency or institution to

disclose personally identifiable information from an education record of a student without consent if the disclosure is to an organization conducting studies for, or on behalf of, the educational agency or institution to (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. 20 U.S.C. 1232g(b)(1)(F); 34 CFR 99.31(a)(6). Disclosures made under the studies exception may only be used by the receiving party for the purposes for which the disclosure was made and for no other purpose or study. As such, § 99.31(a)(6) is not a general research exception to the consent requirement in FERPA but an exception for studies limited to the purposes specified in the statute and regulations.

We first note that it may not be necessary or even advantageous for State educational authorities to use the studies exception in order to conduct or authorize educational research because of the limitations in § 99.31(a)(6). In contrast, § 99.31(a)(3)(iv), under the conditions set forth in § 99.35, allows educational agencies and institutions, such as LEAs and postsecondary institutions, to disclose education records without consent to State educational authorities for audit and evaluation purposes, which can include a general range of research studies beyond the more limited group of studies specified under § 99.31(a)(6). Also, as explained more fully elsewhere in this preamble, while a State educational authority must have the underlying legal authority to audit or evaluate the records it receives from LEAs or postsecondary institutions under § 99.35, the LEA or postsecondary institution is not required to enter into a written agreement for the audit or evaluation as it is required to do under § 99.31(a)(6). (*See Redisclosure of Education Records and Recordkeeping by State and Local Educational Authorities and Federal Officials and Agencies.*) The absence of an explanation of the authorized representatives exception (§ 99.31(a)(3)) in the NPRM created confusion, especially with regard to how State departments of education may utilize education records for evaluation purposes. Therefore, we have included that explanation here.

The conditions for disclosing education records without consent under §§ 99.31(a)(3)(iv) and 99.35 are discussed in the Department's Memorandum from the Deputy Secretary of Education (January 30, 2003) available at <http://www.ed.gov/policy/gen/guid/secletter/030130.html>. The Deputy Secretary's memorandum

explains that under this exception an "authorized representative" of a State educational authority is a party under the direct control of that authority, e.g., an employee or a contractor.

In general, the Department has interpreted FERPA and implementing regulations to permit the disclosure of personally identifiable information from education records, without consent, in connection with the outsourcing of institutional services and functions. Accordingly, the term "authorized representative" in § 99.31(a)(3) includes contractors, consultants, volunteers, and other outside parties (i.e., non-employees) used to conduct an audit, evaluation, or compliance or enforcement activities specified in § 99.35, or other institutional services or functions for which the official or agency would otherwise use its own employees. For example, a State educational authority may disclose personally identifiable information from education records, without consent, to an outside attorney retained to provide legal services or an outside computer consultant hired to develop and manage a data system for education records.

The term "authorized representative" also includes an outside researcher working as a contractor of a State educational authority or other official listed in § 99.31(a)(3) that has outsourced the evaluation of Federal or State supported education programs. An outside researcher may conduct independent research under this provision in the sense that the researcher may propose or initiate research projects for consideration and approval by the State educational authority or other official listed in § 99.31(a)(3) either before or after the parties have negotiated a research agreement. Likewise, the State educational authority or official does not have to agree with or endorse the researcher's results or conclusions. In so doing, an outside researcher retained to evaluate education programs by a State educational authority or other official listed in § 99.31(a)(3) as an "authorized representative" may be given access to personally identifiable information from education records, including statistical information with unmodified small data cells. However, the term "authorized representative" does not include independent researchers that are not contractors or other parties under the direct control of an official or agency listed in § 99.31(a)(3).

While an educational agency or institution may not disclose personally identifiable information from students' education records to independent researchers, nothing in FERPA prohibits

them from disclosing information that has been properly de-identified. Further discussion of this issue is provided in the following paragraphs and under the section entitled *Personally Identifiable Information and De-Identified Records and Information*.

An SEA or other State educational authority that has legal authority to enter into agreements for LEAs or postsecondary institutions under its jurisdiction may enter into an agreement with an organization conducting a study for the LEA or institution under the studies exception. If the SEA or other State educational authority does not have the legal authority to act for or on behalf of an LEA or institution, then it would not be permitted to enter into an agreement with the organization conducting the study under this exception. As previously mentioned, FERPA authorizes certain disclosures without consent; it does not provide an SEA or other State educational authority with the legal authority to act for or on behalf of an LEA or postsecondary institution.

With regard to the request for clarification whether § 99.31(a)(6) permits a school to disclose a student's education records to his or her previous school for evaluation purposes, the studies exception only allows disclosures to organizations conducting studies for, or on behalf of, the educational agency or institution that discloses its records. The "for, or on behalf of" language from the statute does not permit disclosures under this exception so that the receiving organization can conduct a study for itself or some other party. This issue is discussed in more detail under the section of this preamble entitled *Disclosure of Education Records to Student's Former Schools*.

We agree with the comment that the regulations should be revised to provide that only those individuals in the organization conducting the study that have a legitimate interest in the personally identifiable information from education records can have access to the records. The Secretary also shares the commenter's concerns about limiting § 99.31(a)(6) to bona fide research projects, prohibiting commercial utilization of education records, and limiting the duration of research projects. We address these issues in greater detail in the following section concerning written agreements.

*Changes:* None.

*(b) Written Agreements for Studies*

*Comment:* Several commenters expressed concern that § 99.31(a)(6) not be read so broadly as to erode parents'

and students' privacy rights, and, therefore, supported the restrictions that the Secretary included in this provision. Specifically, they supported the new requirement that educational agencies and institutions must enter into a written agreement with the organization conducting the study that specifies: the purpose of the study, that the information from the education records disclosed be used only for the stated purpose, that individuals outside the organization may not have access to personally identifiable information about the students being studied, and that the information be destroyed or returned when it is no longer needed for the purpose of the study.

Several commenters said that the Department should clarify that the existence of a written agreement is not a rationale in and of itself for the disclosure of education records. They stated that the regulations should provide explicitly that a written agreement does not modify the protections under FERPA or justify the use of the records transferred other than as permitted by the statute and the regulations. Some of these commenters stated that the written agreement should include a description of the specific records to be disclosed for the study.

Several commenters agreed with the provision in the proposed regulations that specified that an educational agency or institution does not need to agree with or endorse the conclusions or results of the study. Other commenters asked that we include in the regulations the explanation provided in the preamble to the NPRM that the school also does not need to initiate the study.

One commenter suggested that we change the references from "study" to "studies" so that it is clear that an agency or institution and a research organization could enter into one agreement that would cover a variety of studies that support the State's or school district's educational objectives. One commenter suggested that the Department certify agreements between educational agencies and research organizations as meeting the requirements of FERPA.

There were several comments on the destruction of information requirements in FERPA. Some suggested that we include in the regulations the specific time period by which information disclosed to a researcher must be destroyed, while others stated that ongoing access to data is necessary and that researchers should be permitted to retain information indefinitely. Some commenters suggested that the required time period for the destruction or return of education records, as deemed

necessary by the parties to support the purposes of the authorized study or studies, be established in the written agreement.

One commenter approved including the requirements regarding the use and destruction of data in the written agreement as a way of improving compliance with FERPA. However, the commenter questioned our explanation that the language in the statute providing that the study must be conducted "for, or on behalf of" the educational agency or institution means that the disclosing school must retain control over the information once it has been given to a third party conducting a study. The commenter believed that school districts will not be involved in how a study is performed and that the written agreement with the organization specifying the organization's obligations with regard to the use and destruction of data should be sufficient.

*Discussion:* The Secretary shares the concerns raised by commenters that § 99.31(a)(6) not be read so broadly as to erode parents' and students' privacy rights. Accordingly, we have revised § 99.31(a)(6) to address some of these concerns and believe that these changes will provide adequate protection of students' education records that may be disclosed under the studies exception.

In the NPRM, we proposed to remove current § 99.31(a)(6)(ii)(A) and (B) and included these requirements under the provisions for written agreements. These paragraphs provide that the study must be conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization and that the information be destroyed when no longer needed for the purposes for which the study was conducted. We are including § 99.31(a)(6)(ii)(A) and (B) in the final regulations. After reviewing comments on the proposed changes, we concluded that, by moving these two provisions into the new paragraph relating to written agreements, we would have weakened the statutory requirements concerning the studies exception. We believe this correction will alleviate commenters' concerns about weakening parents' and students' privacy rights under FERPA.

We agree with the comments that the existence of a written agreement is not a rationale in and of itself for the disclosure of education records. As a privacy statute, FERPA requires that parents and eligible students provide written consent before educational agencies and institutions disclose personally identifiable information from students' education records. There are

several statutory exceptions to FERPA's general consent rule, one of which is § 99.31(a)(6), an exception that permits disclosure of records for studies limited to the purposes specified in the statute and regulations. However, a written agreement, a memorandum of understanding, or a contract is not a justification for disclosure of education records. Rather, a disclosure must meet the requirements in § 99.31(a)(6) or the other permitted disclosures under § 99.31. If a disclosure meets the conditions of § 99.31(a)(6), the disclosure may be made, and the written agreement sets forth the requirements that must be followed when entering into such an agreement.

As noted in our earlier discussion of the scope and applicability of the studies exception, the Secretary concurs that the regulations should be revised to require that a written agreement expressly include the purpose, scope, and duration of the agreed upon study, as well as the information to be disclosed. We also agree with commenters that the regulations should specifically limit any disclosures of personally identifiable information from students' education records to those individuals in the organization conducting the study that have a legitimate interest in the information. This requirement is consistent with § 99.32(a)(3)(ii), which requires that an educational agency or institution record the "legitimate interests" the parties had in obtaining information under FERPA.

The Secretary strongly recommends that schools carefully limit the disclosure of students' personally identifiable information under this and the other exceptions in § 99.31 and reminds educational agencies and institutions that disclosures without consent are subject to § 99.33(a)(2), which states: "The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made." The recordation requirements in § 99.32 also apply to any disclosures of personally identifiable information made under the studies exception. (We note that a school does not have to record the disclosure of information that has been properly de-identified.)

Although FERPA permits schools to disclose personally identifiable information under § 99.31(a)(6) to organizations conducting studies for or on its behalf, the Secretary recommends that educational agencies and institutions release de-identified information whenever possible under this exception. Even when schools opt

not to release de-identified information in these circumstances, we recommend that schools reduce the risk of unauthorized disclosure by removing direct identifiers, such as names and SSNs, from records that don't require them, even though these records may still contain some personally identifiable information. This is especially important when a school also discloses sensitive information about students, such as type of disability and special education services received by the students.

We agree with commenters that § 99.31(a)(6) should be revised to indicate that an educational agency or institution is not required to initiate a study. Additionally, we have revised § 99.31(a)(6) to include the word "studies" so that an educational agency or institution may utilize one written agreement for more than one study, so long as the requirements concerning information that must be in the agreement are met.

While we do not have the authority under FERPA to officially certify agreements between educational agencies and institutions and organizations conducting studies, FPCO does provide technical assistance to educational agencies or institutions on FERPA. As such, if school officials have questions about whether an agreement meets the requirements in § 99.31(a)(6), they may contact FPCO for assistance.

With regard to the comments that we include in the regulations a specific time period by which information provided under the studies exception must be destroyed, we believe that the parties entering into the agreement should decide when information has to be destroyed or returned to the educational agency or institution. As we have discussed, we have revised § 99.31(a)(6) to require that the written agreement include the duration of the study and the time period during which the organization must either destroy or return the information to the educational agency or institution.

With regard to the comment that a written agreement with the organization conducting the study should be sufficient for an educational agency or institution to retain control over information from education records once the information is given to an organization conducting a study, we agree that a written agreement required under the regulations will help ensure that the information is used only to meet the purposes of the study stated in the written agreement and that all applicable requirements are met. However, similar to the requirement that an outside service provider serving

as a school official is subject to FERPA's restrictions on the use and redisclosure of personally identifiable information from education records, educational agencies and institutions must ensure that organizations with which they have entered into an agreement to conduct a study also comply with FERPA's restrictions on the use of personally identifiable information from education records. (See pages 15578–15580 of the NPRM.) That is, the school must retain control over the organization's access to and use of personally identifiable information from education records for purposes of the study or studies, including access by the organization's own employees and subcontractors, as well as any school officials whom the organization permits to have access to education records.

An educational agency or institution may need to determine that the organization conducting the study has reasonable controls in place to ensure that personally identifiable information from education records is protected. We note that it is common practice for some data sharing agreements to have a "controls section" that specifies required controls and how they will be verified (e.g., surprise inspections). We recommend that the agreement required by § 99.31(a)(6) include a section that sets forth similar requirements. If a school is unable to verify that these controls are in place, then it should not disclose personally identifiable information from education records to an organization for the purpose of conducting a study.

In this regard, it should be noted that educational agencies and institutions are responsible for any failures by an organization conducting a study to comply with applicable FERPA requirements. FERPA states that if a third party outside the educational agency or institution fails to destroy information in violation of 20 U.S.C. 1232g(b)(1)(F), the studies exception in FERPA, the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years. See 20 U.S.C. 1232g(b)(4)(B).

*Changes:* We have revised § 99.31(a)(6) to: (1) Retain § 99.31(a)(6)(ii)(A) and (B); (2) amend § 99.31(a)(6)(ii)(A) to provide that the study must be conducted in a manner that does not permit personal identification of parents or students by anyone other than representatives of the organization that have legitimate interest in the information; (3) amend § 99.31(a)(6)(ii)(C) to require that the written agreement specify the purpose,

scope, and duration of the study and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; limit any disclosures of information to individuals in the organization conducting the study who have a legitimate interest in the information; and require the organization to destroy or return to the educational agency all personally identifiable information when the information is no longer needed for the purposes of the study and specify the time period during which the organization must either destroy or return the information to the educational agency or institution; and (4) amend § 99.31(a)(6) in new paragraph (iii) to provide that an educational agency or institution is not required to initiate a study.

#### **Disclosure of Education Records to Non-Educational State Agencies**

*Comment:* Several commenters stated that the proposed amendments did not specifically address whether an educational agency or institution is permitted to disclose education records to non-educational State agencies, such as State health or labor agencies, as part of an agreement with those agencies, without first obtaining consent. One commenter said that because the Department has taken the position that education records may be shared with State auditors who are not educational officials and who are not, by definition, under the control of a State educational authority, there is no legal basis to prohibit the disclosure of education records to other non-educational State and local agencies.

Some officials representing State health agencies commented that FERPA should be more closely aligned with the disclosure provisions of the HIPAA Privacy Rule. One commenter noted that there was a critical need for public health researchers to be able to access, without consent, personally identifiable information contained in student health records to allow for analyses, public health studies, and research that will benefit school-aged children, as well as the general population. One organization representing school nurses noted that public health officials need access to education records for the purposes of public health reporting, surveillance, and reimbursement.

Several commenters recommended that SEAs be authorized to share data from education records with State social services, health, juvenile, and employment agencies, to serve the

needs of students, including special needs, low-income, and at-risk students. One SEA commented that it did not support extending access to student data to non-education State agencies, except to State auditors, as specified in proposed § 99.35(a)(3). This commenter asserted that access to and use of information from students' education records should be controlled by a limited number of education officials who are sensitive to the intent of FERPA and well acquainted with its safeguards.

*Discussion:* There is no specific exception to the written consent requirement in FERPA that permits the disclosure of personally identifiable information from students' education records to non-educational State agencies. Educational agencies and institutions may disclose personally identifiable information for audit or evaluation purposes under §§ 99.31(a)(3) and 99.35 only to authorized representatives of the officials or agencies listed in § 99.31(a)(3)(i) through (iv). Typically, LEAs and their constituent schools disclose education records to State educational authorities under § 99.31(a)(3)(iv), such as the SEA, for audit, evaluation, or compliance and enforcement purposes.

There are some exceptions that might authorize disclosures to non-educational State agencies for specified purposes. For example, disclosures may be made in a health or safety emergency (§§ 99.31(a)(10) and 99.36), in connection with financial aid (§ 99.31(a)(4)), or pursuant to a State statute under the juvenile justice system exception (§§ 99.31(a)(5) and 99.38), and any disclosures must meet the specific requirements of the particular exception. FERPA, however, does not contain any specific exceptions to permit disclosures of personally identifiable information without consent for public health or employment reporting purposes. That said, nothing in FERPA prohibits an educational agency or institution from importing information from another source to perform its own evaluations.

We believe that any further expansion of the list of officials and entities in FERPA that may receive education records without the consent of the parent or eligible student must be authorized by legislation enacted by Congress.

We explained in the NPRM on page 15577 that, with respect to State auditors, legislative history for the 1979 FERPA amendment indicates that Congress specifically intended that FERPA not preclude State auditors from obtaining personally identifiable

information from education records in order to audit Federal and State supported education programs, notwithstanding that the statutory language in the amendment refers only to "State and local educational officials." See 20 U.S.C. 1232g(b)(5); H.R. Rep. No. 338, 96th Cong., 1st Sess. at 10 (1979), *reprinted in* 1979 U.S. Code Cong. & Admin. News 819, 824. This legislative history provides a basis for drawing a distinction between State auditors and officials of other State agencies that also are not under the control of the State educational authority. (As explained more fully under *State auditors*, upon further review, we have removed from the final regulations the proposed regulations related to State auditors and audits.)

The 1979 amendment to FERPA does not apply to other State officials or agencies, and there is no other legislative history to indicate that Congress intended that FERPA be interpreted to permit educational agencies and institutions, or State and local educational authorities or Federal officials and agencies listed in § 99.31(a)(3), to share students' education records with non-educational State officials. In fact, Congress has, on numerous occasions, indicated otherwise.

As discussed elsewhere in this preamble under the heading *Health or Safety Emergency*, the HIPAA Privacy Rule specifically excludes from coverage health care information that is maintained as an "education record" under FERPA. 45 CFR 160.103, Protected health information. We understand that the HIPAA Privacy Rule allows covered entities to disclose identifiable health data without written consent to public health authorities. However, there is no comparable exception to the written consent requirement in FERPA.

As mentioned previously, in conducting an audit, evaluation, or compliance or enforcement activity, an educational authority may collaborate with other State agencies by importing data from those sources and conducting necessary matches. Any reports or other information created as a result of the data matches may only be released to those non-educational officials in non-personally identifiable form. Educational authorities may also release information on students to non-educational officials that has been properly de-identified, as described in § 99.31(b)(1).

Additionally, many agencies providing services to low income or at-risk families have parents sign a consent form authorizing disclosure of

information at intake time so that the agency can receive necessary information from schools. In 1993, we amended the FERPA regulations to help facilitate this practice. In final regulations published in the **Federal Register** on January 7, 1993 (58 FR 3188), we removed the previous requirement in the regulations that schools "obtain" consent from parents and eligible students so that parents and eligible students may "provide" a signed and dated consent to third parties in order for the school to disclose education records to those parties.

Therefore, parents can provide consent at intake time to State and local social services and other non-educational agencies serving the needs of students in order to permit their children's schools (or the SEA) to disclose education records to the agency. For example, parents routinely provide consent to the Medicaid agency that permits that agency to collect information from other agencies on the family being served. In many cases those consents are written in a manner that complies with the consent requirement in § 99.30, and the student's school may disclose information to the Medicaid agency necessary for reimbursement purposes for services provided the student.

*Changes:* None.

**Disclosure of Education Records to Student's Former Schools (§§ 99.31(a)(3), 99.31(a)(6), and 99.35(b))**

*Comment:* One commenter asked for clarification whether a school could disclose a student's education records to the student's previous school for the purpose of evaluating Federal or State supported education programs or for improving instruction. Several commenters said that there is a critical need for school districts to be able to access the records of their former students from the student's new district or postsecondary institution so that the previous institution can evaluate the effectiveness of its own education programs. Some commenters said that § 99.35(a) clearly allows a K-12 data system to use postsecondary records to evaluate its own programs, and that a K-12 system does not need to have legal authority to evaluate postsecondary programs for the disclosure to be valid under the audit or evaluation exception.

*Discussion:* Section 99.31(a)(2) allows an educational agency or institution to disclose personally identifiable information from education records, without consent, to a school where the student seeks or intends to enroll or is

already enrolled if the disclosure relates to the student's enrollment or transfer. There is no specific authority in FERPA for an educational agency or institution, or a State or local educational authority, to disclose or redisclose personally identifiable information from education records to a student's former school without consent.

As discussed above, §§ 99.31(a)(3) and 99.35 allow educational agencies and institutions to disclose personally identifiable information from education records without consent to State and local educational authorities that are legally authorized to audit or evaluate the disclosing institution's programs or records. We encourage State and local authorities to take advantage of this exception and establish or modify State or local legal authority, as necessary, to allow K-12 and postsecondary educational authorities to audit or evaluate one another's programs. As noted above, the Department will generally defer to a State Attorney General's interpretation of State or local law on these matters.

Section 99.31(a)(6) allows an educational agency or institution to disclose personally identifiable information from education records without consent to an organization conducting a study for, or on behalf of, the agency or institution that discloses its records. The "for, or on behalf of" language from the statute and regulations, however, does not allow the educational agency or institution to disclose personally identifiable information from education records under this exception so that the receiving organization can conduct a study for itself or some other party. Further, the Secretary does not as a policy matter support expanding the studies exception to permit such a disclosure because it would result in a vast increase in the number of parties gaining access to and maintaining personally identifiable information on students. As discussed below, educational agencies and institution and other parties, including State educational authorities, may always release information from education records to a student's former school, without consent, if all personally identifiable information has been removed.

**Personally Identifiable Information and De-Identified Records and Information (§§ 99.3 and 99.31(b))**

*(a) Definition of Personally Identifiable Information*

*Comment:* We received a number of comments on proposed § 99.3 regarding

changes to the definition of *personally identifiable information*. One commenter applauded the Department's recognition of the increasing ease of identifying individuals from redacted records and statistical information because of the large amount of detailed personal information that is maintained on most Americans by many different organizations. This commenter and others, however, stated that the proposed regulations did not go far enough to ensure that personally identifiable information about students would not be released.

One commenter expressed concern about our proposal to eliminate paragraphs (e) and (f) from the existing definition of *personally identifiable information*, which included a list of personal characteristics and other information that would make a student's identity easily traceable. The commenter said that this was a change to long-standing Department policy and represented an unwarranted invasion of privacy that exceeds statutory authority. This commenter also expressed concern that eliminating the "easily traceable" provisions for determining whether information was personally identifiable could prevent parents from accessing their children's education records and might allow school officials to circumvent FERPA requirements by using nicknames, initials, and other personal characteristics to refer to children.

In contrast, several commenters stated that the regulations would be unworkable or were too restrictive and would prevent or discourage the release of information from education records needed for school accountability and other public purposes. These commenters stated that paragraphs (f) and (g) in the proposed definition of *personally identifiable information*, which replaces the "easily traceable" provisions, would provide school officials too much discretion to conceal information the public deserves to have in order to debate public policy. Proposed paragraph (f) provided that personally identifiable information includes other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. Proposed paragraph (g) provided that personally identifiable information includes information requested by a person who the educational agency or institution reasonably believes has direct, personal knowledge of the identity of the student

to whom the education record relates, sometimes known as a "targeted request."

Several commenters expressed support for the provisions in paragraphs (f) and (g) of the definition of *personally identifiable information*. One of these commenters said that the "school and community" limitation and the "reasonable person" standard in paragraph (f) is sufficiently clear for implementation by parties that release de-identified records. Another commenter said that ambiguity in the terms "reasonable person" and "reasonable certainty" was necessary so that organizations can develop their own standards for addressing the problem of ensuring that information that is released is not personally identifiable. This commenter asked the Department to retain the flexibility in the proposed language and provide examples of policies that have been implemented that meet the requirements in paragraphs (f) and (g) of the definition. The commenter said that most school districts know when they are receiving a targeted request (paragraph (g)) but asked that the Department provide examples to help districts determine whether a non-targeted request will reveal personally identifiable information.

Journalism and writers' associations expressed concern about the "reasonable person" standard in paragraph (f) and our statement in the preamble to the NPRM (73 FR 15583) that an educational agency or institution may not be able to release redacted education records that concern students or incidents that are well-known in the school community, including when the parent or student who is the subject of the record contacts the media and causes the publicity that prevents the release of the record. These commenters stated that FERPA should not prevent schools from releasing records from which all direct and indirect identifiers, such as name, date of birth, address, unusual place of birth, mother's maiden name, and sibling information, have been removed without regard to any outside information, particularly after a student or parent has waived any pretense of confidentiality by contacting the media. They also said that the proposed definition of *personally identifiable information* does not acknowledge the public interest in school accountability.

One commenter said that the "reasonable person in the school or its community" standard in paragraph (f) was too narrow and inappropriate because it would allow individuals with even modest scientific and

technological abilities to identify students based on supposedly de-identified information. Another commenter said that the reference in paragraph (f) to a "reasonable person" should be changed to "ordinary person." A commenter said that if we retain the "reasonable person" standard, we should remove the references to the school or its community and personal knowledge of the circumstances and simply refer to a reasonable person. Several commenters said the "school or its community" standard is too vague and needs to be clarified, particularly in relation to the provision in paragraph (g) regarding targeted requests; these commenters said that school officials will choose to evaluate a request for information based on whether a reasonable person in the community, a broader standard than a reasonable person in the school, could identify the student and automatically find their own decisions to be reasonable. One commenter said that the phrase "relevant circumstances" in paragraph (f) is vague.

One commenter said that the standard in paragraph (f) about whether the information requested is "linked or linkable" to a specific student was too vague and overly broad and could be logically extended to cover almost any information about a student. This commenter said that the regulations should focus on preventing the release of records that in and of themselves contain unique personal descriptors that would make the student identifiable in the school community and not refer to outside information, including what members of the public might know independently of the records themselves.

Several commenters expressed concerns that the provision in paragraph (g) regarding targeted requests will make FERPA and the regulations administratively unwieldy and unnecessarily subjective. One of these commenters said that paragraph (g) is unclear and adds more confusion as opposed to providing clarity; this commenter said that paragraph (g) should be removed and that the requirements in paragraph (f) were sufficient. Another commenter said that the standard in paragraph (g) unfairly holds agencies and institutions responsible for ascertaining the requester's personal knowledge. One commenter said that we should delete the words "direct, personal" before "knowledge" because these terms are unclear. According to this commenter, if a school reasonably believes that the requester knows the student's identity, the school should not disclose the

records, whether the knowledge is "direct" or "personal."

Other commenters expressed a more general concern that the standard for targeted requests in paragraph (g) places an undue burden on school officials to obtain information about the person requesting information and creates a potential conflict with State open records laws. According to these commenters, the regulations as proposed would encourage agencies and institutions to make illegitimate inquiries into a requester's motives for seeking information and what the requester intends to do with it, or require the agency or institution to read the mind of a party requesting information. According to the commenter, this would introduce a degree of subjective judgment that would invariably lead to abuse because the same record that could be considered a public record to one requester could be a confidential document to another. A large university that has decentralized administrative operations questioned how it could be expected to take institutional knowledge into account in evaluating whether a request for records is targeted and asked for confirmation that the Department will not substitute its judgment for that of the institution so long as there was a rational basis for the decision to release information.

We received a few comments on the example of a targeted request that we provided in the preamble to the NPRM (73 FR 15583–15584), in which rumors circulate that a candidate running for political office plagiarized other students' work, and a reporter asks the university for the redacted disciplinary records of all students who were disciplined for plagiarism for the year in which the candidate graduated. We explained that the university may not release the records in redacted form because the circumstances indicate that the requester had direct, personal knowledge of the subject of the case. Two commenters said that confirmation that one unnamed student was disciplined in 1978 for plagiarism does not identify that student or confirm that the candidate was that student, and our explanation of the standard with this example showed that the regulations would prevent parents and the media from discharging their vital oversight responsibilities.

One school district said that the targeted request provision could impair due process in some student discipline cases by limiting the release of redacted witness statements that concern more than one student. The commenter suggested that under its current

practice, if four students are involved in an altercation, the school redacts all personally identifiable information with regard to students 2 through 4 when releasing the statement without parental consent to student 1, but under the proposed regulations, student 1's request would violate the requirements in paragraph (g) because of the student's knowledge of the identity of the other students to whom the record relates. This commenter said that the regulations should not be adopted if they do not address these due process concerns.

Several commenters said they appreciated the addition of a student's date of birth and other indirect identifiers in the definition of *personally identifiable information*.

Another commenter said that a comprehensive list of indirect identifiers would be helpful. One commenter asked us to define the concept of indirect identifiers. Another commenter asked us to clarify which personally identifiable data elements may be released without consent. A commenter asked us to define the term biometric record as used in the definition of *personally identifiable information*.

**Discussion:** The Joint Statement explains that the purpose of FERPA is two-fold: to assure that parents and eligible students can access the student's education records, and to protect their right to privacy by limiting the transferability of their education records without their consent. 120 Cong. Rec. 39862. As such, FERPA is not an open records statute or part of an open records system. The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office. Nonetheless, as explained in the preamble to the NPRM, 73 FR 15584–15585, we believe that the regulatory standard for defining and removing personally identifiable information from education records establishes an appropriate balance that facilitates school accountability and educational research while preserving the statutory privacy protections in FERPA.

The simple removal of nominal or direct identifiers, such as name and SSN (or other ID number), does not necessarily avoid the release of personally identifiable information. Other information, such as address, date

and place of birth, race, ethnicity, gender, physical description, disability, activities and accomplishments, disciplinary actions, and so forth, can indirectly identify someone depending on the combination of factors and level of detail released. Similarly, and as noted in the preamble to the NPRM, 73 FR 15584, the existing professional literature makes clear that public directories and previously released information, including local publicity and even information that has been de-identified, is sometimes linked or linkable to an otherwise de-identified record or data set and renders the information personally identifiable. The regulations properly require parties that release information from education records to address these situations.

We removed the "easily traceable" standard from the definition of *personally identifiable information* because it lacked specificity and clarity. We were also concerned that the "easily traceable" standard suggested that a fairly low standard applied in protecting education records, *i.e.*, that information was considered personally identifiable only if it was easy to identify the student.

The removal of the "easily traceable" standard and adoption of the standards in paragraphs (f) and (g) will not affect a parent's right under FERPA to inspect and review his or her child's education records. Records that teachers and other school officials maintain on students that use only initials, nicknames, or personal descriptions to identify the student are education records under FERPA because they are directly related to the student.

Further, records that identify a student by initials, nicknames, or personal characteristics are personally identifiable information if, alone or combined with other information, the initials are linked or linkable to a specific student and would allow a reasonable person in the school community who does not have personal knowledge about the situation to identify the student with reasonable certainty. For example, if teachers and other individuals in the school community generally would not be able to identify a specific student based on the student's initials, nickname, or personal characteristics contained in the record, then the information is not considered personally identifiable and may be released without consent. Experience has shown, however, that initials, nicknames, and personal characteristics are often sufficiently unique in a school community that a reasonable person can identify the student from this kind of information

even without access to any personal knowledge, such as a key that specifically links the initials, nickname, or personal characteristics to the student.

In contrast, if a teacher uses a special code known only by the teacher and the student (or parent) to identify a student, such as for posting grades, this code is not considered personally identifiable information under FERPA because the only reason the teacher can identify the student is because of the teacher's access to personal knowledge of the relevant circumstances, *i.e.*, the key that links the code to the student's name.

In response to the commenter who stated that a school should not be prevented from releasing information when the subject of the record has waived any pretense of confidentiality by contacting the media and making the incident well-known in the community, we have found that in limited circumstances a parent or student may impliedly waive their privacy rights under FERPA by disclosing information to parties in a special relationship with the institution, such as a licensing or accreditation organization. However, we have not found and do not believe that parents and students generally waive their privacy rights under FERPA by sharing information with the media or other members of the general public. The fact that information is a matter of general public interest does not give an educational agency or institution permission to release the same or related information from education records without consent.

The "reasonableness" standards in paragraphs (f) and (g) of the new definition, which replace the "easily traceable" standard, do not require the exercise of subjective judgment or inquiries into a requester's motives. Both provisions require the disclosing party to use legally recognized, objective standards by referring to identification not in the mind of the disclosing party or requester but by a reasonable person and with reasonable certainty, and by requiring the disclosing party to withhold information when it reasonably believes certain facts to be present. These are not subjective standards, and these changes will not diminish the privacy protections in FERPA.

The standard proposed in paragraph (f) regarding the knowledge of a reasonable person in the school or its community was not intended to describe the technological or scientific skill level of a person who would be capable of re-identifying statistical information or redacted records. Rather, it provided the standard an agency or

institution should use to determine whether statistical information or a redacted record will identify a student, even though certain identifiers have been removed, because of a well-publicized incident or some other factor known in the community. For example, as explained in the preamble to the NPRM, 73 FR 15583, a school may not release statistics on penalties imposed on students for cheating on a test where the local media have published identifiable information about the only student (or students) who received that penalty; that statistical information or redacted record is now personally identifiable to the student or students because of the local publicity.

Paragraph (f) in the proposed definition provided that the agency or institution must make a determination about whether information is personally identifiable information not with regard to what someone with personal knowledge of the relevant circumstances would know, such as the principal who imposed the penalty, but with regard to what a reasonable person in the school or its community would know, *i.e.*, based on local publicity, communications, and other ordinary conditions. We agree with the comment that the "school or its community" standard was confusing because it was not clear whether just the school itself or the larger community in which the school is located is the relevant group for determining what a reasonable person would know.

We are changing this standard in paragraph (f) to the "school community" and by this change we mean that an educational agency or institution may not select a broader "community" standard when the information to be released would be personally identifiable under the narrower "school" standard. For example, it might be well known among students, teachers, administrators, parents, coaches, volunteers, or others at the local high school that a student was caught bringing a gun to class last month but generally unknown in the town where the school is located. In these circumstances, a school district may not disclose that a high school student was suspended for bringing a gun to class last month, even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student. The student's privacy is further protected because a reasonable person in the school community is also presumed to have at least the knowledge of a reasonable person in the local

community, the region or State, the United States, and the world in general. The "school community" standard, therefore, provides the maximum privacy protection for students.

We do not agree that the reference to "reasonable person" should be changed to "ordinary person." "Reasonable person" is a legally recognized standard that represents a hypothetical, rational, prudent, average individual. It would be confusing and inappropriate to introduce a new term "ordinary" in this context.

The standard in paragraph (f) excludes from the "reasonable person in the school community" standard persons who have personal knowledge of the "relevant circumstances," which one commenter considered vague. Under this standard, an agency or institution is not required to take into consideration when releasing redacted or statistical information that someone with special knowledge of the circumstances could identify the student. For example, if it is generally known in the school community that a particular student is HIV-positive, or that there is an HIV-positive student in the school, then the school could not reveal that the only HIV-positive student in the school was suspended. However, if it is not generally known or obvious that there is an HIV-positive student in school, then the same information could be released, even though someone with special knowledge of the student's status as HIV-positive would be able to identify the student and learn that he or she had been suspended.

The provisions in paragraph (g) regarding targeted requests do not require an educational agency or institution to ascertain or guess a requester's motives for seeking information from education records or what a requester intends to do with the information. This paragraph addresses a situation in which a requester seeks what might generally qualify as a properly redacted record but the facts indicate that redaction is a useless formality because the subject's identity is already known.

An educational agency or institution is not required under paragraph (g) to make any special inquiries or otherwise seek information about the person requesting information from education records. It must use information that is obvious on the face of the request or provided by the requester, such as when a requester asks for the redacted transcripts of a particular student. Paragraph (f) also requires an agency or institution to use information known to a reasonable person in the school

community, such as when a requester asks for the redacted transcripts of all basketball players who were expelled for accepting bribes after the local newspaper published a story about the matter. Paragraphs (f) and (g) do not require an educational agency or institution to inquire whether a requester has special knowledge not available generally in the school community that would make the subject of the record identifiable. We disagree with the comment that paragraph (f) is sufficient and paragraph (g) should be removed. Paragraph (g) addresses the problem of targeted requests, which is not addressed under paragraph (f).

We agree with the comment that the provision in paragraph (g) under which an agency or institution must determine whether the information requested is personally identifiable information based on its reasonable belief that the requester has "direct, personal" knowledge of the identity of the student to whom the record relates is ambiguous and confusing, especially in relation to what might be considered indirect knowledge. Therefore, we have modified this provision so that an educational agency or institution must simply have a reasonable belief that the requester knows the identity of the student to whom the record relates.

In reviewing a complaint that an educational agency or institution disclosed personally identifiable information from an education record in response to a targeted request, the Department would examine the request itself, the facts on which the agency or institution based its decision to release the information, as well as any information known generally in the school community that the agency or institution failed to take into account. The Department would also counsel an agency or institution about the nature of the violation in connection with the Department's responsibility for seeking voluntary compliance with FERPA before initiating any enforcement action under § 99.67.

With regard to the comment that the standard in paragraph (g) will impair due process in student discipline cases, it is unclear what the commenter means by releasing redacted witness statements under its current practice. *Education records* are defined in FERPA as records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. 20 U.S.C. 1232g(a)(4)(A); 34 CFR 99.3. Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement

contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.

For example, parents of both John and Michael would have a right to inspect and review the following information in a witness statement maintained by their school district because it is directly related to both students: "John grabbed Michael's backpack and hit him over the head with it." Further, in this example, before allowing Michael's parents to inspect and review the statement, the district must also redact any information about John (or any other student) that is not directly related to Michael, such as: "John also punched Steven in the stomach and took his gloves." Since Michael's parents likely know from their son about other students involved in the altercation, under paragraph (g) the district could not release any part of this sentence to Michael's parents. We note also that the sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student's conduct, except if a perpetrator has been ordered to stay away from a victim.

In order to provide maximum flexibility to educational agencies and institutions, we did not attempt to define or list all other "indirect identifiers". We believe that the examples listed in paragraph (3) of the definition of *personally identifiable information*—date of birth, place of birth, and mother's maiden name—indicate clearly the kind of information that could identify a student. Race and ethnicity, for example, could also be indirect identifiers. It is not possible, however, to list all the possible indirect identifiers and ways in which information might indirectly identify a student. Further, unlike the HIPAA Privacy Rule, these regulations do not attempt to provide a "safe harbor" by listing all the information that may be removed in order to satisfy the de-identification requirements in § 99.31(b). We have also added a definition of *biometric record* that is based on National Security Presidential Directive 59 and Homeland Security Presidential Directive 24.

**Changes:** We added a definition of *biometric record*, which provides that the term means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints, retina and iris patterns, voiceprints, DNA

sequence, facial characteristics, and handwriting.

We also have revised paragraph (f) in the definition of *personally identifiable information* to change the reference "school or its community" to "school community." In paragraph (g) of the definition of *personally identifiable information*, we removed the requirement that the requester have "direct, personal knowledge." As revised, paragraph (g) provides that personally identifiable information means information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the record relates.

#### (b) De-Identified Records and Information

**Comment:** We received a number of comments on § 99.31(b)(1), which would allow an educational agency or institution, or a party that has received personally identifiable information from education records, to release the records or information without parental consent after the removal of all personally identifiable information, provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable because of unique patterns of information about the student, whether through single or multiple releases, and taking into account other reasonably available information. In order to permit ongoing educational research with the same data, § 99.31(b)(2) allows an educational agency or institution or other party that releases de-identified, non-aggregated data (also known as "microdata") from education records to attach a code to each record, which may allow the recipient to match information received from the same source, under three conditions—(1) the educational agency or institution does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code; (2) the record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and (3) the record code is not based on a student's social security number or other personal information.

Several commenters supported these proposed regulations and said that they will help facilitate valuable educational research. One of these commenters said that the provisions for de-identification of education records create clear standards that will allow researchers to

conduct necessary research without compromising student privacy. One commenter appreciated being able to attach a code or linking key to records to facilitate matching students across data sets while preserving student confidentiality.

One commenter stated that de-identified data do not support appropriate analytical research that will lead to improved educational outcomes. Further, according to this commenter, complete de-identification of systematic, longitudinal data on every student may not be possible.

Two commenters expressed concern that agencies and institutions redact too much information from education records and said that the Department should err on the side of disclosure of disaggregated data so that journalists and researchers can obtain accurate information about how students in every accountability subgroup are performing. These commenters said that the regulations should take into account the real track record of journalists and researchers in maintaining the confidentiality of information from education records.

One commenter said that many institutions and individuals have the ability to re-identify seemingly de-identified data and that it is generally much easier to do than most people realize because 87 percent of Americans can be identified uniquely from their date of birth, five-digit zip code, and gender. This commenter said that the regulations need to take into account that re-identification is a much greater risk for student data than other kinds of information because FERPA allows for the regular publication of student directories that contain a wealth of personal information, including address and date of birth, that can be used with existing tools and emerging technology to re-identify statistical data, even by non-experts.

Another commenter said that because the de-identification process is so resource-intensive, the regulations should allow the research entity to de-identify education records as a contractor under § 99.31(a)(1) of the regulations.

We explained in the preamble to the NPRM (73 FR 15585) that educational agencies and institutions should monitor releases of coded, de-identified microdata from education records to ensure that overlapping or successive releases do not result in data sets in which a student's personally identifiable information is disclosed. One commenter said that this monitoring requirement was too burdensome given the vast number of

data requests it receives and asked us to limit the monitoring requirement to single or multiple releases it makes to the same party. An SEA asked specifically for clarification in the regulations regarding what steps, if any, it must take to ensure that multiple releases of de-identified data to the same requester over time that the requester intends to use for a longitudinal study do not result in small data cells that may reveal the identity of the student. A school district said that the regulations should require the destruction of de-identified information from education records by the receiving party to avoid the problem of combining successive data releases to identify students.

Some commenters said that the regulations should provide objective standards for the de-identification of education records. One commenter asked the Department to prescribe a method for States to adopt to ensure that student confidentiality is protected. Two commenters asked specifically for guidance on what minimum cell size should be allowed when releasing statistical information. Several commenters said that SEAs and school districts need specific guidance regarding the release of student achievement data under the NCLB, including, in particular, reporting 100 percent achievement of certain performance levels on State assessments. One commenter who opposed restrictions on the release of de-identified data referred to instances in which some States have created minimum cell sizes of 100 for reporting disaggregated data under NCLB, which prevents the release of a great deal of important information. Another commenter said that our discussion of small cell sizes in the preamble to the NPRM, 73 FR 15584, reflected a misunderstanding of the problem.

One commenter said that § 99.31(b) is confusing because it is not clear how paragraph (b)(2), which is limited to educational research, relates to paragraph (b)(1), which is not so limited. This commenter also said that the regulations impose an unnecessary burden on the entity receiving a request for information and that the requirements of paragraph (f) in the definition of *personally identifiable information* are sufficient to de-identify education records. Another commenter said that the language in § 99.31(b)(1) that requires consideration of unique patterns of information about a student is confusing and creates ambiguity because the definition of *personally identifiable information* itself incorporates standards for de-

identification that appear to differ from the standard in § 99.31(b).

*Discussion:* As explained in the preamble to the NPRM, 73 FR 15584–15585, we believe that the regulatory standard for de-identifying information from education records establishes an appropriate balance that facilitates the release of appropriate information for school accountability and educational research purposes while preserving the statutory privacy protections in FERPA. Unlike the HIPAA Privacy Rule, these regulations do not attempt to provide a “safe harbor” by listing all the direct and indirect identifiers that may be removed to satisfy the de-identification requirements in § 99.31(b). Rather, they are intended to provide standards under which information from education records may be released without consent because all personally identifiable information has been removed.

The Department recognizes that de-identified data may not be appropriate for all educational research purposes and that complete de-identification of longitudinal student data may not be possible without sacrificing essential content and usability. In these situations, and as discussed elsewhere in this preamble, FERPA allows the disclosure and redisclosure of personally identifiable information from education records, without consent, to researchers under the terms and conditions specified in §§ 99.31(a)(1), 99.31(a)(3), and 99.31(6). We note that a researcher who receives personally identifiable information under these provisions would, however, have to de-identify any report or other information in accordance with § 99.31(b) before releasing it to the public or other parties, including other researchers.

In response to comments that educational agencies and institutions may remove too much information from education records, we note that while we have attempted to provide a balanced standard for the release of de-identified data for school accountability and other purposes, FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students. Further, there is no statutory authority in FERPA to modify the prohibition on disclosure of personally identifiable information from education records, or the exceptions to the written consent requirement, based on the track record of the party, including journalists and researchers, in maintaining the confidentiality of information from education records that they have received.

In response to the comment about allowing a researcher to de-identify education records, educational agencies and institutions may outsource the de-identification process to any outside service provider serving as a school official in accordance with the requirements in § 99.31(a)(1)(i)(B). (Those requirements are discussed in detail in the preamble to the NPRM at 73 FR 15578–15580 and elsewhere in these final regulations.) State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) may outsource the de-identification process to their authorized representatives under the conditions specified in § 99.35.

We agree that the risk of re-identification may be greater for student data than other information because of the regular publication of student directories, commercial databases, and de-identified but detailed educational reports by States and researchers that can be manipulated with increasing ease by computer technology. As noted in the preamble to the NPRM, 73 FR 15584, the re-identification risk of any given release is cumulative, *i.e.*, directly related to what has previously been released, and this includes both publicly-available directory information, which is personally identifiable, and de-identified data releases. For that reason, we advised in the NPRM that parties should minimize information released in directories to the extent possible because, since the enactment of FERPA in 1974, the risk of re-identification from such information has grown as a result of new technologies and methods.

In response to comments about the need to monitor releases of coded, de-identified microdata to avoid re-identification of the data, because the risk of re-identification is cumulative, when making a new disclosure of coded data an educational agency or institution or other party must take into account all releases of information from education records it has made, not just releases it has made to the recipient of new data. We note that some of the publicly available directory information and de-identified data releases that need to be taken into account have been produced by the same agency or institution, State or local educational authority, or Federal official that wishes to release newly de-identified information. In general, FERPA poses no restrictions on the recipient's use of directory information and de-identified data from education records. Therefore, it may be unclear whether previous data releases are available generally, have been shared with a limited number of

parties, or not shared at all. Further, unlike personally identifiable information that is disclosed under §§ 99.31(a)(3) and (a)(6), de-identified information from education records does not have to be destroyed when no longer needed for the purposes for which it was released. We note, however, that a releasing party would reduce its monitoring responsibilities if it requires destruction or prohibits redisclosure of coded, de-identified microdata, because coded, de-identified microdata has a higher risk of re-identification than de-identified microdata. In the future the Department will provide further information on how to monitor and limit disclosure of personally identifiable information in successive statistical data releases.

In response to requests for guidance on what specific steps and methods should be used to de-identify information (and as noted in the preamble to the NPRM, 73 FR 15584), it is not possible to prescribe or identify a single method to minimize the risk of disclosing personally identifiable information in redacted records or statistical information that will apply in every circumstance, including determining whether defining a minimum cell size is an appropriate means to protect the confidentiality of aggregated data and, if so, selection of an appropriate number. This is because determining whether a particular set of methods for de-identifying data and limiting disclosure risk is adequate cannot be made without examining the underlying data sets, other data that have been released, publicly available directories, and other data that are linked or linkable to the information in question. For these reasons, we are unable to provide examples of rules and policies that necessarily meet the de-identification requirements in § 99.31(b). The releasing party is responsible for conducting its own analysis and identifying the best methods to protect the confidentiality of information from education records it chooses to release. We recommend that State educational authorities, educational agencies and institutions, and other parties refer to the examples and methods described in the NPRM at page 15584 and refer to the Federal Committee on Statistical Methodology's Statistical Policy Working Paper 22, [www.fcsm.gov/working-papers/wp22.html](http://www.fcsm.gov/working-papers/wp22.html), for additional guidance.

With regard to issues with NCLB reporting in particular, determining the minimum cell size to ensure statistical reliability of information is a completely different analysis than that used to determine the appropriate minimum

cell size to ensure confidentiality. Further, as noted in the preceding paragraph and in the preamble to the NPRM, use of minimum cell sizes or data suppression is only one of several ways in which information from education records may be de-identified before release. Statistical Policy Working Paper 22 describes other disclosure limitation methods, such as "top coding" and "data swapping," which may be more suitable than simple data suppression for releasing the maximum amount of information to the public without breaching confidentiality requirements. Decisions regarding whether to use data suppression or some other method or combination of methods to avoid disclosing personally identifiable information in statistical information must be made on a case-by-case basis.

We agree with the commenter who said that the example we provided in the preamble to the NPRM regarding the small cell problem in reporting that two Hispanic females failed to graduate was misleading and offer the following, more complete explanation. Simply knowing that one out of 100 Hispanic females failed to graduate does not identify which of the Hispanic females it might be. But suppose this female is an English language learner who is also enrolled in special education classes. The school also publishes tables on participation in special education classes by race, ethnicity, and grade, and tables that include the graduation status of Hispanic females disaggregated in one table by English language proficiency status, and by participation in special education classes in another. Suppose that these three tabulations each show separately that there is one 12th grade Hispanic female enrolled in special education classes, that the one Hispanic female who did not graduate was enrolled in special education classes, and that the one Hispanic female who did not graduate was an English language learner. With this information, the discerning observer knows that the one Hispanic female who failed to graduate is an English language learner and that she was the only 12th grade Hispanic student enrolled in special education classes. Any number of people in the school would be able to identify the Hispanic female who did not graduate with these three pieces of information.

Expanding the example to two individuals, the logic is similar, except in this case each of the Hispanic females knows her own characteristics and can find herself in each of the available tables, and thus by a process of elimination identifies the characteristics

of the other non-graduate, perhaps learning something she did not already know about the other student. The published tables show that there are two 12th grade Hispanic females enrolled in special education classes, one with a learning disability and one with mental retardation. The tables also show that the two Hispanic females who did not graduate were enrolled in special education classes, and that the two Hispanic females who did not graduate were both English language learners. Others in the school community may be able to identify the two 12th grade Hispanic females who are English language learners enrolled in special education classes, but not necessarily be able to distinguish the student with the learning disability from the student with mental retardation. However, each girl knows her own disability and by the process of elimination now knows the other girl's disability. Similarly, anyone with knowledge of one of the two Hispanic females who did not graduate can find that girl in the tables, and then isolate the characteristics that belong to the other Hispanic female.

This example can be expanded to an example with three Hispanic females who fail to graduate. All three of the Hispanic females who did not graduate are English language learners, and two Hispanic females who did not graduate are enrolled in special education classes—one with a learning disability and the other with mental retardation. In this case, the one Hispanic female who is an English language learner and did not graduate now knows that the other two Hispanic females in her English language learner classes and also did not graduate are in the special education program, but she does not know which condition each girl has. By the same logic, each of the two females who did not graduate and are in special education classes knows her own disability and as a result knows the disability of the other Hispanic female who was an English language learner enrolled in special education classes who did not graduate. These are some examples of situations in which small cell data reveals personally identifiable information from education records.

The Secretary has no statutory authority to modify the regulations to allow LEAs and SEAs to report that 100 percent of students achieved specified performance levels. In that regard we note that the Department's Non-Regulatory Guidance for NCLB Report Cards (2003) provides:

[S]chools must also ensure that the data they report do not reveal personally identifiable information about individual students \* \* \*. States must adopt a strategy

for dealing with a situation in which all students in a particular subgroup scored at the same achievement level. One solution, referred to as "masking" the data, is to use the notation of >95% when all students in a subgroup score at the same achievement level.

See [www.ed.gov/programs/titleiparta/reportcardguidance.doc](http://www.ed.gov/programs/titleiparta/reportcardguidance.doc) on page 3. Likewise, LEAs and SEAs must adopt a strategy for ensuring that they do not disclose personally identifiable information about low-performing students when they release information about their high-performing students.

In response to the comments that paragraphs (1) and (2) in § 99.31(b) are confusing, paragraph (1) establishes a standard for de-identifying education records that applies to disclosures made to any party for any purpose, including, for example, parents and other members of the general public who are interested in school accountability issues, as well as education policy makers and researchers. The release of de-identified information from education records under § 99.31(b)(1) is not limited to education research purposes because, by definition, the information does not contain any personally identifiable information.

Paragraph (2) of § 99.31(b) applies only to parties conducting education research; it allows an educational agency or institution, or a party that has received education records, such as a State educational authority, to attach a code to each record that may allow the researcher to match microdata received from the same educational source under the conditions specified. The purpose of paragraph (2) is to facilitate education research by authorizing the release of coded microdata. The requirements in paragraph (2) that apply to a record code preclude matching de-identified data from education records with data from another source. Therefore, by its terms, the release of coded microdata under paragraph (2) is limited to education research.

We agree with the commenter who stated that the reference in § 99.31(b)(1) to "unique patterns of information about a student" is confusing in relation to the definition of *personally identifiable information* and believe that it essentially restated the requirements in paragraph (f) of the definition. Therefore, we have removed this phrase from the regulations. We disagree that the definition of *personally identifiable information* and the requirements in § 99.31(b) impose an unnecessary burden on the entity receiving a request for de-identified information from education records and that the requirements in paragraph (f) in the

definition are sufficient. As explained above, paragraph (f) does not address the problem of targeted requests. It also does not address the re-identification risk associated with multiple data releases and other reasonably available information, or allow for the coding of de-identified micro data for educational research purposes. Section 99.31(b) provides the additional standards needed to help ensure that educational agencies and institutions and other parties do not identify students when they release redacted records or statistical data from education records.

*Changes:* We have removed the reference to "unique patterns of information" in § 99.31(b).

#### **Notification of Subpoena (§ 99.33(b)(2))**

*Comment:* We received a few comments on our proposal in § 99.33(b)(2) to require a party that has received personally identifiable information from education records from an educational agency or institution to provide the notice to parents and eligible students under § 99.31(a)(9) before it discloses that information on behalf of an educational agency or institution in compliance with a judicial order or lawfully issued subpoena. One national education association supported the proposed amendment.

One commenter asked the Department to clarify the intent of the proposed language. This commenter said that, when an educational agency or institution requests that a third party make the disclosure to comply with a lawfully issued subpoena or court order, it is reasonable to expect the educational agency or institution to send the required notice to the student(s). The commenter also said that it was not clear from the proposed change whether it is sufficient for the educational agency or institution to send the notice or whether it must come from the third party.

*Discussion:* The Secretary agrees that there needs to be clarification about which party is responsible for notifying parents and eligible students before an SEA or other third party outside of the educational agency or institution discloses education records to comply with a lawfully issued subpoena or court order. We have revised the regulation to provide that the burden to notify a parent or eligible student rests with the recipient of the subpoena or court order. While a third party, such as an SEA, that is the recipient of a subpoena or court order is responsible for notifying the parents and eligible students before complying with the order or subpoena, the educational

agency or institution could assist the third party in the notification requirement, by providing it with contact information so that it could provide the notice.

In order to ensure that this new requirement is enforceable, we have also revised § 99.33(e) so that if the Department determines that a third party, such as an SEA, did not provide the notification required under § 99.31(a)(9)(ii), the educational agency or institution may not allow that third party access to education records for at least five years.

*Changes:* We have amended § 99.33(b)(2) to clarify that the third party that receives the subpoena or court order is responsible for meeting the notification requirements under § 99.31(a)(9). We also have revised § 99.33(e) to provide that if the Department determines that a third party, such as an SEA, did not provide the notification required under § 99.31(a)(9)(ii), the educational agency or institution may not allow that third party access to education records for at least five years.

#### **Health or Safety Emergency (§ 99.36)**

*Comment:* We received many comments in support of our proposal to amend § 99.36 regarding disclosures of personally identifiable information without consent in a health or safety emergency. Most of the parties that commented stated that the proposed changes demonstrated the right balance between student privacy and campus safety. A number of commenters specifically supported the clarification regarding the disclosure of information from an eligible student's education records to that student's parents when a health or safety emergency occurs. One commenter said that the proposed amendment would provide appropriate protection for sensitive and otherwise protected information while clarifying that educational agencies and institutions may notify parents and other appropriate individuals in an emergency so that they may intervene to help protect the health and safety of those involved.

*Discussion:* We appreciate the commenters' support for the amendments to the "health or safety emergency" exception in § 99.36(b). Educational agencies and institutions are permitted to disclose personally identifiable information from students' education records, without consent, under § 99.31(a)(10) in connection with a health or safety emergency. Disclosures under § 99.31(a)(10) must meet the conditions described in § 99.36. We address specific comments

about the proposed amendments to this exception in the following paragraphs.

*Changes:* None.

*(a) Disclosure in Non-Emergency Situations*

*Comment:* Some commenters suggested that we interpret § 99.36 to permit the sharing of information on reportable diseases to health officials in non-emergency situations. These commenters stated that the disclosure of routine immunization data should be subject to State, local, and regional public health laws and regulations and not FERPA. One of these commenters noted that the HIPAA Privacy Rule allows covered entities to disclose personally identifiable health data, without consent, to public health authorities.

*Discussion:* There is no authority in FERPA to exclude students' immunization records from the definition of *education records* in FERPA. Further, the HIPAA Privacy Rule specifically excludes from coverage health care information that is maintained as an "education record" under FERPA. 45 CFR 160.103, Protected health information. We understand that the HIPAA Privacy Rule allows covered entities to disclose identifiable health data without written consent to public health authorities. However, there is no statutory exception to the written consent requirement in FERPA to permit this type of disclosure.

As explained in the preamble to the NPRM (73 FR 15589), the amendment to the health or safety emergency exception in § 99.36 does not allow disclosures on a routine, non-emergency basis, such as the routine sharing of student information with the local police department. Likewise, this exception does not cover routine, non-emergency disclosures of students' immunization data to public health authorities. Consequently, there is no statutory basis for the Department to revise the regulatory language as requested by the commenters.

*Changes:* None.

*(b) Strict Construction Standard*

*Comment:* Several commenters expressed concern that removing the language from current § 99.36 requiring strict construction of the "health and safety emergency" exception and substituting the language providing for a "rational basis" standard would not require schools to make an individual assessment to determine if there is an emergency that warrants a disclosure. One commenter stated that removal of the "strict construction" requirement would severely weaken the

Department's enforcement capabilities and that schools may see this change as an excuse to disclose sensitive student information when there is not a real emergency.

A commenter stated that the removal of the "strict construction" requirement would mean that the Department would eliminate altogether its review of actions taken by schools under the health and safety emergency exception. Another commenter stated that removing the requirement that this exception be strictly construed could erode the privacy rights of individuals. The commenter noted that because parents and eligible students cannot bring suit in court to enforce FERPA, schools face virtually no liability if they violate FERPA requirements.

A commenter asked that the Department clarify what is meant by an "emergency" and how severe a concern must be to qualify as an emergency.

*Discussion:* Section 99.36(c) eliminates the previous requirement that paragraphs (a) and (b) of this section be "strictly construed" and provides instead that, in making a determination whether a disclosure may be made under the "health or safety emergency" exception, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. The new provision states that if there is an articulable and significant threat to the health or safety of the student or other individuals, an educational agency or institution may disclose information to appropriate parties.

As we indicated in the preamble to the NPRM, we believe paragraph (c) provides greater flexibility and deference to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals. 73 FR 15574, 15589. In that regard, paragraph (c) provides that the Department will not substitute its judgment for that of the agency or institution if, based on the information available at the time of the determination there is a rational basis for the agency's or institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties.

We do not agree that removal of the "strict construction" standard weakens FERPA or erodes privacy protections. Rather, the changes appropriately balance the important interests of safety and privacy by providing school officials with the flexibility to act quickly and decisively when emergencies arise. Schools should not

view FERPA's "health or safety emergency" exception as a blanket exception for routine disclosures of student information but as limited to disclosures necessary to protect the health or safety of a student or another individual in connection with an emergency.

After consideration of the comments, we have determined that educational agencies and institutions should be required to record the "articulable and significant threat to the health or safety of a student or other individuals" so that they can demonstrate (to parents, students, and to the Department) what circumstances led them to determine that a health or safety emergency existed and how they justified the disclosure. Currently, educational agencies and institutions are required under § 99.32(a) to record any disclosure of personally identifiable information from education records made under § 99.31(a)(10) and § 99.36. We are revising the recordation requirements in § 99.32(a)(5) to require an agency or institution to record the articulable and significant threat that formed the basis for the disclosure. The school must maintain this record with the education records of the student for as long as the student's education records are maintained (§ 99.32(a)(2)).

We do not specify in the regulations a time period in which an educational agency or institution must record a disclosure of personally identifiable information from education records under § 99.32(a). We interpret this to mean that an agency or institution must record a disclosure within a reasonable period of time after the disclosure has been made, and not just at the time, if any, when a parent or student asks to inspect the student's record of disclosures. We will treat the requirement to record the significant and articulable threat that forms the basis for a disclosure under the health or safety emergency exception no differently than the recordation of other disclosures. In determining whether a period of time for recordation is reasonable, we would examine the relevant facts surrounding the disclosure and anticipate that an agency or institution would address the health or safety emergency itself before turning to recordation of any disclosures and other administrative matters.

In response to concerns about the Department's enforcement of the provisions of § 99.36, the "rational basis" test does not eliminate the Department's responsibility for oversight and accountability. Actions that the Secretary may take in addressing violations of this and other

FERPA provisions are addressed in the analysis of comments under the section in this preamble entitled *Enforcement*. While parents and eligible students do not have a right to sue for violations of FERPA in a court of law, the statute provides that the Secretary may not make funds available to any agency or institution that has a policy or practice of violating parents' and students' rights under the statute with regard to consent to the disclosure of education records. As such, parents and eligible students may file a complaint with the Office if they believe that a school has violated their rights under FERPA and has disclosed education records under § 99.36 inconsistent with these regulations. In conducting an investigation, the Office will require that schools identify the underlying facts that demonstrated that there was an articulable and significant threat precipitating the disclosure under § 99.36.

In response to the comment about what would constitute an emergency, FERPA permits disclosure “\* \* \* in connection with an emergency \* \* \* to protect the health or safety of the student or other persons.” 20 U.S.C. 1232g(b)(1)(I). We note that the word “protect” generally means to keep from harm, attack, or injury. As such, the statutory text underscores that the educational agency or institution must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury. Moreover, to be “in connection with an emergency” means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.

*Changes:* We have amended the recordkeeping requirements in § 99.32(a)(5) to require educational agencies and institutions to record the articulable and significant threat that formed the basis for a disclosure under the health or safety emergency exception and the parties to whom the information was disclosed.

*(c) Articulate and Significant Threat*

*Comment:* One commenter stated that the word “articulable” in § 99.36(c) was confusing in reference to a school’s determination that there is an “articulable and significant threat to the health or safety of a student or other individuals.” This commenter stated that school officials might interpret the provision to mean that there must be a verbal threat or that school officials must write down the exact wording of the threat.

*Discussion:* The requirement that there must be an “articulable and significant threat” does not mean that the threat must be verbal. It simply means that the institution must be able to articulate what the threat is under § 99.36 when it makes and records the disclosure.

In that regard, the words “articulable and significant” are adjectives modifying the key noun “threat.” As such, the focus is on the threat, with the question being whether the threat itself is articulable and significant. The word “articulable” is defined to mean “capable of being articulated.” <http://www.merriam-webster.com/dictionary/articulable>. This portion of the standard simply requires that a school official be able to express in words what leads the official to conclude that a student poses a threat. The other half of the standard is the word “significant,” which means “of a noticeably or measurably large amount.” <http://www.merriam-webster.com/dictionary/significant>. Taken together, the phrase “articulable and significant threat” means that if a school official can explain why, based on all the information then available, the official reasonably believes that a student poses a significant threat, such as a threat of substantial bodily harm, to any person, including the student, the school official may disclose education records to any person whose knowledge of information from those records will assist in protecting a person from that threat.

*Changes:* None.

*(d) Parties That May Receive Information Under § 99.36*

*Comment:* A commenter recommended that the Department adopt a more subjective standard regarding the persons to whom education records may be disclosed under § 99.36, suggesting that we remove the requirement that the disclosure must be to a person “whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.” Conversely, another commenter

expressed concern that the Department was sending the wrong message to educational agencies and institutions with these changes to § 99.36. The commenter stated that the health or safety emergency exception must not be perceived to permit schools to routinely disclose education records to parents, police, or others.

A commenter asked who at a school may share personally identifiable information in a health or safety emergency, and specifically whether a school secretary would be allowed to tell parents that a student on campus made a threat to others.

A commenter stated that school districts, especially small or rural districts, may not have the expertise on staff to determine whether a situation constitutes an “articulable and significant threat.” The commenter said that personally identifiable information on students may need to be disclosed to outside law enforcement and mental health professionals so that they can help schools determine whether a real threat exists. The commenter recommended that the Department change the proposed regulations to allow school districts to involve outside experts in determining whether a health or safety emergency exists. Noting that the NPRM addressed the disclosure of education records to an eligible student’s parents, the organization also asked for clarification regarding whether the parents of a potential perpetrator and the potential victim at the K–12 level could be told about a threat.

Several commenters stated that our proposed amendments did not go far enough and urged the Department to expand § 99.36 to permit a school to notify whomever the student has listed as his or her emergency contact. Another commenter requested that the Secretary, through these regulations, direct institutions to proactively notify parents of students who are in acute care situations, such as illness or accidents, if any institutional official is aware of the emergency.

*Discussion:* On its face, FERPA permits disclosure to “appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.” 20 U.S.C. 1232g(b)(1)(I). FERPA does not require that the person receiving the information be responsible for providing the protection. Rather, the focus of the statutory provision is on the information itself: The “health or safety emergency” exception permits the institution to disclose information from education records in order to gather information from any person who has information that would be necessary to

provide the requisite protection. Thus, for example, an educational institution that reasonably believes that a student poses a threat of bodily harm to any person may disclose information from education records to current or prior peers of the student or mental health professionals who can provide the institution with appropriate information to assist in protecting against the threat. Moreover, the institution may disclose records to persons such as law enforcement officials that it determines may be helpful in providing appropriate protection from the threat. An educational agency or institution may also generally disclose information under § 99.36 to a potential victim and the parents of a potential victim as "other individuals" whose health or safety may need to be protected.

Similarly, in order to obtain information that would inform its judgment on how to address the threat, the student's current institution may disclose information from education records to other schools or institutions which the student previously attended. In that regard, the same set of facts underlying the current institution's determination that an emergency existed would also permit former schools and institutions attended by the student to disclose personally identifiable information from education records to the student's current institution. That is, a former school would not need to make a separate determination regarding the existence of an articulable and significant threat to the health or safety of a student or others, and could rely instead on the determination made by the school currently attended by the student in making the disclosure.

In the discussion on page 15589 of the NPRM, we noted that the "health or safety emergency" exception does not permit a local school district to routinely share its student information database with the local police department. This example was meant to clarify that FERPA's health or safety provisions would not permit a school to disclose without consent education records to the local police department unless there was a health or safety emergency and the disclosure of the information was necessary to protect the health or safety of students or other individuals. This does not prevent schools from having working relationships with local police authorities and to use local police officers in maintaining the safety of their campuses.

In response to the comment about which school official should be permitted to disclose information under

§ 99.36, an educational agency or institution will need to make its own determination about which school officials may access a student's education records and disclose information to parents or other parties whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. Under § 99.31(a)(1), an educational agency or institution may disclose education records, without consent, to school officials whom the agency or institution has determined have legitimate educational interests in the information. It may be helpful for schools to have a policy in place concerning which school officials will have access to and the responsibility for disclosing information in emergency situations.

We understand that some educational agencies and institutions may need assistance in determining whether a health or safety emergency exists for purposes of complying with these regulations. The Department encourages schools to implement a threat assessment program, including the establishment of a threat assessment team that utilizes the expertise of representatives from law enforcement agencies in the community. Schools can respond to student behavior that raises concerns about a student's mental health and the safety of the student and others that is chronic or escalating by using a threat assessment team, and then make other disclosures under the health or safety emergency exception, as appropriate, when an "articulable and significant threat" exists. Information on establishing a threat assessment program and other helpful resources for emergency situations can be found on the Department's Web site: <http://www.ed.gov/admins/lead/safety/edpicks.jhtml?src=ln>.

An educational agency or institution may disclose education records to threat assessment team members who are not employees of the district or institution if they qualify as "school officials" with "legitimate educational interests" under § 99.31(a)(1)(i)(B), which is discussed elsewhere in this preamble. To receive the education records under the "school officials" exception, members of the threat assessment team must be under the direct control of the educational agency or institution with respect to the maintenance and use of personally identifiable information from education records. For example, a representative from the city police who serves on a school's threat assessment team generally could not redisclose to the city police personally identifiable information from a student's education

records to which he or she was privy as part of the team. As noted above, however, the institution may disclose personally identifiable information from education records when and if the threat assessment team determines that a health or safety emergency exists under §§ 99.31(a)(10) and 99.36.

We believe that § 99.36 does not need to be expanded to permit a school to contact whomever an eligible student has listed as his or her emergency contact, nor is there authority to do so. FERPA does not preclude institutions from contacting other parties, including parents, in addition to the emergency contacts provided by the student, if the school determines these other parties are "appropriate parties" under this exception. (An eligible student may provide consent for the institution to notify certain individuals in case of an emergency, should an emergency occur.)

The regulations would not prevent an institution from having a policy of seeking prospective consent from eligible students for the disclosure of personally identifiable information or from having a policy for obtaining consent for disclosure on a case-by-case basis. However, FERPA does not require that a postsecondary institution disclose information to any party except to the eligible student, even if the student has consented to the disclosure. Thus, the Secretary does not have the statutory authority to require school officials to disclose information from a student's education records in compliance with a consent signed by the student or to otherwise require the institution to contact a family member.

*Changes:* None.

*(e) Treatment Records*

*Comment:* A commenter stated that while the amendments to § 99.36 provide needed clarification about when an educational agency or institution may disclose students' education records to avert tragedies like the one at Virginia Tech in April 2007, the NPRM did not provide clarity on the issue of information sharing between on-campus and off-campus health care providers. The commenter also noted that the Virginia Tech Review Panel recommended that Congress amend FERPA to explain how Federal privacy laws apply to medical records held for treatment purposes and that the NPRM did not provide that clarity.

Another commenter stated that if information about a student related to a health or safety emergency is part of the treatment records maintained by a university's health clinic, the treatment records should be treated like education

records so that they may be disclosed under the health and safety emergency exception. A commenter asked that the Department clarify that college health and mental health records are not education records under FERPA and must be treated like other health and mental health records in other settings.

*Discussion:* While we have carefully considered the comments concerning "treatment records," the Secretary does not believe that it is necessary to amend the regulations to provide clarification on the handling of health and medical records. The Departments of Education and Health and Human Services have issued joint guidance that explains the relationship between FERPA and the HIPAA Privacy Rule. The guidance addresses this issue for these records at the elementary and secondary levels, as well as at the postsecondary level. The joint guidance, which is on the Web sites of both agencies, addresses many of the questions raised by school administrators, health care professionals, and others as to how these two laws apply to records maintained on students. It also addresses certain disclosures that are allowed without consent or authorization under both laws, especially those related to health and safety emergency situations. The guidance can be found here: <http://www.ed.gov/policy/gen/guid/fpco/index.html>.

As discussed elsewhere in this preamble with respect to § 99.31(a)(2), while "treatment records" are excluded from the definition of *education records* under FERPA, if an eligible student's treatment records are used for any purpose other than the student's treatment, or if a school wishes to disclose the treatment records for any purpose other than the student's treatment, they may only be disclosed as education records subject to FERPA requirements. Therefore, an eligible student's treatment records may be disclosed to any party, without consent, as long as the disclosure meets one of the exceptions to FERPA's general consent rule. See 34 CFR 99.31. One of the permitted disclosures under this section is the "health or safety emergency" exception.

*Changes:* None.

#### **Identification and Authentication of Identity (§ 99.31(c))**

*Comment:* Several commenters supported our proposal to require educational agencies and institutions to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or

institution discloses personally identifiable information from education records. One commenter supported the provision but advocated requiring the use of two-factor identification for information that could be used to commit identity theft and financial fraud. (Two-factor identification requires the use of two methods to authenticate identity, such as fingerprint identification in addition to a PIN.)

One commenter said that the identification and authentication requirement will help protect students affected by domestic violence who are living in substitute care situations. The commenter noted that many parents in situations involving domestic violence do not have photo identification (ID) and would be unable to meet a requirement to provide photo ID in order to access their children's education records.

One commenter strongly supported the proposed amendment and said it will be valuable in aiding the privacy and protection of homeless children. Another commenter questioned whether the identification and authentication requirement is necessary for staff of large school districts with centralized offices.

One commenter did not support the proposed regulation stating that it will be an additional burden on school districts. The commenter agreed with our statement in the preamble to the NPRM that the regulations should permit districts to determine their own methods of identification and authentication. However, the commenter stated that districts should not be required to have a sliding scale of control based on the level of potential threat and harm and that it would not be practical to give every person requesting access to education records a PIN or similar method of authentication. For example, the commenter stated that parents might be provided with a PIN, but districts would not want to provide a PIN to a reporter or other third party. The commenter requested additional examples of how districts may authenticate requests received by phone or e-mail. The commenter also stated that districts are sometimes concerned that government-issued photo IDs are fraudulent. As a result, the group requested that the Department adopt a "safe harbor" provision that requiring a government-issued photo ID for in-person requests is reasonable.

One commenter expressed concern that the proposed regulations were too restrictive and could be too complex to administer, and that this would cause an institution to choose not to transfer

information even though it is permitted to do so. This commenter asked whether the Department will accept an institution's efforts at compliance as sufficient without examining the effectiveness of those efforts.

*Discussion:* The identification and authentication methods discussed in the NPRM (73 FR 15585) are intended as examples and should not be considered to be exhaustive. Because there are many methods available to provide secure authentication of identity, and as more methods continue to be developed, we do not think it appropriate at this time to require the use of two-factor authentication as requested by the commenter. Two-factor authentication can be expensive and cumbersome, and we believe that each educational agency or institution should decide whether to use its resources to implement a two-factor authentication method or another reasonable method to ensure that education records are disclosed only to an authorized party. The comment that a portion of the population will be disadvantaged if only photo ID is permitted to authenticate identity confirms that we need to retain flexibility in the regulations.

We do not agree that certain types of staff should be exempted from the identification and authentication requirement. All staff members, whether in a centralized office, or in separate administrative offices throughout a school system, must be cognizant of and responsible for complying with identification and authentication requirements.

Due to the differences in size, complexity, and access to technology, we believe that educational agencies and institutions should have the flexibility to decide the methods for identification and authentication of identity best suited to their own circumstances. The regulatory requirement is that agencies and institutions use "reasonable" methods to identify and authenticate identity when disclosing personally identifiable information from education records. "Effectiveness" is certainly one measure, but not necessarily a dispositive measure, of whether the methods used by an agency or institution are "reasonable". As we explained in the NPRM, an agency or institution is not required to eliminate all risk of unauthorized disclosure of education records but to reduce that risk to a level commensurate with the likely threat and potential harm. 73 FR 15585.

Further in that regard, we note that a "sliding scale" of protection is not mandated *per se*. However, it may not be "reasonable" to use the same

methods to protect students' SSNs or credit card numbers from unauthorized access and disclosure that are used to protect students' names and other directory information. We believe that a PIN process could be useful to provide access to education records for parties, such as parents, students, or school officials, but that it would not generally be useful for providing records to outside parties, such as reporters or parties seeking directory information. While the use of government-issued photo ID may be a reasonable method to authenticate identity, depending on the circumstances and the information being released, we are unable to conclude at this time that it is sufficiently secure to constitute a safe harbor for meeting this requirement.

*Changes:* None.

#### **Enforcement (§ 99.64)**

##### *(a) § 99.64(a)*

*Comment:* One commenter supported our proposal to amend § 99.64(a) to provide that a complaint submitted to FPCO does not have to allege that a violation or failure to comply with FERPA is based on a policy or practice of the agency or institution. The commenter stated that parents often are not aware of legal and technical criteria, and complaints filed by parents should not be subject to technical rules typically applied to filings made by attorneys.

Another commenter did not support the proposed amendment and asked several questions concerning the effects of the change. The commenter asked whether this provision means that the Office will investigate an allegation concerning a single and perhaps unintentional action not related to a policy or practice of the institution. The commenter also asked whether such an investigation could result in a finding of a violation if the finding is not based on an institution's policy or practice, and what enforcement actions can be taken in those circumstances. The commenter suggested that we modify the regulations to provide that, for complaints not alleging a violation based on an institution's policy or practice, the Office will undertake an investigation only when it determines that the allegations are of a sufficiently serious nature to warrant an inquiry.

*Discussion:* The changes we proposed in this section were intended to clarify that it is sufficient for a complaint to allege that an educational agency or institution violated a requirement of FERPA, and that a complaint does not need to allege that the violation is a result of a policy or practice of an

agency or institution in order for the Office to investigate the complaint.

We explain in our discussion of the proposed changes to § 99.67 that the Secretary must find that an educational agency or institution has a policy or practice in violation of the non-disclosure requirements in FERPA before seeking to withhold, terminate, or recover program funds for that violation. However, FPCO is not limited to investigating complaints and finding that an educational agency or institution violated FERPA only if the allegations and findings are based on a policy or practice of an educational agency or institution.

Moreover, we do not agree that only conduct that involves a policy or practice or that affects multiple students is serious enough to warrant an investigation of the allegations. An educational agency or institution may not even be aware of FERPA violations committed by its own school officials until the Office investigates an allegation of misconduct. These kinds of investigations often serve the very important purpose of helping ensure that single instances of misconduct do not become policies or practices of an agency or institution. Further, while an agency or institution may not think that a single, unintentional violation of FERPA is significant, it is often considered serious by the parent or student affected by the violation.

Therefore, consistent with its current practice, the Office may find that an educational agency or institution violated FERPA without also finding that the violation was based on a policy or practice. Note that under §§ 99.66(c) and 99.67, the Office may not take any enforcement action against an agency or institution that has violated FERPA until it provides the agency or institution with a reasonable period of time to come into compliance voluntarily.

*Changes:* None.

##### *(b) § 99.64(b)*

*Comment:* A number of commenters supported proposed § 99.64(b), which provided that the Office may investigate a possible FERPA violation even if it has not received a timely complaint from a parent or student or if a valid complaint is subsequently withdrawn. Several of these commenters stated that it is appropriate and important to permit persons who are not parents or eligible students, but who have knowledge of potential FERPA violations, to provide this information to the Office for consideration of a possible investigation.

Several commenters objected to the proposed change. One commenter expressed serious concern that the regulations will greatly expand the authority of the Office to investigate any potential FERPA violation, even when no complaint is filed or when a complaint has been withdrawn. In particular, the commenter stated that an institution would not have an opportunity to review and respond to specific allegations when the investigation does not concern a particular complaint.

Another commenter asserted that the Department has not demonstrated why the proposed amendment is necessary. The commenter said that unless there is evidence of a widespread problem, the proposed change will increase university costs in responding to investigations without a corresponding benefit to the public.

Another commenter said that the Office should not investigate allegations that are not filed by a parent or eligible student because an institution must know the name of the filing party and the specific circumstances of the allegation in order to properly defend its actions. The commenter said that it should not be unnecessarily burdened by an investigation by the Office when it has already dealt with the situation to the satisfaction of the affected student, and that any student who is not satisfied with the institution's efforts retains the ability to file a complaint. The commenter also noted that a complaint filed by an affected student has more credibility than allegations made by other parties. The commenter was concerned that accepting information from other parties could result in filings from persons with grievances unrelated to FERPA, such as a disgruntled employee, or an applicant rejected for admission, or a parent or eligible student who missed a filing deadline of some kind.

One commenter said that the proposed change would result in an ineffective use of the limited resources of the Office because it would be investigating allegations that may not have a sufficient basis.

*Discussion:* We proposed the changes to § 99.64(b) to clarify that the Office may initiate its own investigation that an educational agency or institution has violated FERPA. (The amendment also clarifies that if the Office determines that an agency or institution violated FERPA, it may also determine whether the violation was based on a policy or practice of the agency or institution.)

Our experience has shown that sometimes FERPA violations are brought to the attention of the Office by

school officials, officials in other schools, or by the media. It is important that the Office have authority to investigate allegations of non-compliance in these situations.

Consistent with its current practice, a notice of investigation issued by the Office will provide sufficient and specific factual information to permit the agency or institution to adequately investigate and respond to the allegations, whether or not the investigation is based on a complaint by a parent or eligible student.

We do not agree that allowing the Office to initiate its own investigations of possible FERPA violations will lead to abuses of the process by persons seeking to redress other grievances with an institution. The Office will continue to be responsible for evaluating the validity of the information and allegations that come to its attention by means other than a valid complaint and determining whether to initiate an investigation. We do not anticipate that the Office will initiate an investigation of every allegation or information it receives. We believe, however, that it is important that the Office be able to investigate any violation of FERPA for which it receives notice. As stated in the NPRM, 73 FR 15591, the Department is not seeking to expand the scope of FERPA investigations beyond the current practices of the Office.

*Changes:* None.

(c) § 99.66

*Comment:* We received one comment on the proposed change to § 99.66(c), which allows but does not require FPCO to make a finding that an educational agency or institution has a policy or practice in violation of a FERPA requirement when the Office issues a notice of findings in § 99.66(b). The commenter stated that its review of FERPA and the Supreme Court decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (*Gonzaga*), indicates that the Office may not issue a finding of a violation of FERPA and require corrective action or take any enforcement action without also finding that the violation constituted a policy or practice of the agency or institution.

*Discussion:* We explain in the discussion of the changes to § 99.67 that there are circumstances in which the Office would be required to find that an educational agency or institution has a policy or practice in violation of a FERPA requirement before taking certain enforcement actions, such as an action to terminate funding for a violation of the non-disclosure requirements, 20 U.S.C. 1232g(b)(1) and (b)(2) and 34 CFR 99.30. However, the

Office is not required to find a policy or practice in violation of FERPA before issuing a notice of findings or taking other kinds of enforcement actions.

*Changes:* None.

(d) § 99.67

*Comment:* One commenter supported the clarification in proposed § 99.67 that the Office may not seek to withhold payments, terminate eligibility for funding, or take certain other enforcement actions unless it determines that the educational agency or institution has a policy or practice that violates FERPA. Another commenter expressed general support for the proposed change, including the clarification that the Secretary may take any legally available enforcement action, in addition to those specifically listed in the current regulations. The commenter expressed concern, however, that the penalties are not severe enough to effectively discourage unintentional or willful violations by third parties, particularly in areas of research and data sharing with outside parties.

Another commenter expressed concern that the proposed amendment would unnecessarily broaden the enforcement options available to the Secretary. The commenter stated that educational agencies and institutions will not be able to assess the risks and consequences associated with their actions without a limitation on the range of enforcement actions available to the Department when a violation of FERPA is found.

One commenter asked the Department to clarify that all methods of enforcing FERPA that are contained in the current regulations will be retained in the final regulations. The commenter said that the proposed regulations in the NPRM (73 FR 15602) appear to remove the Secretary's ability to terminate funding.

*Discussion:* We explained in the preamble to the NPRM (73 FR 15592) that there were two reasons for the proposed changes to § 99.67(a). One was the need to clarify that the Secretary may take any enforcement action that is legally available and is not limited to those specified under the current regulations, *i.e.*, withholding further payments under any applicable program; issuing a complaint to compel compliance through a cease-and-desist order; or terminating eligibility to receive funding under any applicable program. Other actions the Secretary may take to enforce FERPA include entering into a compliance agreement under 20 U.S.C. 1234f and seeking an injunction.

This change to § 99.67(a) does not broaden the Secretary's enforcement options, as suggested by one commenter. The General Education Provisions Act (GEPA) provides the Secretary with the authority to take certain enforcement actions to address violations of statutory and regulatory requirements, including general authority to "take any other action authorized by law with respect to the recipient." 20 U.S.C. 1234c(a)(4). The change to § 99.67(a) simply includes, for purposes of clarity, the Secretary's existing authority under GEPA to take any legally available action to enforce FERPA requirements. (We note that before taking enforcement action the Office must determine that the educational agency or institution is failing to comply substantially with a FERPA requirement and provide it with a reasonable period of time to comply voluntarily. See 20 U.S.C. 1234c(a); 20 U.S.C. 1232g(f); and 34 CFR 99.66(c).)

We also proposed to amend § 99.67(a) to clarify that the Office may issue a notice of violation for failure to comply with specific FERPA requirements and require corrective actions but may not seek to terminate eligibility for funding, withhold payments, or take other enforcement actions unless the Office determined that an agency or institution has a policy or practice in violation of FERPA requirements (73 FR 15592). Upon further review, we have decided not to adopt this particular change because we believe it limits the Secretary's enforcement authority in a manner that is not legally required.

In support of its holding in *Gonzaga* that FERPA's non-disclosure provisions do not create rights that are enforceable under 42 U.S.C. 1983, the Court observed that FERPA provides that no funds shall be made available to an educational agency or institution that has a policy or practice of disclosing education records in violation of FERPA requirements. 536 U.S. at 288; see also 20 U.S.C. 1232g(b)(1) and (b)(2); 34 CFR 99.30. As such, the statute and *Gonzaga* decision suggest that with respect to violations of FERPA's non-disclosure requirements, the Secretary must find that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking actions to terminate, withhold, or recover funds for those violations. However, there is no requirement under the statute (or the *Gonzaga* decision) for the Secretary to find a policy or practice in violation of FERPA requirements on the part of an educational agency or institution before taking other kinds of enforcement actions for violations of the non-disclosure requirements, such as

seeking an injunction or a cease-and-desist order. We note also that the *Gonzaga* opinion does not address violations of other FERPA requirements, such as parents' right to inspect and review their children's education records and the requirement that educational agencies and institutions afford parents an opportunity for a hearing to challenge the content of a student's education records under certain circumstances, which do not contain the same "policy or practice" language as the non-disclosure requirements. Because we did not address enforcement of these other FERPA requirements in the NPRM, we have decided not to address in the final regulations limitations or pre-conditions that apply solely to actions to terminate, withhold, or recover program funds for violations of the non-disclosure requirements.

In response to the comment that the available penalties are not severe enough to discourage FERPA violations, we note that the Secretary has authority to terminate, withhold, and recover program funds and take other enforcement actions in accordance with part E of GEPA. The Secretary may not increase penalties beyond those authorized under FERPA and GEPA. Further, the regulations do not remove the Secretary's authority to terminate eligibility for program funding or any other enforcement authority. The changes noted by the commenter who was concerned that the proposed regulations removed the Secretary's authority to terminate funding were corrections to punctuation and formatting only, not substantive changes.

*Changes:* We have removed the language in § 99.67(a) that requires the Office to determine that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking any enforcement action.

#### **Department Recommendations for Safeguarding Education Records**

*Comment:* We received a few comments on the recommendations for safeguarding education records included in the NPRM. One commenter expressed concern that schools and school districts should exercise enhanced security for the records of children receiving special education services. According to the commenter, these children often have a large number of records and may receive services from a variety of providers, which can add to the challenge of ensuring that appropriate privacy controls are used.

One commenter supported the safeguarding recommendations and suggested that we revise the recommendations to list non-Federal government sources providing guidance on methods for safeguarding education records. Another commenter supported the recommendations, but suggested that the regulations should require that a parent or eligible student receive notification of an unauthorized release or theft of information.

*Discussion:* The comments on the records of students who receive special education services illustrate the necessity for educational agencies and institutions to ensure that adequate controls are in place so that the education records of all students are handled in accordance with FERPA's privacy protections. The safeguarding recommendations that we provided in the NPRM, and are repeated in these final regulations, are intended to provide agencies and institutions additional information and resources to assist them in meeting this responsibility. In addition, educational agencies and institutions should refer to the protections required under § 300.623 of the confidentiality of information requirements in Part B of the IDEA, 34 CFR 300.623 (Safeguards).

We acknowledge that there are many sources available concerning information security technology and processes. The Department does not wish to appear to endorse the information or product of any company or organization; therefore, we have included only Federal government sources in this notice.

The Department does not have the authority under FERPA to require that agencies or institutions issue a direct notice to a parent or student upon an unauthorized disclosure of education records. FERPA only requires that the agency or institution record the disclosure so that a parent or student will become aware of the disclosure during an inspection of the student's education record.

*Changes:* None.

We are republishing here, for the administrative convenience of educational agencies and institutions and other parties, the *Department Recommendations for Safeguarding Education Records* that were published in the preamble to the NPRM (73 FR 15598–15599):

The Department recognizes that agencies and institutions face significant challenges in safeguarding educational records. We are providing the following information and recommendations to assist agencies and institutions in meeting these challenges.

As noted elsewhere in this document, FERPA provides that no funds administered by the Secretary may be made available to any educational agency or institution that has a policy or practice of releasing, permitting the release of, or providing access to personally identifiable information from education records without the prior written consent of a parent or eligible student except in accordance with specified exceptions. In light of these requirements, the Secretary encourages educational agencies and institutions to utilize appropriate methods to protect education records, especially in electronic data systems.

In recent years the following incidents have come to the Department's attention:

- Students' grades or financial information, including SSNs, have been posted on publicly available Web servers;

- Laptops and other portable devices containing similar information from education records have been lost or stolen;

- Education records, or devices that maintain education records, have not been retrieved from school officials upon termination of their employment or service as a contractor, consultant, or volunteer;

- Computer systems at colleges and universities have become favored targets because they hold many of the same records as banks but are much easier to access. See "College Door Ajar for Online Criminals" (May 2006), available at <http://www.uh.edu/ednews/2006/latimes/200605/20060530hackers.html>, and July 10, 2006, Viewpoint in Business Week/Online available at [http://www.businessweek.com/technology/content/jul2006/tc20060710\\_558020.htm](http://www.businessweek.com/technology/content/jul2006/tc20060710_558020.htm);

- Nearly 65 percent of postsecondary educational institutions identified theft of personal information (SSNs, credit/debit/ATM card, account or PIN numbers, etc.) as a high risk area. See Table 7, Perceived Risks at [http://www.educause.edu/ir/library/pdf/ecar\\_so/ers/ers0606/Ekf0606.pdf](http://www.educause.edu/ir/library/pdf/ecar_so/ers/ers0606/Ekf0606.pdf); and

- In December 2006, a large postsecondary institution alerted some 800,000 students and others that the campus computer system containing their names, addresses, and SSNs had been compromised.

The Department's Office of Inspector General (OIG) noted in Final Inspection Alert Memorandum dated February 3, 2006, that the Privacy Rights Clearinghouse reported that between February 15, 2005, and November 19, 2005, there were 93 documented computer breaches of electronic files

involving personal information from education records such as SSNs, credit card information, and dates of birth. According to the reported data, 45 percent of these incidents have occurred at colleges and universities nationwide. OIG expressed concern that student information may be compromised due to a failure to implement or administer proper security controls for information systems at postsecondary institutions.

The Department recognizes that no system for maintaining and transmitting education records, whether in paper or electronic form, can be guaranteed safe from every hacker and thief, technological failure, violation of administrative rules, and other causes of unauthorized access and disclosure. Although FERPA does not dictate requirements for safeguarding education records, the Department encourages the holders of personally identifiable information to consider actions that mitigate the risk and are reasonably calculated to protect such information. Of course, an educational agency or institution may use any method, combination of methods, or technologies it determines to be reasonable, taking into consideration the size, complexity, and resources available to the institution; the context of the information; the type of information to be protected (such as social security numbers or directory information); and methods used by other institutions in similar circumstances. The greater the harm that would result from unauthorized access or disclosure and the greater the likelihood that unauthorized access or disclosure will be attempted, the more protections an agency or institution should consider using to ensure that its methods are reasonable.

One resource for administrators of electronic data systems is "The National Institute of Standards and Technology (NIST) 800-100, Information Security Handbook: A Guide for Managers" (October 2006). See <http://csrc.nist.gov/publications/nistpubs/800-100/SP800-100-Mar07-2007.pdf>. A second resource is NIST 800-53, Information Security, which catalogs information security controls. See <http://csrc.nist.gov/publications/nistpubs/800-53-Rev1/800-53-rev1-final-clean-sz.pdf>. Similarly, a May 22, 2007, memorandum to heads of Federal agencies from the Office of Management and Budget requires executive departments and agencies to ensure that proper safeguards are in place to protect personally identifiable information that they maintain, eliminate the unnecessary use of SSNs, and develop and implement a "breach notification policy." This memorandum,

although directed towards Federal agencies, may also serve as a resource for educational agencies and institutions. See <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf>.

Finally, if an educational agency or institution has experienced a theft of files or computer equipment, hacking or other intrusion, software or hardware malfunction, inadvertent release of data to Internet sites, or other unauthorized release or disclosure of education records, the Department suggests consideration of one or more of the following steps:

- Report the incident to law enforcement authorities.
- Determine exactly what information was compromised, *i.e.*, names, addresses, SSNs, ID numbers, credit card numbers, grades, and the like.
- Take steps immediately to retrieve data and prevent any further disclosures.
- Identify all affected records and students.
- Determine how the incident occurred, including which school officials had control of and responsibility for the information that was compromised.
- Determine whether institutional policies and procedures were breached, including organizational requirements governing access (user names, passwords, PINS, etc.); storage; transmission; and destruction of information from education records.
- Determine whether the incident occurred because of a lack of monitoring and oversight.
- Conduct a risk assessment and identify appropriate physical, technological, and administrative measures to prevent similar incidents in the future.
- Notify students that the Department's Office of Inspector General maintains a Web site describing steps students may take if they suspect they are a victim of identity theft at <http://www.ed.gov/about/offices/list/oig/misused/idtheft.html>; and <http://www.ed.gov/about/offices/list/oig/misused/victim.html>.

FERPA does not require an educational agency or institution to notify students that information from their education records was stolen or otherwise subject to an unauthorized release, although it does require the agency or institution to maintain a record of each disclosure. 34 CFR 99.32(a)(1). (However, student notification may be required in these circumstances for postsecondary institutions under the Federal Trade Commission's Standards for Insuring

the Security, Confidentiality, Integrity and Protection of Customer Records and Information ("Safeguards Rule") in 16 CFR part 314.) In any case, direct student notification may be advisable if the compromised data includes student SSNs and other identifying information that could lead to identity theft.

#### Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments, or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f)(4) of the Executive order.

#### 1. Summary of Public Comments

The Department did not receive any comments on the analysis of the costs and benefits in the NPRM. However, since the publication of the NPRM, we have identified several information collection requirements that were not identified in the NPRM. We have added discussions of the costs and benefits of two information collection requirements in the following Summary of Costs and Benefits.

#### 2. Summary of Costs and Benefits

Following is an analysis of the costs and benefits of the most significant changes to the FERPA regulations. In conducting this analysis, the Department examined the extent to which the regulations add to or reduce the costs of educational agencies and institutions and, where appropriate, State educational agencies (SEAs) and other State and local educational authorities in relation to their costs of complying with the FERPA regulations prior to these changes.

This analysis is based on data from the most recent *Digest of Education Statistics* (2007) published by the National Center for Education Statistics (NCES), which projects total enrollment for Fall 2008 of 49,812,000 students in public elementary and secondary schools and 18,264,000 students in postsecondary institutions; and a total of 97,382 public K–12 schools; 14,166 school districts; and 6,463 postsecondary institutions. (Excluded are data from private institutions that do not receive Federal funding from the Department and, therefore, are not subject to FERPA.) Based on this analysis, the Secretary has concluded that the changes in these regulations will not impose significant net costs on educational agencies and institutions. Analyses of specific provisions follow.

#### **Alumni Records**

The regulations in § 99.3 clarify the current exclusion from the definition of *education records* for records that only contain information about an individual after he or she is no longer a student, which is intended to cover records of alumni and similar activities. Some institutions have applied this exclusion to records that are created after a student has ceased attending the institution but that are directly related to his or her attendance as a student, such as investigatory reports and settlement agreements about incidents and injuries that occurred during the student's enrollment. The amendment will clarify that this provision applies only to records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

We believe that most of the more than 103,845 K–12 schools and postsecondary institutions subject to FERPA already adhere to this revised interpretation in the regulations and that for those that do not, the number of records affected is likely to be very small. Assuming that each year one half of one percent of the 68.1 million students enrolled in these institutions have one record each affected by the change, in the year following issuance of the regulations institutions will be required to try to obtain written consent before releasing 350,380 records that they would otherwise release without consent. We estimate that for the first year contacting the affected parent or student to seek and process written consent for these disclosures will take approximately one-half hour per record at an average cost of \$32.67 per hour for a total cost of \$5,562,068.

(Compensation for administrative staff time is based on published estimates for 2005 from the Bureau of Labor Statistics' National Compensation Survey of \$23.50 per hour plus an average 39 percent benefit load for Level 8 administrators in education and related fields.)

In terms of benefits, the change will protect the privacy of parents and students by clarifying the intent of this regulatory exclusion and help prevent the unlawful disclosure of these records. It will also provide greater legal certainty and therefore some cost savings for those agencies and institutions that may be required to litigate this issue in connection with a request under a State open records act or other legal proceeding. For these reasons, we believe that the overall benefits outweigh the potential costs of this change.

#### **Exclusion of SSNs and ID Numbers From Directory Information**

The proposed regulations in § 99.3 clarified that a student's SSN or student ID number is personally identifiable information that may not be disclosed as directory information under FERPA. The final regulations allow an educational agency or institution to designate and disclose student ID numbers as directory information if the number cannot be used by itself to gain access to education records, *i.e.*, it is used like a name. SSNs may never be disclosed as directory information.

The principal effect of this change is that educational agencies and institutions may not post grades by the student's SSN or non-directory student ID number and may not include these identifiers with directory information they disclose about a student, such as a student's name, school, and grade level or class, on rosters, or on sign-in sheets that are made available to students and others. (Educational agencies and institutions may continue to include SSNs and non-directory student ID numbers on class rosters and schedules that are disclosed only to teachers and other school officials who have legitimate educational interests in this information.)

A class roster or sign-in sheet that contains or requires students to affix their SSN or non-directory student ID number makes that information available to every individual who signs in or sees the document and increases the risk that the information may be improperly used for purposes such as identity theft or to find out a student's grades or other confidential educational information. In regard to posting grades, an individual who knows which classes

a particular student attends may be able to ascertain that student's SSN or non-directory student ID number by comparing class lists for repeat numbers. Because SSNs are not randomly generated, it may be possible to identify a student by State of origin based on the first three (area) digits of the number, or by date of issuance based on the two middle digits.

The Department does not have any actual data on how many class or test grades are posted by SSN or non-directory student ID number at this time, but we believe that the practice is rare or non-existent below the secondary level. Although the practice was once widespread, particularly at the postsecondary level, anecdotal evidence suggests that as a result of consistent training and informal guidance by the Department over the past several years, together with the increased attention States and privacy advocates have given to the use of SSNs, many institutions now either require teachers to use a code known only to the teacher and the student or prohibit the posting of grades entirely.

The most recent figures available from the Bureau of Labor Statistics (2007) indicate that there are approximately 2.7 million secondary and postsecondary teachers in the United States. As noted above, we assume that most of these teachers either do not post grades at all or already use a code known only to the teacher or student. We assume further that additional costs to deliver grades personally in the classroom or through electronic mail, instead of posting, will be minimal. For purposes of this analysis, we estimate that no more than five percent of 2.7 million, or 135,000 teachers, continue to post grades by SSN or non-directory student ID number and thus will need to convert to a code, which will require them to spend an average of one-half hour each semester establishing and managing grading codes for students. Since we do not know how many teachers at either education level will continue to post grades, and wages for postsecondary teachers are higher than secondary teacher wages, we use postsecondary teacher wages to ensure that the estimate encompasses the upper limit of possible costs. Using the Bureau of Labor Statistics' published estimate of average hourly wages of \$42.98 for teachers at postsecondary institutions and an average 39 percent load for benefits, we estimate an average cost of \$59.74 per teacher per year, for a total of \$8,064,900. Parents and students should incur no costs except for the time they might have to spend to

contact the school official if they forget the student's grading code.

This change will benefit parents and students and educational agencies and institutions by reducing the risk of identity theft associated with posting grades by SSN, and the risk of disclosing grades and other confidential educational information caused by posting grades by a non-directory student ID number. It is difficult to quantify the value of reducing the risk of identity theft. According to the Federal Trade Commission, however, for the past few years over one-third of complaints filed with that agency have been for identity theft. According to the Better Business Bureau, identity theft costs businesses nearly \$57 billion in 2006, while victims spent an average of 40 hours resolving identity theft issues. It is even more difficult to measure the benefits of enhanced privacy protections for student grades and other confidential educational information from education records because the value individuals place on the privacy of this information varies considerably and because we are unable to determine how often it happens. Therefore, we have no basis to estimate the value of these enhanced privacy protections in relation to the expected costs to implement the changes.

#### **Prohibit Use of SSN To Confirm Directory Information**

The regulations will prevent an educational agency or institution (or a contractor providing services for an agency or institution) from using a student's SSN (or other non-directory information) to identify the student when releasing or confirming directory information. This occurs, for example, when a prospective employer or insurance company telephones an institution or submits an inquiry through the institution's Web site to find out whether a particular individual is enrolled in or has graduated from the institution. While this provision will apply to educational agencies and institutions at all grade levels, we believe that it will affect mainly postsecondary institutions because K-12 agencies and institutions typically do not provide enrollment and degree verification services.

A survey conducted in March 2002 by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) showed that nearly half of postsecondary institutions used SSNs as the primary means to track students in academic databases. Since then, use of SSNs as a student identifier has decreased significantly in response to public concern about identity theft.

While postsecondary institutions may continue to collect students' SSNs for financial aid and tax reporting purposes, many have ceased using the SSN as a student identifier either voluntarily or in compliance with State laws. Also, over the past several years the Department has provided training on this issue and published on the Office Web site a 2004 letter finding a postsecondary institution in violation of FERPA when its agent used a student's SSN, without consent, to search its database to verify that the student had received a degree. [www.ed.gov/policy/gen/guid/fpco/ferpa/library/auburnuniv.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/auburnuniv.html). Given these circumstances, we estimate that possibly one-quarter of the nearly 6,463 postsecondary institutions in the United States, or 1,616 institutions, may ask a requester to provide the student's SSN (or non-directory student ID number) in order to locate the record and respond to an inquiry for directory information.

Under the regulations an educational agency or institution that identifies students by SSN (or non-directory student ID number) when releasing directory information will either have to ensure that the student has provided written consent to disclose the number to the requester, or rely solely on a student's name and other properly designated directory information to identify the student, such as address, date of birth, dates of enrollment, year of graduation, major field of study, degree received, etc. Costs to an institution of ensuring that students have provided written consent for these disclosures, for example by requiring the requester to fax copies of each written consent to the institution or its contractor, or making arrangements to receive them electronically, could be substantial for large institutions and organizations that utilize electronic recordkeeping systems. Institutions may choose instead to conduct these verifications without using SSNs or non-directory student IDs, which may make it more difficult to ensure that the correct student has been identified because of the known problems in matching records without the use of a universal identifier. Increased institutional costs either to verify that the student has provided consent or to conduct a search without use of SSNs or non-directory student ID numbers should be less for smaller institutions, where the chances of duplicate records are decreased. Parents and students may incur additional costs if an employer, insurance company, or other requester is unable to verify enrollment or graduation based solely on directory

information, and written consent for disclosure of the student's SSN or non-directory student ID number is required. Due to the difficulty in ascertaining actual costs associated with these transactions, we have no basis to estimate costs that educational agencies and institutions and parents and students will incur as a result of this change.

The enhanced privacy protections of this amendment will benefit students and parents by reducing the risk that third parties will disclose a student's SSN without consent and possibly confirm a questionable number for purposes of identity theft. Similarly, preventing institutions from implicitly confirming a questionable non-directory student ID number will help prevent unauthorized individuals from obtaining confidential information from education records. In evaluating the benefits or value of this change, we note that this provision does not affect any activity that an educational agency or institution is permitted to perform under FERPA or other Federal law, such as using SSNs to identify students and confirm their enrollment status for student loan purposes, which is permitted without consent under the financial aid exception in § 99.31.

#### **User ID for Electronic Communications**

The regulations will allow an educational agency or institution to disclose as directory information a student's ID number, user ID or other electronic identifier so long as the identifier functions like a name; that is, it cannot be used without a PIN, password, or some other authentication factor to gain access to education records. This change will impose no costs and will provide benefits in the form of regulatory relief allowing agencies and institutions to use directory services in electronic communications systems without incurring the administrative costs associated with obtaining student consent for these disclosures.

Costs related to honoring a student's decision to opt out of these disclosures will be minimal because we assume that only a small number of students will elect not to participate in electronic communications at their school. Applying this change to records of both K-12 and postsecondary students and assuming that one-tenth of one percent of parents and eligible students will opt out of these disclosures, we estimate that institutions will have to flag the records of approximately 68,000 students for opt-out purposes. We lack sufficient data on costs institutions currently incur to flag records for

directory information opt-outs for other purposes, so we are unable to estimate the administrative and information technology costs institutions will incur to process these new directory information opt-outs resulting from this change.

#### **Student Anonymity in the Classroom**

The final regulations will ensure that parents and students do not use the right to opt out of directory information disclosures to remain anonymous in the classroom, by clarifying that opting out does not prevent disclosure of the student's name, institutional e-mail address, or electronic identifier in the student's physical or electronic classroom. We estimate that this change will result in a small net benefit to educational agencies and institutions because they will have greater legal certainty about the element of classroom administration, and it will reduce the institutional costs of responding to complaints from students and parents about the release of this information.

#### **Disclosing Education Records to New School and to Party Identified as Source Record**

The final regulations in § 99.31(a)(2) will allow an educational agency or institution to disclose education records, or personally identifiable information from education records, to a student's new school even after the student is already attending the new school so long as the disclosure relates to the student's enrollment in the new school. This change will provide regulatory relief by reducing legal uncertainty about how long a school may continue to send records or information to a student's new school, without consent, under the "seeks or intends to enroll" exception.

The amendment to the definition of *disclosure* in § 99.3 will allow a school that has concerns about the validity of a transcript, letter of recommendation, or other record to return these documents (or personally identifiable information from these documents) to the student's previous school or other party identified as the source of the record in order to resolve questions about their validity. Combined with the change to § 99.31(a)(2), discussed earlier in this analysis, this change will also allow the student's previous school to continue to send education records, or clarification about education records, to the student's new school in response to questions about the validity or meaning of records sent previously by that party. We are unable to determine how much it will cost educational agencies and institutions to return potentially

fraudulent documents to the party identified as the sender because we do not have any basis for estimating how often this occurs. However, we believe that these changes will provide significant regulatory relief to educational agencies and institutions by helping to reduce transcript and other educational fraud based on falsified records.

#### **Outsourcing**

The regulations in § 99.31(a)(1)(i) will allow educational agencies and institutions to disclose education records, or personally identifiable information from education records, without consent to contractors, volunteers, and other non-employees performing institutional services and functions as school officials with legitimate educational interests. An educational agency or institution that uses non-employees to perform institutional service and functions will have to amend its annual notification of FERPA rights to include these parties as school officials with legitimate educational interests.

This change will provide regulatory relief by permitting, and clarifying the conditions for, non-consensual disclosure of education records. Our experience suggests that virtually all of the more than 103,000 schools subject to FERPA will take advantage of this provision. We have no actual data on how many school districts publish annual FERPA notifications for the 97,382 K-12 public schools included in this total and, therefore, how many entities will be affected by this requirement. However, because educational agencies and institutions were already required under previous regulations to publish a FERPA notification annually, we believe that costs to include this new information will be minimal.

#### **Access Control and Tracking**

The regulations in § 99.31(a)(1)(ii) will require an educational agency or institution to use reasonable methods to ensure that teachers and other school officials obtain access to only those education records in which they have legitimate educational interests. This requirement will apply to records in any format, including computerized or electronic records and paper, film, and other hard copy records. An educational agency or institution that chooses not to restrict access to education records with physical or technological controls, such as locked cabinets and role-based software security, must ensure that its administrative policy for controlling access is effective and that it remains in

compliance with the legitimate educational interest requirement.

Administrative experience has shown that schools that allow teachers and other school officials to have unrestricted access to education records tend to have more problems with unauthorized disclosures, such as school officials obtaining access to education records for personal rather than professional reasons. Preventing unrestricted access to education records by teachers and other school officials will benefit parents and students by helping to ensure that education records are used only for legitimate educational purposes. It will also help ensure that education records are not accessed or disclosed inadvertently.

Information gathered by the Director of the Office at numerous FERPA training sessions and seminars, along with recent discussions with software vendors and educational organizations, indicates that the vast majority of mid- and large-size school districts and postsecondary institutions currently use commercial software for student information systems. These systems generally include role-based security features that allow administrators to control access to specific records, screens, or fields according to a school official's duties and responsibilities. These systems also typically contain transactional logging features that document or track a user's actual access to particular records, which will help ensure that an agency's or institution's access control methods are effective. Educational agencies and institutions that already have these systems will incur no additional costs to comply with the regulations.

For purposes of this analysis we excluded from a total of 14,166 school districts and 6,463 postsecondary institutions those with more than 1,000 students, for a total of 6,887 small K-12 districts and 3,906 small postsecondary institutions that may not have software with access control security features. The discussions that the Director of the Office has had with numerous SEAs and local districts suggest that the vast majority of these small districts and institutions do not make education records available to school officials electronically or by computer but instead use some system of administrative and physical controls.

We estimate for this analysis that 15 percent, or 1,619, of these small districts and institutions use home-built computerized or electronic systems that may not have the role-based security features of commercial software. The most recent published estimate we have for software costs comes from the final

Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule) published by the Department of Health and Human Services (HHS) on December 28, 2000, which estimated that the initial per-hospital cost of software upgrades to track the disclosure of medical records would be \$35,000 (65 FR 82768). We assume that costs will be comparable for education records, and, as discussed above, software that tracks disclosure history can also be used to control or restrict access to electronic records. Based on these assumptions, if 1,619 small K-12 districts and postsecondary institutions decide to purchase student information software rather than rely on administrative policies to comply with the regulations, they will incur estimated costs of \$56,665,000. We estimate that the remaining 9,174 small districts and institutions will not purchase new software because they do not make education records available electronically and rely instead on less costly administrative and physical methods to control access to records by school officials. Those that provide school officials with open access to hard copy education records may incur new costs to track actual disclosures to help ensure that they remain in compliance with legitimate educational interests requirements. We assume that these districts and institutions may devote some additional administrative staff time to procedures such as keeping logs of school officials who access records. However, no reliable estimates exist for the average number of teachers and other school officials who access education records or the number of times access is sought, so we are unable to estimate the cost of restricting or tracking actual disclosures of hard copy education records to school officials.

#### Education Research

The regulations in § 99.31(a)(6)(ii)(C) require an educational agency or institution to enter into a written agreement before disclosing personally identifiable information from education records, without consent, to organizations conducting studies for, or on behalf of, the educational agency or institution to: (a) Develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. The written agreement must specify the purpose or purposes, scope, and duration of the study or studies and the information to be disclosed, require the organization to conduct the study in a manner that does not permit personal identification of

parents and students by anyone other than representatives of the organization with legitimate interests, require the destruction or return of the information to the educational agency or institution when the study is completed, and specify the time period for destruction or return of the information. We believe that the additional cost of entering into written agreements to comply with this change is unlikely to be significant because most educational agencies and institutions already specify the terms under which personally identifiable information can be used when it is disclosed to organizations for these types of studies. Although this change will create an additional information collection requirement, we believe the benefits of the written agreement outweigh the costs, because it will ensure better compliance with FERPA and provide clarity for both researchers and educational agencies and institutions about the restrictions and use of personally identifiable information disclosed under § 99.31(a)(6) for studies.

#### Identification and Authentication of Identity

The regulations in § 99.31(c) require educational agencies and institutions to use reasonable methods to identify and authenticate the identity of parents, students, school officials and other parties to whom the agency or institution discloses personally identifiable information from education records. The use of widely available information to authenticate identity, such as the recipient's name, date of birth, SSN or student ID number, is not considered reasonable under the regulations.

The regulations will impose no new costs for educational agencies and institutions that disclose hard-copy records through the U.S. postal service or private delivery services with use of the recipient's name and last known official address.

We were unable to find reliable data that would allow us to estimate the additional administrative time that educational agencies and institutions will spend checking photo ID against school records or using other reasonable methods, as appropriate, to identify and authenticate the identity of students, parents, and other parties to whom the agency or institution discloses education records in person.

Authentication of identity for electronic or telephonic access to education records involves a wider array of security options because of continuing advances in technologies, but is not necessarily more costly than

authentication of identity for hard-copy records. We assume that educational agencies and institutions that require users to enter a secret password or PIN to authenticate identity will deliver the password or PIN through the U.S. postal service or in person. We estimate that no new costs will be associated with this process because agencies and institutions already have direct contact with parents, eligible students, and school officials for a variety of other purposes and will use these opportunities to deliver a secret authentication factor.

As noted in the preamble to the NPRM, 73 FR 15585, single-factor authentication of identity, such as a standard form user name combined with a secret password or PIN, may not provide reasonable protection for access to all types of education records or under all circumstances. We lack a basis for estimating costs of authenticating identity when educational agencies and institutions allow authorized users to access sensitive personal or financial information in electronic records for which single-factor authentication would not be reasonable.

#### Rediscovery and Recordkeeping

The regulations allow the officials and agencies listed in § 99.31(a)(3) (the U.S. Comptroller General, the U.S. Attorney General, the Secretary, and State and local educational authorities) to redisclose education records, or personally identifiable information from education records, without consent under the same conditions that apply currently to other recipients of education records under § 99.33(b). This change provides substantial regulatory relief to these parties by allowing them to redisclose information on behalf of educational agencies and institutions under any provision in § 99.31(a), which allows disclosure of education records without consent. For example, States will be able to consolidate K-16 education records under the SEA or State higher educational authority without having to obtain written consent under § 99.30. Parties that currently request access to records from individual school districts and postsecondary institutions will in many instances be able to obtain the same information in a more cost-effective manner from the appropriate State educational authority or the Department.

In accordance with the current regulations in § 99.32(b), an educational agency or institution must record any redisclosure of education records made on its behalf under § 99.33(b), including the names of the additional parties to

which the receiving party may redisclose the information and their legitimate interests or basis for the disclosure without consent under § 99.31 in obtaining the information. The regulations require SEAs and other State educational authorities (such as higher education authorities), the Secretary, and other officials or agencies listed in § 99.31(a)(3) that make further disclosures on behalf of an educational agency or institution to maintain the record of redisclosure required under § 99.32(b) if the educational agency or institution has not recorded the redisclosure or if the information was obtained from another State or Federal official or agency listed in § 99.31(a)(3). The regulations also require the State or Federal official or agency listed in § 99.31(a)(3) to provide a copy of its record of redisclosures to the educational agency or institution upon request. In addition, an educational agency or institution must maintain with each student's record of disclosures the names of State and local educational authorities and Federal officials and agencies that may make further disclosures from the student's records without consent under § 99.33(b) and must obtain a copy of the record of redisclosure, if any, maintained by the State or Federal official that redisclosed information on behalf of the agency or institution.

State educational authorities and Federal officials listed in § 99.31(a)(3) will incur new administrative costs if they maintain the record of redisclosure for the educational agency or institution on whose behalf they redisclose education records under the regulations. We estimate that two educational authorities or agencies in each State and the District of Columbia (one for K-12 and one for postsecondary) and the Department itself, for a total of 103 authorities, will maintain the required records of redisclosures. (We anticipate that educational agencies and institutions will record under § 99.32(b)(1) any further disclosures made by the other Federal officials listed in § 99.31(a)(3), the U.S. Comptroller General and the U.S. Attorney General.) We estimate further that these authorities will need to record two redisclosures per year from their records and that it will take one hour of administrative time to record each redisclosure electronically at an average hourly rate of \$32.67, for a total annual administrative cost of \$6,730. (Compensation for administrative staff time is explained earlier in this analysis.) We also assume for purposes of this analysis that State educational

authorities and the Department already have software that will allow them to record these disclosures electronically.

State educational authorities and Federal officials that maintain records of redisclosures will also have to make that information available to the educational agency or institution whose records were redisclosed, upon request, so that the agency or institution can make that record available to a parent or eligible student who has asked to inspect and review the student's record of disclosures. We assume that few parents and students request this information and, therefore, use an estimate that one tenth of one percent of a total of 68.1 million students will make such a request each year, or 68,076 requests. If it takes one-quarter of an hour to locate and print a record of disclosures at an average administrative hourly rate of \$32.67, the average annual administrative cost for State and Federal officials and agencies to provide this service will be \$556,011, plus mailing costs (at \$.42 per letter) of \$28,592, for a total of \$584,603. We estimate that educational agencies and institutions themselves will incur comparable costs when they ask State and Federal officials to send them these records of redisclosure and then make them available to parents and students. We note that printing and mailing costs may be reduced to the extent that e-mail is used to transmit the record, and if parents or students pick up the record on-site, but we do not have information to estimate these potential savings.

The Department believes that these changes will result in a net benefit to educational agencies and institutions because they will not have to record further disclosures made by State and Federal authorities and officials who redisclose information from education records on their behalf and will not have to ask for a copy unless a parent or eligible student asks to inspect and review the student's record of disclosures. State and Federal authorities and officials will also benefit because they will not have to provide their record of further disclosures to anyone unless the educational agency or institution asks for a copy. Overall, the costs to State and Federal authorities to record their own redisclosures will be offset by the savings that educational agencies and institutions will realize by not having to record the disclosures themselves.

#### **Notification of Compliance With Court Order or Subpoena**

The regulations in § 99.33(b)(92) require any party that rediscloses education records in compliance with a

court order or subpoena under § 99.31(a)(9) to provide the notice to parents and eligible students required under § 99.31(a)(9)(ii). We anticipate that this provision will affect mostly State and local educational authorities, which maintain education records they have obtained from their constituent districts and institutions and, under § 99.35(b), may redisclose the information, without consent, in compliance with a court order or subpoena under § 99.31(a)(9).

There is no change in costs as a result of shifting responsibility for notification to the disclosing party under this change. However, we believe that minimizing or eliminating uncertainty about which party is legally responsible for the notification will result in a net benefit to all parties.

#### **Health or Safety Emergency**

The regulations in § 99.32(a)(5) require that a school that discloses information under the health and safety emergency exception in § 99.36 record the articulable and significant threat that formed the basis for the disclosure and the parties to whom the education records were disclosed. Because § 99.32(a) already requires schools to record disclosures made under § 99.36, including the legitimate interests the parties had in requesting or obtaining the information, we believe these changes will not create any significant additional administrative costs for schools and that the benefit of including the legitimate interests the parties had in requesting or obtaining the information outweighs the costs.

#### **Directory Information Opt Outs**

The regulations in § 99.37(b) clarify that while an educational agency or institution is not required to notify former students under § 99.37(a) about the institution's directory information policy or allow former students to opt out of directory information disclosures, they must continue to honor a parent's or student's decision to opt out of directory information disclosures after the student leaves the institution. Most agencies and institutions should already comply with this requirement because of informal guidance and training provided by FPCO.

Parents and students will benefit from this clarification because it will help ensure that schools do not invalidate the parent's or student's decisions on directory information disclosures after the student is no longer in attendance. It will also benefit schools by eliminating any uncertainty they may have about whether they must continue to honor an opt out once the student is

no longer in attendance. We have insufficient information to estimate the number of institutions affected and the additional costs involved in changing systems to maintain opt-out flags on education records of former students.

#### **Paperwork Reduction Act of 1995**

Following publication of the NPRM, we provided, through a notice published in the **Federal Register** (73 FR 28810, May 19, 2008) opportunity for the public to comment on information collections in the current regulations, and indicated in that notice the pendency of the NPRM.

Additionally, based on comments received in response to the NPRM, we have identified several information collection requirements associated with these regulations. We describe these information collections in the following paragraphs and will be submitting these sections to OMB for review and approval. We note that the Paperwork Reduction Act of 1995 does not require a response to these information collection requirements unless they display a valid OMB control number. A valid OMB control number will be assigned to the information collection requirements at the end of the affected sections of the regulations.

##### *(1) § 99.31(a)(6)(ii)*

FERPA permits an educational agency or institution to disclose personally identifiable information from education records, without consent, to organizations conducting studies for or on behalf of the agency or institution for purposes of testing, student aid, and improvement of instruction. In the NPRM, we proposed to add § 99.31(a)(6)(ii) to require that an educational agency or institution to disclose personally identifiable information under § 99.31(a)(6)(i) only if it enters into a written agreement with the organization specifying the purposes of the study. Under these final regulations, this written agreement must specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require the organization to conduct the study in a manner that does not permit personal identification of parents and students by individuals other than representatives with legitimate interest of the organization that conducts the study; require the organization to destroy the information or return to the educational agency or institution when it is no

longer needed for the purposes for which the study was conducted; and specify the time period for the destruction or return of the information.

The Department did not identify in the NPRM the requirement in § 99.31(a)(6)(ii) as an information collection requirement under the Paperwork Reduction Act of 1995 and did not realize this would be an information collection requirement until a commenter brought this matter to our attention. The commenter pointed out that, while this change created another paperwork burden for school districts, the commenter did not object to the written agreement requirement because putting the requirements regarding the use and destruction of data in writing may improve compliance with FERPA. The Department agrees with the comment.

##### *(2) § 99.32(a)(1)*

Under FERPA, an educational agency or institution is required to record its disclosures of personally identifiable information from education records, even when it discloses information to its own State educational authority. This statutory requirement is reflected in the current FERPA regulations. The final regulations permit the State and local educational authorities and Federal officials listed in § 99.31(a)(3) to make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b) and require them to record these further disclosures of § 99.33(b) if the educational agency or institution does not do so. We have included provisions in the final regulations that require educational agencies and institutions to maintain a listing in each student's record of the State and local educational authorities and Federal officials and agencies that may make further disclosures of the student's education records without consent so that parents and eligible students will be made aware of these further disclosures.

##### *(3) § 99.32(a)(4)*

Under this new provision, parents and eligible students will be able to inspect and review any further disclosures that were made by any of the parties listed under § 99.31(a)(3) by asking the educational agency or institution to obtain a copy of the record of further disclosures. We believe that this is only a minor paperwork burden for schools because it would involve asking officials to whom they have disclosed education records for the record of further disclosure or, in the

case of some SEAs, accessing the State database for this information. Also, we do not expect that a large number of parents and eligible students will ask to see the record of further disclosures.

##### *(4) § 99.32(a)(5)*

During the development of the final regulations, we identified another change to the recordation requirements of § 99.32 that would require the collection of information. In response to several comments we received regarding changes to FERPA's "health or safety emergency exception" in § 99.36, we have amended § 99.32(a) to include a new recordation requirement. Specifically, we have added a paragraph to the recordation requirement that requires that for any disclosures under § 99.36 a school must record the articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure and the parties to whom the agency or institution disclosed information.

The Secretary believes that this is only a minor paperwork burden for schools because schools are already required to record disclosures made under § 99.36. The new language in § 99.32(a)(5) simply clarifies the type of information that must be recorded when a school discloses personally identifiable information in response to a health or safety emergency, either for one student or for all students in a school.

##### *(5) § 99.32(b)(2)*

In the NPRM, we specifically noted that the Department was interested in relieving any administrative burdens associated with recording disclosures of education records and, therefore, invited public comment on whether an SEA, the Department, or other authority or official listed in § 99.31(a)(3) should be allowed to maintain the record of the redisclosures it makes on behalf of an educational agency or institution under § 99.32(b).

Several commenters stated that an SEA (or other authority or official listed in § 99.31(a)(3)) should be responsible for maintaining the record of disclosure required under § 99.32 when it rediscloses information on behalf of educational agencies and institutions. The commenters stated that requiring each educational agency or institution, such as school districts, to record each redisclosure made by an SEA or other State educational authority on its behalf imposes an unacceptable recordkeeping burden on school districts and is impractical for State educational authorities to adhere to in making

further disclosures on behalf of the agency or institution. In response to these comments, we are revising § 99.32 to require the State and local educational authorities and Federal officials listed in § 99.31(a)(3) to maintain the record of further disclosures if the educational agency or institution does not do so and make it available to the educational agency or institution upon request. We agree that by requiring State and Federal authorities and officials to record their redisclosures in these circumstances school districts will have less total paperwork burden because schools will not have to comply with the recordkeeping requirement in these instances.

**Assessment of Educational Impact**

In the NPRM, and in accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e-4, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number does not apply.)

**List of Subjects in 34 CFR Part 99**

Administrative practice and procedure, Directory information, Education records, Information, Parents, Privacy, Records, Social Security Numbers, Students.

Dated: December 2, 2008.

**Margaret Spellings,**  
*Secretary of Education.*

■ For the reasons discussed in the preamble, the Secretary amends part 99 of title 34 of the Code of Federal Regulations as follows:

**PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY**

■ 1. The authority citation for part 99 continues to read as follows:

**Authority:** 20 U.S.C. 1232g, unless otherwise noted.

■ 2. Section 99.2 is amended by revising the note following the authority citation to read as follows:

**§ 99.2 What is the purpose of these regulations?**

\* \* \* \* \*

**Note to § 99.2:** 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

- 3. Section 99.3 is amended by:
  - A. Adding, in alphabetical order, a definition of *Biometric record*.
  - B. Revising the definitions of *Attendance*, *Directory information*, *Disclosure*, and *Personally identifiable information*.
  - C. In the definition of *Education records*, revising paragraph (b)(5) and adding a new paragraph (b)(6).

These additions and revisions read as follows:

**§ 99.3 What definitions apply to these regulations?**

\* \* \* \* \*

*Attendance* includes, but is not limited to—

- (a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and
- (b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

\* \* \* \* \*

*Biometric record*, as used in the definition of *personally identifiable*

*information*, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

\* \* \* \* \*

*Directory information* means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

- (1) Social security number; or
- (2) Student identification (ID) number, except as provided in paragraph (c) of this section.

(c) Directory information includes a student ID number, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

\* \* \* \* \*

*Disclosure* means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

\* \* \* \* \*

**Education Records**

\* \* \* \* \*

(b) \* \* \*

- (5) Records created or received by an educational agency or institution after

an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

\* \* \* \* \*

**Personally Identifiable Information**

The term includes, but is not limited to—

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Authority: 20 U.S.C. 1232g)

\* \* \* \* \*

■ 4. Section 99.5 is amended by redesignating paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

**§ 99.5 What are the rights of students?**

- (a)(1) \* \* \*
- (2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

\* \* \* \* \*

- 5. Section 99.31 is amended by:
  - A. Redesignating paragraph (a)(1) as paragraph (a)(1)(i)(A) and adding new paragraphs (a)(1)(i)(B) and (a)(1)(ii).
  - B. Revising paragraph (a)(2).
  - C. Redesignating paragraphs (a)(6)(iii) and (a)(6)(iv) as paragraphs (a)(6)(iv) and (a)(6)(v), respectively.
  - D. Revising paragraph (a)(6)(ii).
  - E. Adding a new paragraph (a)(6)(iii).
  - F. In paragraph (a)(9)(ii)(A), removing the word "or" after the punctuation ";

- G. In paragraph (a)(9)(ii)(B), removing the punctuation "." and adding in its place the word "or".
- H. Adding paragraph (a)(9)(ii)(C).
- I. Adding paragraph (a)(16).
- J. Revising paragraph (b).
- K. Adding paragraphs (c) and (d).
- L. Revising the authority citation at the end of the section.

The additions and revisions read as follows:

**§ 99.31 Under what conditions is prior consent not required to disclose information?**

- (a) \* \* \*
  - (1)(i)(A) \* \* \*
    - (B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—
      - (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
      - (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
      - (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.
    - (ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

**Note:** Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(6)(i) \* \* \*  
 (ii) An educational agency or institution may disclose information under paragraph (a)(6)(i) of this section only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution enters into a written agreement with the organization that—  
 (1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and

(4) Requires the organization to destroy or return to the educational agency or institution all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

(iii) An educational agency or institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

\* \* \* \* \*

(9) \* \* \*

(ii) \* \* \*

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

\* \* \* \* \*

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or

institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)).

■ 6. Section 99.32 is amended by:

■ A. Revising paragraph (a)(1).

■ B. Adding new paragraphs (a)(4) and (a)(5).

■ C. Redesignating paragraphs (b)(1) and (b)(2) as paragraphs (b)(1)(i) and (b)(1)(ii) and redesignating paragraph (b), introductory text, as paragraph (b)(1).

■ D. Revising newly redesignated paragraph (b)(1).

■ E. Adding a new paragraph (b)(2).

■ F. Revising paragraph (d)(5).

The additions and revisions read as follows:

**§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?**

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

\* \* \* \* \*

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

\* \* \* \* \*

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

\* \* \* \* \*

(d) \* \* \*

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

\* \* \* \* \*

■ 7. Section 99.33 is amended by revising paragraphs (b), (c), (d), and (e) to read as follows:

\* \* \* \* \*

**§ 99.33 What limitations apply to the redisclosure of information?**

\* \* \* \* \*

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of § 99.31; and

(ii)(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required

to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(e) If this Office determines that a third party outside the educational agency or institution improperly rediscloses personally identifiable information from education records in violation of this section, or fails to provide the notification required under paragraph (b)(2) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

\* \* \* \* \*

■ 8. Section 99.34 is amended by revising paragraph (a)(1)(ii) to read as follows:

**§ 99.34 What conditions apply to disclosure of information to other educational agencies and institutions?**

- (a) \* \* \*
- (1) \* \* \*

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

\* \* \* \* \*

■ 9. Section 99.35 is amended by revising paragraphs (a) and (b)(1) to read as follows:

**§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?**

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal

requirements that relate to those programs.

(2) Authority for an agency or official listed in § 99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by the Act or this part and must be established under other Federal, State, or local authority.

(b) \* \* \*

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the officials or agencies headed by officials referred to in paragraph (a) of this section, except that those officials and agencies may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and

\* \* \* \* \*

■ 10. Section 99.36 is amended by revising paragraphs (a) and (c) to read as follows:

**§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?**

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

\* \* \* \* \*

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

\* \* \* \* \*

- 11. Section 99.37 is amended by:
  - A. Revising paragraph (b).
  - B. Adding new paragraphs (c) and (d).
 The revision and additions read as follows:

**§ 99.37 What conditions apply to disclosing directory information?**

\* \* \* \* \*

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled.

(d) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

\* \* \* \* \*

■ 12. Section 99.62 is revised to read as follows:

**§ 99.62 What information must an educational agency or institution submit to the Office?**

The Office may require an educational agency or institution to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out its enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(f) and (g))

**§ 99.63 [Amended]**

■ 13. Section 99.63 is amended by removing the mail code designation "4605" before the punctuation "."

■ 14. Section 99.64 is amended by:

- A. Revising the section heading.
- B. Revising paragraphs (a) and (b).

The revisions read as follows:

**§ 99.64 What is the investigation procedure?**

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution.

\* \* \* \* \*

■ 15. Section 99.65 is revised to read as follows:

**§ 99.65 What is the content of the notice of investigation issued by the Office?**

(a) The Office notifies the complainant, if any, and the educational agency or institution in writing if it initiates an investigation under § 99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the allegations against the educational agency or institution; and

(2) Directs the agency or institution to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

■ 16. Section 99.66 is amended by revising paragraphs (a), (b), and the introductory text of paragraph (c) to read as follows:

**§ 99.66 What are the responsibilities of the Office in the enforcement process?**

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution. A notice of findings issued under paragraph (b) of this section to an educational agency or institution that has not complied with a provision of the Act or this part—

\* \* \* \* \*

■ 17. Section 99.67 is amended by revising paragraph (a) to read as follows:

**§ 99.67 How does the Secretary enforce decisions?**

(a) If an educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part E of the General Education Provisions Act—

\* \* \* \* \*

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