The Rights of Parents and The Responsibilities of Schools

Public Law 94-142

The Education for All Handicapped Children Act

Mandated for Implementation, September, 1978

and

Public Law 93-112 - Section 504

Non-Discrimination on the Basis of Handicap Act

- Complete text of the laws.
- Up-to-date amendments.
- Policy interpretations from the Federal Register.

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The Rights of Parents
and
The Responsibilities of Schools

Compiled by James G. Meade, Ph.D.

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An Introduction to Reading and Using P.L. 94-142 and Section 504 of P.L. 93-112

Section 504 of PL 93-112 is a civil rights law.

PL 94-142 is a funding law containing specific procedures that implement certain sections of the civil rights law.

Anyone wishing to use these two federal laws for the handicapped should understand the difference. Though both guarantee free appropriate public education for the handicapped, they do so in quite different ways.

Section 504 (often referred to as simply "504" and reprinted here from the *Federal Register* of Wednesday, May 4, 1977) is designed as a civil rights law, and anyone who has been alive in America during the past three decades is likely to know what that means. The document states inalienable principles, similar in that sense to the Bill of Rights of the United States Constitution.

In comparison with PL 94-142, the "Nondiscrimination on the Basis of Handicap Act" (Section 504) states ideals, the other procedures. For example, "Free Appropriate Public Education" as set forth in 504 is as absolute as "freedom of speech" or "freedom of the press" in the Bill of Rights. The act requires "the provision of educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . . ." But for such an ideal to be realized and protected we need practical administrative procedures.

Practical Procedures

The Bill of Rights is brief, but to make it real we need the rest of the Constitution and the full body of American laws. Section 504 itself is but a single phrase within another law, and it states one right: "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The 504 *Regulations* reprinted here then begin to implement the ideal, but for primary and secondary education the *Regulations* for the Education For All Handicapped Children Act implement the ideal more completely.

PL 94-142, the "Education for All Handicapped Children Act," is a body of practical procedures. When *it* says "Free Appropriate Public Education" it means specifically defined requirements. By "free appropriate public education," that is, PL 94-142 means "special education and related services which . . . are provided in conformity with an individualized education program which meets the requirements under Sections 121a.340-121a.349 of Subpart C."

The "Education for All Handicapped Children Act" defines administrative procedures to be followed by all the machinery of local schools, state governments, and the federal government.

Complementary Laws

The two laws are complementary, at once setting absolute ideals and prescribing the precise procedures to fulfill them. Either law by itself is strong. The two together are much stronger than the sum of the two individual laws.

For instance, the funding law (PL 94-142) says under the heading "limitations and exclusions": "In determining the amount of a grant . . . the Commissioner may not count: (1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the state."

If taken only by itself the funding law might be seen as placing limits on the number of children to be serviced. PL 94-142, after all, does state the maximum amount of money the federal government will provide the state. Section 504, however, makes it clear that the limit in funding is in no sense a limit in state and local responsibilities to handicapped children. Were it not for the civil rights law, many might conclude that a restriction was at least implied. — The schools should provide special services to up to 12 percent of the total population. Some might even think that to service more might be illegal.

The "Rehabilitation Act of 1973" (PL 93-112 and Section 504) eliminates such possible misinterpretation, however. It says boldly, "A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." The government will fund up to 12 percent of all children. The school districts, though, must service all handicapped children who qualify.

Reconciling the two laws — the one offering funding by a quota system, the other requiring "free appropriate public education" for all handicapped — is the business of school boards and local schools, teachers, parents, and taxpayers. To be worked out in Individualized Education Plan meetings and even hearings, it is the demanding process the two laws bring upon every school district in the country. The two laws constitute a kind of carpenter's vice,

with PL 94-142 defining procedures on one side, section 504 staunchly maintaining the ideals on the other.

Other Differences

There are other, related differences between the funding law and the civil rights law. Section 504, for one thing, is not only broader than PL 94-142 in its requirements for the schools. It is broader overall. Where the "Education for All Handicapped Children Act" relates entirely to preschool, primary, and secondary education; the "Nondiscrimination on the Basis of Handicap" regulations also apply to employment, postsecondary education, health, and "program accessibility." (The well-known requirements for "barrier-free construction," that is, can be found only in section 504.)

If one wants to find a prohibition against discrimination in any form for the handicapped of any age in any part of society, then section 504 is the likely source . . . more likely than PL 94-142.

The funding law, on the other hand, though more focused in its coverage than Section 504, is much more detailed and complete within the specific area it treats. Where the civil rights law devotes only one and one half pages to preschool, elementary, and secondary education; the funding law sets forth detailed regulations on the same subject that require twenty times as much space.

It is to PL 94-142 that one must look, for instance, for the specific due process procedures a parent or school must follow to win free appropriate public education through legal means. Where section 504 may say that state and local officials must give "notice" to parents of a handicapped child, PL 94-142 lists everything that the notice must contain — a full description of procedural safeguards, "a description of each evaluation procedure, test, record, or report the agency uses," and much more.

Knowing just so much about the two laws — that section 504 is a civil rights law and PL 94-142 a funding law — is a good beginning toward making proper use of both.

The third set of regulations reprinted here, "Procedures for Evaluating Specific Learning Disabilities" from the *Federal Register* of December 29, 1977, offers amendments and additions to the funding law. Everything said about PL 94-142 is true of the "procedures" as well.

The fourth group of regulations — "Nondiscrimination on the Basis of Handicap in Federally Assisted Programs" — are directives to government agencies for implementing section 504 and, similarly, can be seen as part of that law.

With this much background, one is ready to read and implement the regulations themselves.

Summary of Public Law 94-142 with Pertinent Excerpts

Education for All Handicapped Children Act

Free Appropriate Public Education (FAPE)

Summary:

. . . The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children. . . .

(See also 121a.1 and 121a.4, which specify that Free Appropriate Public Education for the handicapped include "special education and related services to meet their unique needs.")

Handicapped children

Section 121a.5 Handicapped children. See p. 40.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with Sections 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness,

due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors:

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(Editor's Note: Amended according to *Federal Register*, Thursday, December 29, 1977.)

(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

Special Education and Related Services

Section 121a.13 Related services.

See p. 41.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

Section 121a.14 Special education.

See p. 42.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a

handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

Timeliness and Ages for Free Appropriate Public Education

Section 121a.122 Timeliness and ages for free appropriate public education. See p. 43.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

Identification

Section 121a.128 Identification, location, and evaluation of handicapped children. See p. 44.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; . . .

Residential placement

Section 121a.302 Residential placement. See p. 50.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

Priorities

Section 121a.320 Definitions of "first priority children" and "second priority children" . . . the term: See p. 51.

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under Section 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

Comment. After September 1, 1978, there should be no second priority

children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

Individualized Education Programs (IEP)

Participants in meetings

Section 121a.344 Participants in meetings. See p. 52.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Section 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

Parent participation encouraged

Section 121a.345 Parent participation. See p. 52.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including: . . .

Content

Section 121a.346 Content of individualized education program. See p. 53.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

Accountability

Section 121a.349 Individualized education program — accountability. See p. 53.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

Personnel Development

Section 121a.380 Scope of system. See p. 54.

Each annual program plan must include a description of programs and pro-

cedures for the development and implementation of a comprehensive system of personnel development. . .

Due Process Procedures for Parents and Children

Independent educational evaluation

Section 121a.503 Independent educational evaluation. See p. 56.

. . .

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under Section 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

Prior notice, parent consent

Section 121a.504 Prior notice; parent consent. See p. 57.

(a) *Notice.* Written notice which meets the requirements under Section 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child. . . .

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

Content of notice

Section 121a.505 Content of notice. See p. 57.

(a) The notice under Section 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, . . .

Right to an impartial hearing

Section 121a.506 Impartial due process hearing. See p. 57.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in Section 121a.504(a) (1) and (2).

Hearing Rights

Section 121a.508 Hearing rights. See p. 57.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

Timeliness and convenience of hearings and reviews

Section 121a.512 Timeliness and convenience of hearings and reviews. See p. 58.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties. . . .

Surrogate Parents

Section 121a.514 Surrogate parents. See p. 58.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in Section 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents.

Criteria for Determining Specific Learning Disability

Section 121a.541 Criteria for determining the existence of a specific learning disability. See p. 83.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a) (2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:
(i) Oral expression;
(ii) Listening comprehension;
(iii) Written expression;
(iv) Basic reading skill;
(v) Reading comprehension;
(vi) Mathematics calculation; or
(vii) Mathematics reasoning.

(Editor's Note: Inserted in accordance with *Federal Register*, December 29, 1977.)

Least Restrictive Environment [Mainstreaming]

Section 121a.550 General. See p. 59.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Sections 121a.550-121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Access Rights

Section 121a.562 Access rights. See p. 60.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. . . .

Complaint Procedures

Section 121a.602 Adoption of complaint procedures. See p. 63.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with Section 121a.194.

State entitlement; formula

Section 121a.701 State entitlement; formula. See p. 64.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978 — 5 percent,
(2) 1979 — 10 percent,
(3) 1980 — 20 percent,
(4) 1981 — 30 percent, and
(5) 1982, and for each fiscal year after 1982, 40 percent.

Limitations and exclusions

Section 121a.702 Limitations and exclusions. See p. 64.

(a) In determining the amount of a grant under Section 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State; . . .

(Editor's Note: The limit on Specific Learning Disability children, set forth in the August, 1977 *Federal Register,* is removed in the December 29, 1977 *Federal Register.* Says the latter set of regulations:

"Upon the effective date of these regulations, the two percent limit (the 'cap') on the number of children with specific learning disabilities who may be counted for allocation purposes under part B is removed.")

Summary of Section 504 — Public Law 93-112 with Pertinent Excerpts (Rehabilitation Act of 1973)

Nondiscrimination on the Basis of Handicap Act

Summary:

"No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . ."

> **"Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap."**

Handicapped Person

Section 84.3 . . . See p. 99.

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

Employment Practices

— Discrimination prohibited

Section 84.11 Discrimination prohibited. See p. 101.

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

— Reasonable accommodation

Section 84.12 Reasonable Accommodation. See p. 101.

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

— Preemployment inquiries

Section 84.14 Preemployment Inquiries. See p. 102.

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

Program Accessibility

— Discrimination prohibited

Section 84.21 Discrimination prohibited. See p. 102.

No qualified handicapped person shall, because a recipient's facilities are

inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

Preschool, Elementary, and Secondary Education

— Free appropriate public education "regardless of the nature or severity of the person's handicap." See p. 103.

Section 84.33 Free appropriate public education.

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

— Free education

Section 84.33 See p. 103.

. . .

(c) *Free education* — (1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. . . .

— Transportation

Section 84.33 See p. 103.

. . .

(c)(2) . . . The recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

— Residential placement

Section 84.33 See p. 103.

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

— Educational setting — [Mainstreaming]

Section 84.34 Educational setting. See p. 103.

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

Postsecondary Education

— Admissions and Recruitment

Section 84.42 Admissions and recruitment. See p. 104.

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

— Academic adjustments

Section 84.44 Academic adjustments. See p. 105.

(a) . . . Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

— Course examinations

Section 84.44 See p. 105.

. . .

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

Health, Welfare, and Social Services

— Drug and alcohol addicts

Section 84.53 Drug and alcohol addicts. See p. 106.

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

Penalty for noncompliance

Section 80.8 Procedure for effecting compliance See p. 116.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law.

Introduction to the Full Text of the Laws

Public Law 94-142 makes surprisingly good reading for anyone looking to help a handicapped child. Within its tightly structured paragraphs is the promise of attention, skilled teaching, careful follow-up, direct school responsibility, and significant expenditure to help the child.

The purpose of this book is to satisfy the need to bring such significant reading material before the public and, secondly, to present the regulations of the laws themselves in a format that parents and school officials (not attorneys alone) will find easy to read. For beneath the imposing legal documents that follow is knowledge, practical advice, and information for the parent, teacher, or school administrator looking to improve the lives of all handicapped children.

The brief descriptions of the various laws may help you to select those sections that are pertinent for your particular needs. The full text of the regulations to the Education for All Handicapped Children Act and Section 504 follow.

In addition, each state has its own special education laws but they are now amended or revised to conform with the federal laws. There are court decisions — *Mills v. Board of Education of the District of Columbia,* and *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania,* that interpret and apply the law.

"Affirmative Action for Disabled People: A pocket Guide," put out by the President's Committee on Employment of the Handicapped, says in summary of Section 503, "Every employer doing business with the Federal Government under a contract for more than $2,500 must take 'affirmative action' to hire handicapped people. Contracts may be for the procurement of supplies or services, or for the use of real or personal property. 'Affirmative action' covers more than hiring. It also covers job assignments, promotions, training transfers, working conditions, terminations, etc. Half of all the businesses in America — some 3,000,000 — are covered."

'Affirmative action' has meant major changes in hiring practices for minorities and women. It means the same for the handicapped. The Department of Labor, not the Department of Health, Education, and Welfare, has jurisdiction over Section 503. Its requirements have not, like "architectural barriers" or "Free Appropriate Public Education" provisions of companion laws, attracted the attention of the schools and universities. Section 503 applies to employment. Nevertheless, the regulations could have applications to schools and universities, certainly to the handicapped as they move from schools into society. Section 503 regulations are reprinted here.

Another law likely to affect many people appeared in the Federal Register on May 8, 1978 — regulations under P.L. 81-874 dealing with "handicapped children residing on Indian lands or whose parents are in the uniformed services." These young people qualify for additional financial assistance, beyond P.L. 94-142, so long as they are already receiving special education "which conforms to the requirements for special education programs under Part B of the Education of the Handicapped Act."

As a service to Native Americans, military families living abroad, and those educating such groups the latest regulations appear here.

Handicapped children in state supported institutions also qualify for special funding. In their case — in contrast to children served by P.L. 81-174 — additional funding comes only if the state has P.L. 94-142 monies after "all other requirements of P.L. 94-142 have been met." Aimed almost exclusively at state department of education officials, the new regulations to P.L. 89-313 specify how such officials may (and may *not*) use P.L. 89-313 monies in relation to P.L. 94-142.

The April 17, 1978 regulations also reaffirm that handicapped children in institutions do qualify for Free Appropriate Public Education under the "Education for All Handicapped Children Act" and the "Nondiscrimination on the Basis of Handicap Act." Because parents and teachers are not likely to have use for the complete text, the regulations are not reprinted here.

Although the regulations recapitulate and add to the original law, the 1975 text of the Education For All Handicapped Children Act has been reprinted here for reference.

For Section 504 the 1973 original is one all-inclusive "we-prohibit-discrimination" sentence. It says, "No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The Regulations for P.L. 94-142 and Section 504, however, are in themselves a firm foundation for the parent seeking free appropriate public education for their handicapped child and for the school seeking to comply with the law of the land. To provide that foundation, the full texts of the regulations follow.

Guidelines to HEW Policy Interpretations Under Section 504

On May 1, 1978, the Office for Civil Rights announced that it would "hereafter publish all major policy determinations in the *Federal Register*." By September, 1978, five policy interpretations had appeared, the first two on May 1, 1978 and three on August 14, 1978. Here is a summary of what they say. See complete text on pp. 137-144.

Discrimination Prior to the Effective Date of Regulations and State of Limitations for Such Discrimination, *Federal Register*, May 1, 1978.

Policy Interpretation No. 1

Discrimination Prior to the Effective Date of Regulations

"The Office for Civil Rights will investigate complaints of alleged discrimination that occurred after September 26, 1978, the date section 504 became law, and prior to June 3, 1977, the date the section 504 regulation became effective."

Policy Interpretation No. 2

"The 180-day limitations period for complaints of discrimination will not be applied to acts of discrimination occurring prior to the effective date of the regulation . . . . For these complaints, the 180-day limitations period will begin to run from June 3, 1977.

(Editor's note on interpretations 1 and 2.

These two interpretations seem to give with one hand and take away with the other. The first says that the office will investigate complaints prior to 1977. The second, however, announces an expiration date of November 30, 1977 for all who wished to file such complaints. The interpretation appeared on May 1, 1978.)

Program Accessibility, Participation of the Handicapped in Contact Sports, and School Board Members Acting as Hearing Officers, *Federal Register*, August 14, 1978

Policy Interpretation No. 3

"A recipient [of federal funds] is not required to make structural modifications to its existing facilities if its services can be made effectively available to mobility impaired persons by other methods." Institutions must, however, give priority to those methods "that offer handicapped and nonhandicapped persons programs and activities in the same setting."

The regulation "does not allow for waivers."

Policy Interpretation No. 4

"Carrying is an unacceptable method for achieving program accessibility for mobility impaired persons except in two cases."

- as an interim measure, while structural changes are completed.
- "in manifestly exceptional cases" if the carriers are well-instructed and reliable

Policy Interpretation No. 5

"Students who have lost an organ, limb, or appendage but who are otherwise qualified, may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition. . . ."

Steps for Parents to Follow in Using the Law

P.L. 94-142 as a whole is designed to cover all possible situations that might come up under the law and all responsibilities of local and state educational agencies. Within its many sections are eight precise steps any parent could take in asking the school for free appropriate education for a handicapped child.

Though the law does not say it, most advocacy groups advise parents to follow an additional step — to keep a telephone log of conversations with the school and a complete file of letters exchanged. Here are questions for parents to ask schools:

1. **Does my child qualify for Free Appropriate Public Education (FAPE) under P.L. 94-142?**

   If he or she is handicapped, no matter how severely, he qualifies. Section 121a.1 sets forth the FAPE requirement. See pp. 39 & 40. Section 121a.5 lists and defines handicaps covered. See pp. 40 & 41.

2. **Will you test my child? (Evaluation)**

   Sections 121a.530 to 121a.534 define evaluation requirements. See pp. 58-59. Section 121a.128 requires that the school carry out an evaluation. See p. 44. Sections 121a.500 and 121a.504 explain parental consent. See pp. 56 & 57. Section 121a.534 says that the school must re-evaluate if the parent requests it. See p. 59.

3. **What tests will you use? What do the test results mean?**

   When the school notifies you of the evaluation, it must send you "a description of each evaluation, procedure, test, record, or report the agency uses as a basis for [the action proposed or refused]." See Section 121a.505(a)(3) on p. 57.

4. **When may I come in to review my child's records?**

   "In no case later than 45 days after the request has been made," says Section 121a.562(a). See p. 60.

   Reviewing the records is one good way to prepare for the meeting to draw up the individualized education program, which will define the child's program for the year.

5. **When do we meet to draw up the Individualized Education Programs?**

   The meeting must be "within thirty calendar days of a determination that the child needs special education and related services." See Section 121a.343(c) on p. 52.

   Parents are invited. See Section 121a.344(a)(3) on p. 52.

   Moreover, schools must take special steps to assure that parents participate. See whole section of 121a.345 on pp. 52 & 53.

6. **Where do I go for a good independent educational evaluation? I would like the school to pay for it.**

   If not satisfied with the school's individualized education program, parents, under 121a.503, have the right "to obtain an independent educational evaluation." The school, however, may initiate a hearing "to show that its evaluation is appropriate." If the program is found appropriate, "the parent still has the right to an independent educational evaluation, but not at public expense." See pp. 56 & 57.

7. **Will you please arrange for an impartial due process hearing?**

   Parents need not approve the school's Individualized Educational Program (I.E.P.). They can, at any time, call for an impartial due process hearing. See Section 121a.506 on p. 57.

8. **Where can I go for free or low cost legal help and other relevant services?**

   The **List of Information Centers** on pp. 163-184 can help the parent find such assistance. But, also, Section 121a.506 says, "The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area." See p. 57.

Public Law 94-142
94th Congress, S. 6
November 29, 1975

An Act

To amend the Education of the Handicapped Act to provide educational assistance to all handicapped children, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Education for All Handicapped Children Act of 1975".

Education for All Handicapped Children Act of 1975.
20 USC 1401 note.

EXTENSION OF EXISTING LAW

SEC. 2. (a)(1)(A) Section 611(b)(2) of the Education of the Handicapped Act (20 U.S.C. 1411(b)(2)) (hereinafter in this Act referred to as the "Act"), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(B) Section 611(c)(1) of the Act (20 U.S.C. 1411(c)(1)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(2) Section 611(c)(2) of the Act (20 U.S.C. 1411(c)(2)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977", and by striking out "2 per centum" each place it appears therein and inserting in lieu thereof "1 per centum".

(3) Section 611(d) of the Act (20 U.S.C. 1411(d)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977".

(4) Section 612(a) of the Act (20 U.S.C. 1412(a)), as in effect during the fiscal years 1976 and 1977, is amended—

(A) by striking out "year ending June 30, 1975" and inserting in lieu thereof "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977"; and

(B) by striking out "fiscal year 1974" and inserting in lieu thereof "preceding fiscal year".

(b)(1) Section 614(a) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1975" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,". **20 USC 1411 note.**

(2) Section 614(b) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,". **20 USC 1411 note.**

20 USC 1413 note.

(3) Section 614(c) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

Ante, p. 773.

(c) Section 612(a) of the Act, as in effect during the fiscal years 1976 and 1977, and as amended by subsection (a)(4), is amended by inserting immediately before the period at the end thereof the following: ", or $300,000, whichever is greater".

20 USC 1412.

(d) Section 612 of the Act (20 U.S.C. 1411), as in effect during the fiscal years 1976 and 1977, is amended by adding at the end thereof the following new subsection:

Publication in Federal Register.

"(d) The Commissioner shall, no later than one hundred twenty days after the date of the enactment of the Education for All Handicapped Children Act of 1975, prescribe and publish in the Federal Register such rules as he considers necessary to carry out the pro-

Ante, p. 773. visions of this section and section 611.".

20 USC 1411 note.

(e) Notwithstanding the provisions of section 611 of the Act, as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated $100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and $200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act, as in effect during such fiscal years.

STATEMENT OF FINDINGS AND PURPOSE

20 USC 1401 note.

SEC. 3. (a) Section 601 of the Act (20 U.S.C. 1401) is amended by inserting "(a)" immediately before "This title" and by adding at the end thereof the following new subsections:

"(b) The Congress finds that—

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.". Ante, p. 773.

(b) The heading for section 601 of the Act (20 U.S.C. 1401) is amended to read as follows:

"SHORT TITLE; STATEMENT OF FINDINGS AND PURPOSE".

DEFINITIONS

SEC. 4. (a) Section 602 of the Act (20 U.S.C. 1402) is amended— 20 USC 1401.

(1) in paragraph (1) thereof, by striking out "crippled" and inserting in lieu thereof "orthopedically impaired", and by inserting immediately after "impaired children" the following: ", or children with specific learning disabilities,";

(2) in paragraph (5) thereof, by inserting immediately after "instructional materials," the following: "telecommunications, sensory, and other technological aids and devices,";

(3) in the last sentence of paragraph (15) thereof, by inserting immediately after "environmental" the following: ", cultural, or economic"; and

(4) by adding at the end thereof the following new paragraphs:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

"(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5).

"(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

"(20) The term 'excess costs' means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this part or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.

20 USC 241a note, 881.

"(21) The term 'native language' has the meaning given that term by section 703(a)(2) of the Bilingual Education Act (20 U.S.C. 880b-1(a)(2)).

"(22) The term 'intermediate educational unit' means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.".

(b) The heading for section 602 of the Act (20 U.S.C. 1402) is amended to read as follows:

"DEFINITIONS".

ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

SEC. 5. (a) Part B of the Act (20 U.S.C. 1411 et seq.) is amended to read as follows:

"PART B—ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

"ENTITLEMENTS AND ALLOCATIONS

20 USC 1411. Post, p. 793.

"SEC. 611. (a)(1) Except as provided in paragraph (3) and in section 619, the maximum amount of the grant to which a State is entitled under this part for any fiscal year shall be equal to—

"(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

"(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

"(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this part for the fiscal year ending September 30, 1977.

"(2) For the purpose of this subsection and subsection (b) through subsection (e), the term 'State' does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands. **"State."**

"(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the average of the number of such children receiving special education and related services on October 1 and February 1 of the fiscal year preceding the fiscal year for which the determination is made.

"(4) For purposes of paragraph (1)(B), the term 'average per pupil expenditure', in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year. **"Average per pupil expenditure."**

"(5)(A) In determining the allotment of each State under paragraph (1), the Commissioner may not count—

"(i) handicapped children in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State;

"(ii) as part of such percentage, children with specific learning disabilities to the extent the number of such children is greater than one-sixth of such percentage; and

"(iii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965. **20 USC 241c-1.**

"(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

"(b)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1978—

"(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 612(3).

"(2) Of the funds which any State may use under paragraph (1)

(A)—

"(A) an amount which is equal to the greater of—

"(i) 5 per centum of the total amount of funds received under this part by such State; or

"(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 612 and 613;

"(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3).

"(c)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

"(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 612(3).

"(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—

"(i) an amount which is equal to the greater of—

"(I) 5 per centum of the total amount of funds received under this part by such State; or

"(II) $200,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 612 and 613; and

"(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3).

"(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

"(3) The provisions of section 613(a)(9) shall not apply with respect to amounts available for use by any State under paragraph (2).

"(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

"(i) such local educational agency or intermediate educational unit is entitled, under subsection (d), to less than $7,500 for such fiscal year; or

"(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 614.

"(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

"(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this part.

"(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(2) Each jurisdiction to which this subsection applies shall be

entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this part for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

Ante, p. 774.

"(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

"(f)(1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this part for that fiscal year.

"(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 614(a) and which is approved by the Commissioner. The provisions of section 616 shall apply to any such application.

"(g)(1) If the sums appropriated for any fiscal year for making payments to States under this part are not sufficient to pay in full the total amounts which all States are entitled to receive under this part for such fiscal year, the maximum amounts which all States are entitled to receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

"ELIGIBILITY

20 USC 1412.

"SEC. 612. In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

"(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

"(A) there is established (i) a goal of providing full educational

opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

"(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

"(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617(c); and

"(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

"(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

"(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614(a)(5).

"(5) The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

Administration.

"(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

Notice, hearings.

"(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians

of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613.

"STATE PLANS

20 USC 1413.

"SEC. 613. (a) Any State meeting the eligibility requirements set forth in section 612 and desiring to participate in the program under this part shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

"(1) set forth policies and procedures designed to assure that funds paid to the State under this part will be expended in accordance with the provisions of this part, with particular attention given to the provisions of sections 611(b), 611(c), 611(d), 612(2), and 612(3);

"(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-2), section 305(b)(8) of such Act (20 U.S.C. 844a (b)(8)) or its successor authority, and section 122(a)(4)(B) of the Vocational Education Act of 1963 (20 U.S.C. 1262(a)(4)(B)), under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

20 USC 241c-1.

"(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

"(4) set forth policies and procedures to assure—

"(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

"(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

"(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this part for services to any child who is determined to be erroneously classified as eligible to be counted under section 611(a) or section 611(d);

"(6) provide satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property;

Reports and records.

"(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this part, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part;

Notice, hearings.

"(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

"(9) provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

"(10) provide, consistent with procedures prescribed pursuant to section 617(a)(2), satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

Evaluation.

"(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 617; and

State advisory panel.

"(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

"(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) as are contained in section 614(a), except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 614(a).

"(c) The Commissioner shall approve any State plan and any modification thereof which—

"(1) is submitted by a State eligible in accordance with section 612; and

"(2) meets the requirements of subsection (a) and subsection (b).

Notice, hearings.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity

for a hearing to the State.

"APPLICATION

20 USC 1414.

"SEC. 614. (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d) for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

"(1) provide satisfactory assurance that payments under this part will be used for excess costs directly attributable to programs which—

"(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

"(B) establish policies and procedures in accordance with detailed criteria prescribed under section 617(c);

"(C) establish a goal of providing full educational opportunities to all handicapped children, including—

"(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 613(a)(3);

"(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

"(iii) the participation and consultation of the parents or guardian of such children; and

"(iv) to the maximum extent practicable and consistent with the provisions of section 612(5)(B), the provision of special services to enable such children to participate in regular educational programs;

"(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

"(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

"(2) provide satisfactory assurance that (A) the control of funds provided under this part, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part;

"(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

"(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of

Recordkeeping.

such information furnished under subclause (A);

"(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

Public information, availability.

"(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

"(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a); and

"(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 612(5)(B), 612(5)(C), and 615.

Application approval.

"(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application meets the requirements of subsection (a), except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) is approved by the Commissioner under section 613(c). A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application does not meet the requirements of subsection (a).

Notice, hearing.

"(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

"(i) make no further payments to such local educational agency or such intermediate educational unit under section 620 until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

"(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a).

"(B) The provisions of the last sentence of section 616(a) shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

"(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 615 which is adverse to the local educational agency or intermediate educational unit involved in such decision.

"(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 611(c)(4)(A)(i) or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

"(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 611(d) if an individual application of any such local educational agency had been

approved.

"(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a) and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part. Rules and regulations.

"(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this part, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

"(d) Whenever a State educational agency determines that a local educational agency—

"(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a);

"(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

"(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this part.

"(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 611(d), to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies. Funds, reallocation.

"(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611(d) for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

"PROCEDURAL SAFEGUARDS

20 USC 1415.

"SEC. 615. (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b)(1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the

child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Hearing.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12)).

"(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Civil action.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the

parents or guardian, be placed in the public school program until all such proceedings have been completed.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

District courts jurisdiction.

"WITHHOLDING AND JUDICIAL REVIEW

"SEC. 616. (a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

Notice, hearing. 20 USC 1416.

"(1) that there has been a failure to comply substantially with any provision of section 612 or section 613, or

"(2) that in the administration of the State plan there is a failure to comply with any provision of this part or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 613(a)(2) within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in clause (1) or clause (2), no further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this part shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

Petition for review.

"(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 613, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

"(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"ADMINISTRATION

"SEC. 617. (a)(1) In carrying out his duties under this part, the 20 USC 1417.

Commissioner shall—

"(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this part;

"(B) provide such short-term training programs and institutes as are necessary;

"(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

"(D) assure that each State shall, within one year after the date of the enactment of the Education for All Handicapped Children Act of 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

"(2) As soon as practicable after the date of the enactment of the Education for All Handicapped Children Act of 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this part in order to assure equity among the States. Regulations.

"(b) In carrying out the provisions of this part, the Commissioner (and the Secretary, in carrying out the provisions of subsection (c)) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

"(c) The Secretary shall take appropriate action, in accordance with the provisions of section 438 of the General Education Provisions Act, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of this part. 20 USC 1232g.

"(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 618 and to carry out his duties under subsection (a)(1) of this subsection without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time. 5 USC 5101, 5331.

"EVALUATION

"SEC. 618. (a) The Commissioner shall measure and evaluate the impact of the program authorized under this part and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children. 20 USC 1418.

"(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this part. In carrying out his responsibilities under this section, the Commissioner shall—

"(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this part and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this part, including—

"(A) the number of handicapped children in each State, within each disability, who require special education and related services;

"(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

"(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 612(5)(B) and section 614(a)(1)(C)(iv), and the number

of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

"(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

"(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

"(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this Act; and

"(2) provide for the evaluation of programs and projects assisted under this part through—

"(A) the development of effective methods and procedures for evaluation;

"(B) the testing and validation of such evaluation methods and procedures; and

"(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

"(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b), the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

Report, transmittal to congressional committees.

"(d)(1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b).

Contents.

"(2) The Commissioner shall include in each such report—

"(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

"(B) any recommendations for change in the provisions of this part, or any other Federal law providing support for the education of handicapped children; and

"(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 611, including actions undertaken by the Commissioner to carry out provisions of this Act relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

Appropriation authorization.

"(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

"INCENTIVE GRANTS

20 USC 1419.

"SEC. 619. (a) The Commissioner shall make a grant to any State which—

"(1) has met the eligibility requirements of section 612;

"(2) has a State plan approved under section 613; and

"(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 611(a)(1)(A).

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

"(b) Each State which—

"(1) has met the eligibility requirements of section 612,

"(2) has a State plan approved under section 613, and

"(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

"(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

"(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this part for such fiscal year, the maximum amounts which all States may receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

Appropriation authorization.

"(e) In addition to the sums necessary to pay the entitlements under section 611, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

"PAYMENTS

20 USC 1420.

"SEC. 620. (a) The Commissioner shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this part. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this part after the State educational agency has approved applications of such agencies or units for payments in accordance with section 614(b).

"(b) Payments under this part may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.".

Regulations. 20 USC 1411 note.

(b) (1) The Commissioner of Education shall, no later than one year after the effective date of this subsection, prescribe—

(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying with the criteria established under clause (A) and clause (B).

Proposed regulation, submittal to congressional committees. Publication in Federal Register.

(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such committee, at least fifteen days before such regulation is published in the Federal Register.

20 USC 402.

(3) If the Commissioner determines, as a result of the promulgation of regulations under paragraph (1), that changes are necessary in the definition of the term "children with specific learning disabilities", as such term is defined by section 602(15) of the Act, he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

Definitions.

(4) For purposes of this subsection:

(A) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental

retardation, of emotional disturbance, or environmental, cultural. or economic disadvantage.

(B) The term "Commissioner" means the Commissioner of Education.

20 USC 1411. (c) Effective on the date upon which final regulations prescribed by the Commissioner of Education under subsection (b) take effect, the amendment made by subsection (a) is amended, in subparagraph (A) of section 611(a)(5) (as such subparagraph would take effect on the effective date of subsection (a)), by adding "and" at the end of clause (i), by striking out clause (ii), and by redesignating clause (iii) as clause (ii).

AMENDMENTS WITH RESPECT TO EMPLOYMENT OF HANDICAPPED INDIVIDUALS, REMOVAL OF ARCHITECTURAL BARRIERS, AND MEDIA CENTERS

SEC. 6. (a) Part A of the Act is amended by inserting after section 605 thereof the following new sections: 20 USC 1404.

"EMPLOYMENT OF HANDICAPPED INDIVIDUALS

"SEC. 606. The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act. 20 USC 1405.

"GRANTS FOR THE REMOVAL OF ARCHITECTURAL BARRIERS

"SEC. 607. (a) Upon application by any State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers. 20 USC 1406.

"(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.". Appropriation authorization.

(b) Section 653 of the Act (20 U.S.C. 1453) is amended to read as follows:

"CENTERS ON EDUCATIONAL MEDIA AND MATERIALS FOR THE HANDICAPPED

"SEC. 653. (a) The Secretary is authorized to enter into agreements with institutions of higher education, State and local educational agencies, or other appropriate nonprofit agencies, for the establishment and operation of centers on educational media and materials for the handicapped, which together will provide a comprehensive program of activities to facilitate the use of new educational technology in education programs for handicapped persons, including designing, developing, and adapting instructional materials, and such other activities consistent with the purposes of this part as the Secretary may prescribe in such agreements. Any such agreement shall—

"(1) provide that Federal funds paid to a center will be used solely for such purposes as are set forth in the agreement; and

"(2) authorize the center involved, subject to prior approval by the Secretary, to contract with public and private agencies and organizations for demonstration projects.

"(b) In considering proposals to enter into agreements under this section, the Secretary shall give preference to institutions and agencies—

"(1) which have demonstrated the capabilities necessary for the development and evaluation of educational media for the handicapped; and

"(2) which can serve the educational technology needs of the Model High School for the Deaf (established under Public Law 89-694). 80 Stat. 1027.

"(c) The Secretary shall make an annual report on activities carried out under this section which shall be transmitted to the Congress.". Report to Congress.

CONGRESSIONAL DISAPPROVAL OF REGULATIONS

SEC. 7. (a)(1) Section 431(d)(1) of the General Education Provisions Act (20 U.S.C. 1232(d)(1)) is amended by inserting "final" immediately before "standard" each place it appears therein.

(2) The third sentence of section 431(d)(2) of such Act (20 U.S.C.

1232(d)(2)) is amended by striking out "proposed" and inserting in lieu thereof "final".

(3) The fourth and last sentences of section 431(d)(2) of such Act (20 U.S.C. 1232(d)(2)) each are amended by inserting "final" immediately before "standard".

(b) Section 431(d)(1) of the General Education Provisions Act (20 U.S.C. 1232(d)(1)) is amended by adding at the end thereof the following new sentence: "Failure of the Congress to adopt such a concurrent resolution with respect to any such final standard, rule, regulation, or requirement prescribed under any such Act, shall not represent, with respect to such final standard, rule, regulation, or requirement, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.".

EFFECTIVE DATES

20 USC 1411 note.

SEC. 8. (a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) shall take effect on July 1, 1975.

(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 shall take effect on the date of the enactment of this Act.

(c) The amendments made by sections 4 and 5(a) shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act, as amended by this Act, section 617(a)(1)(D) of the Act, as amended by this Act, section 617(b) of the Act, as amended by this Act, and section 618(a) of the Act, as amended by this Act, shall take effect on the date of the enactment of this Act.

(d) The provisions of section 5(b) shall take effect on the date of the enactment of this Act.

Approved November 29, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-332 accompanying H.R. 7217 (Comm. on Education and Labor) and 94-664 (Comm. of Conference).
SENATE REPORTS: No. 94-168 (Comm. on Labor and Public Welfare) and No. 94-455 (Comm. of Conference).
CONGRESSIONAL RECORD, Vol. 121 (1975):
June 18, considered and passed Senate.
July 21, 29, considered and passed House, amended, in lieu of H.R. 7217.
Nov. 18, House agreed to conference report.
Nov. 19, Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 49:
Dec. 2, Presidential statement.

EDUCATION OF HANDICAPPED CHILDREN —
Implementation of Part B of the Education of the Handicapped Act

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

EDUCATION OF HANDICAPPED CHILDREN

Implementation of Part B of the Education of the Handicapped Act

AGENCY: U.S. Office of Education, HEW.

ACTION: Final regulation.

SUMMARY: These regulations implement amendments to Part B of the Education of the Handicapped Act (as required by the Education for All Handicapped Children Act of 1975) by: (1) amending the existing regulations governing assistance to States for education of handicapped children, (2) adding a new part on incentive grants programs for handicapped children aged three through five, and (3) making certain conforming amendments to the general provisions for State-administered programs.

These regulations govern the provision of formula grant funds to State and local educational agencies to assist them in the education of handicapped children.

The regulations include provisions which are designed (1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children.

These regulations also include the final rules for counting and reporting handicapped children. (The child count rules were published in proposed form on September 8, 1976, and were incorporated into the December 30 proposed regulations for the convenience of the reader.)

EFFECTIVE DATE: October 1, 1977.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4046 Donohoe Building), Washington, D.C. 20202, telephone: 202-472-2265;

or

Thomas B. Irvin, Policy Officer, Bureau of Education for the Handicapped, 400 Maryland Ave. SW., (room 4926 Donohoe Building), Washington, D.C. 20202, telephone: 202-245-9405.

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that Pub. L. 94-142 will have on the education of handicapped children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of regulations, and took steps to insure maximum public involvement throughout the entire rulemaking process. A description of these steps is included in the following paragraphs:

Before the proposed rules were drafted, the Office of Education carried out a massive effort to obtain comments and suggestions for developing regulations from interested parties throughout the Nation. This involved participating in approximately 20 meetings about the law conducted on both a geographic and special interest basis. Approximately 2,200 people participated in these meetings and several hundred comments were received.

In June 1976, the Office of Education convened a national writing group of approximately 170 people to develop concept papers for use in writing the regulations. This group was composed of parents, representatives of special interest organizations (i.e., AFT, NEA, private schools), and administrators of State and local schools. These concept papers formed the basis for the proposed regulations.

During the months of July–November, the Office of Education prepared several redrafts of the concept papers and continued to seek inputs on these drafts from various interested parties.

On December 30, 1976, the proposed rules were published in the FEDERAL REGISTER. Written comments and recommendations on the proposed rules were invited for a 60-day comment period ending March 1, 1977; and public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta. Over 1,600 written comments were received during that period, all of which were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, room 4921, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

In addition to the above public comment activities, the Office of Education continued with other public participation efforts, including:

(1) Participating in 10 regional meetings of the American Association of School Administrators and other regional meetings with the Council of the Great City Schools;

(2) Conducting a national conference on the regulations for administrators of various State agency programs for the handicapped, and participating in meetings at other national conferences; and

(3) Participating in a special series of meetings organized by the Institute for Educational Leadership and composed of representatives of the National Governors' Conference, the National Conference of State Legislatures, the National Association of State Boards of Education, and the Education Commission of the States.

ACTION TAKEN ON PUBLIC COMMENTS

PART 100B—STATE ADMINISTERED PROGRAMS

No comments were received on the proposed amendments to Part 100b, and no changes have been made.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

The Office of Education conducted a careful review of the public comments received and summarized them by subpart and topic.

A very large number of comments dealt with specific statutory requirements. These comments expressed concerns about the statute and suggested changes to be made in the statutory provisions. However, because they are statutory, the Office of Education is not able to make any changes in the regulations with respect to those points. Some of the statutory provisions on which comments were received, together with concerns about them, are included below:

(1) Free appropriate public education—problems with timelines and concerns about the cost of implementing this requirement;

(2) Priorities—concerns about Federal priorities which are not consistent with State and local priorities;

(3) Individualized education programs—suggestions that the requirement be deleted from the regulation unless more funds are available for implementing it;

(4) Prior notice and other due process procedures—concerns about the amount of detail in these requirements and the time, cost and paper work involved in their implementation;

(5) State educational agency responsibility for general supervision of all special education programs in the State—concerns about lack of authority over other State agencies and the lack of funds to efficiently implement the provision;

(6) Child count—concerns about the dates on which the count must be taken.

Another large number of commenters cited specific concerns or issues with respect to the content of the proposed rules. Because of the large number of comments received, individual comments have been consolidated.

PART 121m—INCENTIVE GRANTS

Part 121m sets forth the conditions under which States may receive grants to assist in the education of handicapped children aged three through five. Congress established incentive grants in the recognition that when education begins at the earlier stages of development (1) benefits are maximized, (2) additional or more severe handicaps may be prevented, and (3) greater long-term cost effectiveness is realized.

Comment: An issue was raised concerning the possible use of incentive grant funds for children from birth through two years of age.

Response: Section 619 of the Act and the legislative history specify that the use of incentive grant funds is limited to children aged three through five years. However, the State's entitlement under section 611 of the Act may be used for children from birth through age twenty-one.

Comment: An issue was raised as to whether incentive grant funds may be

used for administrative or supervisory costs.

Response: The regulation has been amended to make it clear that administrative costs are allowable.

MINIMUM REGULATION—FUTURE RULEMAKING PLANS

The preamble to the proposed rules contained the following statement regarding minimum regulations:

The Department sees the development of regulations for implementing Pub. L. 94-142 as being an evolutionary process which will continue over a period of several years. The actual impact and consequences of the statutory provisions and problems which State and local educational agencies may have in implementing these provisions are not known at this time. Therefore, the Department feels that the most rational approach to follow is (1) to write minimum regulations at this point, and (2) to amend and revise such regulations in the future as need and experience dictate.

Because the Statute is very comprehensive and specific on many points, the Department has elected (1) to incorporate the basic wording or substance of the Statute directly into the regulations, and (2) to expand on the statutory provisions only where additional interpretation sems to be necessary.

Although some commenters felt that more extensive regulations were necessary, many persons who responded to the proposed rules felt that the Office of Education had already over-regulated and should cut back on the rules when they are published in final form. At this juncture, the Office of Education holds to the same position that it took in the proposed rules, and for the same reasons as set forth in that document.

The Office of Education believes that some working experience with this regulation is essential before determining whether there is a need to amend it. Once the regulation becomes effective (Oct. 1, 1977) and people gain experience in implementing it, there will likely be a series of questions raised in individual States which could result in the development of policies and interpretations that would be proposed for addition to these regulations.

OVERVIEW OF CHANGES IN THE PART 121a REGULATIONS

A substantial number of changes have been made in response to comments received on the proposed rules. However, few of these changes have resulted in adding major substantive requirements. Most of the changes are technical or have been made in an attempt to provide greater clarity or to add more explanatory material.

Extensive use has been made of explanatory comments in the text of the regulations. The purpose of these comments is to attempt, where appropriate, to clarify or further interpret a particular rule, or to provide direction and assistance without imposing additional requirements. For example, an extensive explanation is included under the excess cost requirement and an example is given on how to make the computation under that requirement.

ORGANIZATION OF REGULATIONS

Three parts of Title 45 of the Code of Federal Regulations are amended by this document:

(1) Part 100b—*State Administered Programs*. This includes certain conforming amendments to the regulations under section 434(b)(1)(A) of the General Education Provisions Act.

(2) Part 121a—*Assistance to States for Education of Handcapped Children*. This is divided into seven subparts: (A) General, (B) State Annual Program Plans and Local Applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocation of Funds and Reports.

(3) Part 121m—*Incentive Grants*. This governs the administration of the incentive grants program for handicapped children aged three through five, authorized under section 619 of the Act.

ANALYSIS OF REGULATIONS

Appendix A of Part 121a includes an analysis of each subpart, which (1) discusses significant comments received and the action taken with respect to those comments, and (2) explains the basis for any changes made from the proposed rules published on December 30, 1976.

TOPICAL INDEX

Appendix B of Part 121a includes an index of the major topics in the regulations (e.g., free appropriate public education, priorities, and individualized education program) and the specific sections under which each term is used.

NOTE.—The Department of Health, Education, and Welfare, has determined that this document contains a major proposal requiring preparation of an Economic Impact Analysis (EIA) Statement under Executive Orders 11821 and 11949 and OMB Circular A-107, and certifies that an Economic Impact Analysis has been prepared. However, because the portion of this regulation involving major costs is virtually identical to the content of subpart D of the regulation issued on discrimination against the handicapped under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published May 4, 1977, at 42 FR 22676), the Department has determined that (a) this regulation involves no substantial costs not imposed by Part 84 and (b) the pertinent parts of the EIA Statement for that regulation meet the EIA requirements for this regulation. Both regulations impose the following requirements: (1) appropriate education to handicapped children; (2) identification and evaluation of handicapped children; and (3) procedural safeguards for handicapped children and their parents.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: August 12, 1977.

JOHN ELLIS,

Acting U.S. Commissioner of Education.

Approved: August 15, 1977.

HALE CHAMPION,

Acting Secretary of Health, Education, and Welfare.

Title 45 of the Code of Federal Regulations is amended as follows:

PART 100b—STATE ADMINISTERED PROGRAMS

1. In Part 100b, § 100b.17 is revised to read as follows:

§ 100b.17 General applications.

(a) The general application of a State must meet the requirements of section 434(b)(1)(A) of the General Education Provisions Act.

(b) A State does not have to resubmit its general application.

(20 U.S.C. 1232c(b)(1)(A).)

(c)(1) The following statutes require that a State must submit certain provisions to the Commissioner which are similar to provisions in the general application.

(2) Subject to paragraph (d) of this section, if the Commissioner has approved a State's general application, the State does not have to submit the provisions required under the following statutes:

(i) *Compensatory education.* Section 142(a) (2) and (3) of Title I of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(ii) *School library resources.* Section 203(a) (5), (6) and (7) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III), and (IV).)

(iii) *Supplementary educational centers and services; guidance, counseling, and testing.* Section 305(b) (9)(B), (10), and (11) of Title II of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(iv) *Education of the handicapped.* Section 613(a) (7)(A), (9)(B), and (10) of Part B of the Education of the Handicapped Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III) and (IV).)

(v) *Adult education.* Section 306(a) (6) and (7) of the Adult Education Act, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii) (II), (III).)

(vi) *Strengthening instruction in academic subjects.* Section 1004(a) (2) and (3) of Title X of the National Defense Education Act of 1958, as amended.

(20 U.S.C. 1232c(b)(1)(A)(ii), (II), (III).)

(vii) *State reading improvement programs.* Section 714(a)(10) of Title VII-B of the Education Amendments of 1974.

(20 U.S.C. 1232c(b)(1)(A)(ii), (III).)

(d)(1) The general application does not change the legal substance of the provisions listed under paragraph (c)(2) of this section.

(2) If a provision listed in paragraph (c)(2) of this section is different in wording from an assurance in the general application, the provision listed in that paragraph governs any question of compliance with the assurance.

(20 U.S.C. 1232c(b)(1)(B)(i), (b)(1)(B)(iii), (b)(2).)

2. In Part 100b, § 100b.35 is revised to read as follows:

§ 100b.35 Effective date of an application, plan, or amendment.

(a) Federal funds are available only for obligations incurred under:

(1) A State plan approved by the Commissioner (in the case of the programs set forth in § 100b.10 other than those referenced in § 100b.15(a)); or

(2) A general application and an annual program plan approved by the Commissioner in the case of the programs referenced in § 100b.15(a)).

(b) A State plan, general application, annual program plan, or amendment to any of them, is effective on the date the State submits it to the Federal Government in substantially approvable form. However, the effective date cannot be earlier than the first day of the fiscal period for which it is submitted.

(c) The Commissioner sends the State agency a notice of approval, including notice of the effective date, when the application, plan, or amendment is approved.

(d) Federal funds are not available for obligation by a State or local agency before the effective date of the State plan or annual program plan (whichever is submitted under paragraph (a) of this section). If funds are expressly made available by statute for the development of the State plan, general application, or annual program plan, the first sentence of this paragraph does not apply to obligations by the State for that purpose.

(20 U.S.C. 1221e-3(a)(1).)

3. In Part 100b, § 100b.55 is revised to read as follows:

§ 100b.55 Obligation by recipients.

(a) *Period for obligation.* Federal funds which the Federal government may obligate during a fiscal period remain available for obligation by State and local recipients through the end of that fiscal period. Federal funds made available for construction of facilities remain available for obligation by State and local recipients for that purpose for a reasonable period of time as determined by the Commissioner.

(b) *Carryovers.* In accordance with section 414(b) of the General Education Provisions Act, any Federal funds which are not obligated by State and local recipients before the end of the fiscal period under paragraph (a) of this section, remain available for obligation by those agencies for one additional fiscal year.

(c) *Determinations of obligation.* (1) An obligation for the acquisition of real or personal property, for the construction of facilities, or for the performance of work, is incurred by a recipient on the date it makes a binding written commitment.

(2) An obligation for personal services, for services performed by public utilities, for travel, or for the rental of real or personal property, is incurred by a recipient on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(20 U.S.C. 1221c(a); 1225(b); 1232c(b)(1)(A)(ii)(II).)

4. Part 121a is revised to read as follows:

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

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Appendix A—Analysis of Final Regulation. (45 CFR Part 121a.) Under Part B of the Education of the Handicapped Act.

Appendix B—Index to Part 121a.

AUTHORITY: Part B of the Education of the Handicapped Act, Pub. L. 91-230, Title VI, as amended, 89 Stat. 776–794 (20 U.S.C. 1411–1420), unless otherwise noted.

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

§ 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which in-

cludes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note.)

§ 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 121a.400–121a.403.)

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B).)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, 100c, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

(20 U.S.C. 1417(b).)

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 121a.500 of Subpart E)
Destruction (Section 121a.560 of Subpart E)
Direct services (Section 121a.370(b)(1) of Subpart C)
Evaluation (Section 121a.500 of Subpart E)
First priority children (Section 121a.320(a) of Subpart C)
Independent educational evaluation (Section 121a.503 of Subpart E)
Individualized education program (Section 121a.340 of Subpart C)
Participating agency (Section 121a.560 of Subpart E)
Personally identifiable (Section 121a.500 of Subpart E)
Private school handicapped children (Section 121a.450 of Subpart D)
Public expense (Section 121a.503 of Subpart E)
Second priority children (Section 121a.320(b) of Subpart C)
Special definition of "State" (Section 121a.700 of Subpart G)
Support services (Section 121a.370(b)(2) of Subpart C)

§ 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1401(18).)

§ 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530–121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which

adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15).)

§ 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b).)

§ 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401(22).)

§ 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401(8).)

§ 121a.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21).)

Comment. Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 121a.505(b)(2) and § 121a.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

§ 121a.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415.)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); 1413(a).)

§ 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b).)

§ 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17).)

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p.12 (1975).)

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§ 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16).)

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16).)

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1401(6).)

Subpart B—State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS—GENERAL

§ 121a.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413.)

§ 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b).)

§ 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

(20 U.S.C. 1413(a).)

§ 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and Subpart B of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in §§ 121a.580–121a.583 of Subpart E for a hearing under this section.

(20 U.S.C. 1413(c).)

§ 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under § 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

(20 U.S.C. 1413(a), 1232c(b).)

ANNUAL PROGRAM PLANS—CONTENTS

§ 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.280–121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice,

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

(20 U.S.C. 1412(7).)

§ 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 121a.127(a)(1) of this subpart; and

(4) Establishes timelines for implementing the policy, in accordance with § 121a.122.

(20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3).)

§ 121a.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timelines.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B).)

§ 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978–1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public and private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

§ 121a.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A).)

§ 121a.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and

the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2) (A).)

§ 121a.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 121a.320–121a.324 of Subpart C.

(2) The State priorities meet the timelines under § 121a.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in §§ 121a.321 of Subpart C:

(1) By disability category, and

(2) By the age ranges in § 121a.124(e) (2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3).)

§ 121a.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b) (1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2) (C).)

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576.

§ 121a.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.560–121a.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2) (D); 1417(c).)

Comment. The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603–8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94–142. Those regulations are incorporated in § 121a.560–121a.576 of Subpart E.

§ 121a.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4).)

§ 121a.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.500–121a.514 of Subpart E are met.

(20 U.S.C. 1412(5(A).)

§ 121a.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.550–121a.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 121a.550–121a.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5)(B).)

§ 121a.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in §§ 121a.530–121a.534 of Subpart E are met.

(10 U.S.C. 1412(5)(C).)

§ 121a.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in § 121a.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6).)

§ 121a.135 Monitoring procedures.

Each annual program plan must include information which shows that the requirements in § 121a.601 and § 121a.602 of Subpart F are met.

(20 U.S.C. 1412(6).)

§ 121a.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6).)

§ 121a.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7)(A).)

§ 121a.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e–2), section 305(b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV–C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2).)

§ 121a.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under §§ 121a.380–121a.387 of Subpart C.

(20 U.S.C. 1413(a)(3).)

§ 121a.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4).)

§ 121a.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a)(5).)

§ 121a.142 Control of funds and property.

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a)(6).)

§ 121a.143 Records.

Each annual program plan must provide for keeping records and affording access to those records, as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a)(7)(B).)

§ 121a.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8).)

§ 121a.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9).)

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories).)

§ 121a.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11).)

§ 121a.147 State advisory panel.

Each annual program plan must provide that the requirements of §§ 121a.650–121a.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12).)

§ 121a.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1).)

§ 121a.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under § 121a.370 of Subpart C and § 121a.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under § 121a.360 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii).)

§ 121a.150 Nondiscrimination and employment of handicapped individuals.

(a) Each annual program plan must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The State educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under §§ 121a.226–121a.228, 121a.231, and 121a.235.

(20 U.S.C. 1413(b).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

§ 121a.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a).)

§ 121a.181 Responsibilities of State educational agency.

Each State educational agency shall establish the procedures and format which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a)

§ 121a.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i).)

§ 121a.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under § 121a.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(b) Each local educational agency must keep records adequate to show that it has met the excess cost requirement.

(20 U.S.C. 1402(20); 1414(a)(1).)

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 121a.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the "Comment" under section 121a.184, there is an example of how the minimum amount is computed.

§ 121a.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under § 121a.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1).)

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under § 121a.183. This example follows the formula in § 121a.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped elementary school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$10,500,000
	−500,000
Total expenditures for elementary school students (less capital outlay and debt service)	=10,000,000

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	$300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of handicapped children	500,000

(5) From a locally-funded program for handicapped children	$250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

(A local educational agency would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
−1,600,000
8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000
7,000 students
= $1,200/student

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However, the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

§ 121a.185 Computation of excess costs—consolidated application.

The minimum average amount under § 121a.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under § 121a.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1).)

§ 121a.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for non-handicapped children in that age range. However, the local educational agency must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1).)

§ 121a.190 Consolidated applications.

(a) *Voluntary applications.* Local educational agencies may submit a consolidated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 121a.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1).)

§ 121a.191 Payments under consolidated applications.

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A).)

§ 121a.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612(1)–(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B).)

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C).)

§ 121a.193 State educational agency approval; disapproval.

(a) *Approval.* A State educational agency shall approve an application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.220–121a.240. However, the State educational agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.220–121a.240.

(20 U.S.C. 1414(b)(1).)

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.506–121a.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3).)

§ 121a.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 121a.592.

(20 U.S.C. 1414(b)(2).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed

special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a) (1) (A).)

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560–121a.576 of Subpart E.

§ 121a.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.560–121a.574 of Subpart E are met.

(20 U.S.C. 1414(a) (1) (B).)

§ 121a.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a) (1) (C), (D).)

§ 121a.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.222.

(20 U.S.C. 1414(a) (1) (E).)

§ 121a.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140.

(20 U.S.C. 1414(a) (1) (C) (i).)

§ 121a.225 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.320–121a.324.

(20 U.S.C. 1414(a) (1) (C) (ii).)

§ 121a.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a) (1) (C) (iii).)

§ 121a.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.550–121a.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a) (1) (C) (iv).)

§ 121a.228 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a) (2) (A).)

§ 121a.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under § 121a.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a) (2) (B).)

§ 121a.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a) (2) (B).)

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in § 121a.230 (b) (1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

§ 121a.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a) (2) (C).)

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under §§ 121a.320–121a.324.

§ 121a.232 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational

agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a)(3)(A).)

§ 121a.233 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.232.

(20 U.S.C. 1414(a)(3)(B).)

§ 121a.234 Public participation.

(a) Each application must:

(1) Provide for making the application and all documents related to the application available to parents and the general public; and

(2) Provide that all evaluations and reports required under § 121a.232 are public information.

(b) In implementing the requirement in paragraph (a)(1), the local educational agency shall use methods for public participation within its jurisdiction which are comparable to those required in § 121a.280–121a.284 of this subpart. However, the local educational agency is not required to hold public hearings.

(20 U.S.C. 1414(a)(4).)

§ 121a.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1414(a)(5).)

§ 121a.236 Local policies consistent with statute.

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612(1)–(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a)(6).)

§ 121a.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1414(a)(7).)

§ 121a.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a).)

§ 121a.239 Nondiscrimination and employment of handicapped individuals.

(a) Each application must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The local educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

> The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794.)

§ 121a.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under §§ 121a.120–121a.151.

(20 U.S.C. 1414(a)(6).)

APPLICATION FROM SECRETARY OF INTERIOR

§ 121a.260 Submission of annual application; approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with § 121a.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f).)

§ 121a.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with §§ 121a.280–121a.284.

(20 U.S.C. 1411(f).)

§ 121a.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.320–121a.324 of Subpart C.

(20 U.S.C. 1411(f).)

§ 121a.263 Applicable regulations.

The Secretary of Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2).)

PUBLIC PARTICIPATION

§ 121a.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7).)

§ 121a.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about the plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7).)

§ 121a.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 121a.281.

(20 U.S.C. 1412(7).)

§ 121a.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7).)

§ 121a.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7).)

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

§ 121a.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94–168 p. 19 (1975).)

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under section 121a.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under § 121a.321.

2. In order to be in compliance with § 121a.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 121a.530–121a.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93–380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0–21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under § 121a.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under §§ 121a.320–121a.324.

§ 121a.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B).)

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B).)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

§ 121a.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B).)

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95–381, p. 67 (1977).)

§ 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320–121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under §§ 121a.320–121a.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94–142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally-supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94–168, p. 13 (1975).)

§ 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the

area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. The above list of program options is not exhaustive, and could include any program or activity in which non-handicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320-121a.324.

§ 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

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

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

§ 121a.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6).)

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * * * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975).)

PRIORITIES IN THE USE OF PART B FUNDS

§ 121a.320 Definitions of "first priority children" and "second priority children.

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3).)

Comment. After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE.—The term "free appropriate public education," as defined in § 121a.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program * * *."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

§ 121a.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under § 121a.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975).)

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly-identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under section 121a.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

§ 121a.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411 (b), (c).)

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an inservice training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

§ 121a.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all of its first priority children,

that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under § 121a.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii).)

§ 121a.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(B), (c)(1)(B); 1414 (a)(1)(C)(ii).)

INDIVIDUALIZED EDUCATION PROGRAMS

§ 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 121a.341–121a.349.

(20 U.S.C. 1401(19).)

§ 121a.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1413(a)(4).)

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

§ 121a.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 121a.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94–142, Sec. 8(c) (1975).)

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977–1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the pur-

pose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6), 1414(a)(5); Senate Report No. 94-168, p. 11 (1975).)

§ 121a.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 121a.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 121a.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

§ 121a.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 121a.220–121a.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 121a.182–121a.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d).)

Comment. Section 121a.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part

B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

§ 121a.361 Nature and location of services.

The State educational agency may provide special education and related services under § 121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 121a.550–121a.556 of Subpart E).

(20 U.S.C. 1414(d).)

§ 121a.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 121a.320–121a.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.380–121a.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2).)

§ 121a.371 State matching.

Beginning with the period July 1, 1978–June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 121a.370 most be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B).)

Comment. The requirement in § 121a.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 121a.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 121a.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3).)

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

§ 121a.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in § 121a.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicaped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3).)

§ 121a.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the State which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3).)

§ 121a.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3).)

§ 121a.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3).)

§ 121a.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3).)

§ 121a.385 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3).)

§ 121a.386 Evaluation.

Each annual program plan must include:

(a) Procedures for evaluating the overall effectiveness of:

(1) The comprehensive system of personnel development in meeting the needs for personnel, and

(2) The procedures for administration of the system; and

(b) A description of the monitoring activities that will be undertaken to assure the implementation of the comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

§ 121a.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3).)

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.400 Applicability of §§ 121a.401–121a.403.

Sections 121a.401–121a.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.340–121a.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.402 Implementation by State educational agency.

In implementing § 121a.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B).)

§ 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 121a.450–121a.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500–121a.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415).)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.450 Applicability of §§ 121a.451–121a.460.

As used in §§ 121a.451–121a.460, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400–121a.403.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.451 State educational agency responsibility.

The State educational agency shall insure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in §§ 121a.452–121a.460 are met.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6).)

§ 121a.453 Determination of needs, number of children, and types of services.

The needs of private school handicapped children, the number of them who will participate under this part, and the types of special education and related services which the local educational agency will provide for them must be determined after consultation with persons knowledgeable of the needs of these

children, on a basis comparable to that used in providing for the participation under this part of handicapped children enrolled in public schools.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.454 Service arrangements.

Services to private school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile educational services and equipment.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.455 Differences in services to private school handicapped children.

A local educational agency may provide special education and related services to private school handicapped children which are different from the special education and related services it provides to public school children, if:

(a) The differences are necessary to meet the special needs of the private school handicapped children, and

(b) The special education and related services are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance.

(20 U.S.C. 1413(a)(4)(a); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974).)

§ 121a.456 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include:

(1) The payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control; or

(2) The construction of private school facilities.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.457 Equipment.

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.458 Prohibition of segregation.

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.459 Funds and property not to benefit private school.

Funds provided under Part B of the Act and property derived from those funds may not inure to the benefit of any private school.

(20 U.S.C. 1413(a)(4)(A).)

§ 121a.460 Existing level of instruction.

Provisions for serving private school handicapped children may not include the financing of the existing level of instruction in the private schools.

(20 U.S.C. 1413(a)(4)(A).)

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417 (c).)

§ 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500–121a.514.

(20 U.S.C. 1415(a).)

§ 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562–121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A).)

§ 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506–121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510—121a.513.

(20 U.S.C. 1415(b)(1) (C), (D).)

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§ 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

§ 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2).)

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2).)

§ 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d).)

§ 121a.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless

a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(20 U.S.C. 1415(c).)

§ 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975).)

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

§ 121a.511 Civil action.

Any party aggrevied by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415.)

§ 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415.)

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3).)

Comment. Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in § 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B).)

PROTECTION IN EVALUATION PROCEDURES

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530-121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

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

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

skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C).)

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§ 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550–121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340–121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5).)

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340–121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c).)

LEAST RESTRICTIVE ENVIRONMENT

§ 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550–121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv).)

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B).)

§ 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided

opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

§ 121a.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.550 is effectively implemented.

(20 U.S.C. 1412(5)(B).)

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

§ 121a.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B).)

§ 121a.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 121a.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 121a.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B).)

CONFIDENTIALITY OF INFORMATION

§ 121a.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.568.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading,

or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.570 Hearing procedures.

A hearing held under § 121a.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Under section 121a.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in pargraph (b).

§ 121a.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c).)

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 121a.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c).)

§ 121a.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a(b) (1)–(2), (4)–(11); (c); (d); (e)(1), (2), (3)(A), (B), and (D), (5)–(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c).)

OFFICE OF EDUCATION PROCEDURES

§ 121a.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.113 of Subpart B.

(b) Withholding payments from a State under § 121a.590 or under section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.581 Hearing panel.

The Commissioner appoints a Hearing Panel consisting of not less than three persons to conduct any hearing under § 121a.530 of this subpart.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.582 Hearing procedures.

(a)(1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

(i) In whole or in part in writing, or

(ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

(i) Notice of the issues to be considered (if this notice has not already been given); and

(ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a)(2) of this section:

(1) An opportunity to obtain a record of the proceedings;

(2) An opportunity to present witnesses on the party's behalf; and

(3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416.)

§ 121a.583 Initial decision; final decision.

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each party (or to the party's counsel) and to the Commissioner, with a notice that each

party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232c(c); 1413(a)(9)(b); 1413(c); 1416.)

§ 121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local Educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See § 121a.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.580–121a.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B).)

§ 121a.590 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a hearing under §§ 121a.580–121a.583 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of section 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.139 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a).)

§ 121a.591 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.590(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a).)

§ 121a.592 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.590(a) shall by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 1416(a).)

§ 121a.593 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect to its annual program plan submitted under Subpart B, the State may under section 616(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b).)

Subpart F—State Administration

State Educational Agency Responsibilities: General

§ 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring;

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6).)

Comment. The requirement in § 121a.600 (a) is taken essentially verbatim from sec-

tion 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

§ 121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D, and E.

(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in that education of handicapped children. These procedures must include:

(1) Collection of data and reports;

(2) Conduct of on-site visits;

(3) Audit of Federal fund utilization; and

(4) Comparison of a sampling of individualized education programs with the programs actually provided.

(20 U.S.C. 1412(6); 1413(a)(11).)

Comment: In carrying out the requirements of paragraph (b) of this section, State educational agencies could include additional procedures, such as involving parents or representatives of parent organizations in on-site visits and other monitoring activities.

§ 121a.602 Adoption of complaint procedures.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with § 121a.194

(20 U.S.C. 1412(6).)

USE OF FUNDS

§ 121a.620 Federal funds for State administration.

A State may use five per cent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a.704 or § 121a.705, as the case may be.

(20 U.S.C. 1411 (b), (c).)

§ 121a.621 Allowable costs.

(a) The State educational agency may use funds under § 121a.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.620 in accordance with § 121a.370 of Subpart C.

(20 U.S.C. 1411 (b), (c).)

STATE ADVISORY PANEL

§ 121a.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12).)

§ 121a.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12).)

Comment. The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives inputs from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 121a.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the

State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(20 U.S.C. 1413(a)(12).)

§ 121a.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 121a.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 121a.620 for this purpose.

(20 U.S.C. 1413(a)(12).)

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

§ 121a.700 Special definition of the term State.

For the purposes of § 121a.701, § 121a.702, and §§ 121a.704–121a.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2).)

§ 121a.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,

(2) 1979—10 percent,

(3) 1980—20 percent,

(4) 1981—30 percent, and

(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1).)

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4).)

§ 121a.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State;

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5).)

§ 121a.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1).)

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in §121a.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2).)

§ 121a.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1).)

§ 121a.705 Within-State distribution: fiscal year 1978.

Of the funds received under § 121a.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(b)(1).)

§ 121a.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 121a.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(c)(1).)

§ 121a.707 Local educational agency entitlements; formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d).)

§ 121a.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e).)

§ 121a.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1).)

§ 121a.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601 (c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e).)

REPORTS

§ 121a.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3).)

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

§ 121a.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b).)

§ 121a.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b).)

§ 121a.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefitting from special education;

(4) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 121a. 186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special

education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 121a.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b).)

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

APPENDIX A—ANALYSIS OF FINAL REGULATION (45 CFR PART 121a) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT

These regulations set forth requirements to be followed by States and localities if they are to receive funds under Part B of the Education of the Handicapped Act. The regulations cover matters such as the identification, location, and evaluation of handicapped children; the provision of free appropriate public education; the establishment of a full educational opportunity goal; the count of handicapped children for allocation purposes; priorities in the use of Part B funds; the proper use of Part B funds; the development of an individualized education program; the creation of a comprehensive personnel development system; procedural safeguards (e.g. right to notice and conduct of hearings); methods to guarantee public participation; and details about State annual program plans and local educational agency applications.

RELATIONSHIP BETWEEN REGULATIONS UNDER PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published at 42 FR 22675; May 4, 1977) deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act.

Basically, both require that handicapped persons be provided a free appropriate public education; that handicapped students be educated with nonhandicapped students to the extent appropriate; that educational agencies identify and locate all unserved handicapped children; that evaluation procedures be adopted to insure appropriate classification and educational services; and that procedural safeguards be established.

In several respects, however, the section 504 regulations are broader in coverage than Part B. For example, the definition of "handicapped person" and "qualified handicapped person" under section 504 covers a broader population than the definition of "handicapped children" under Part B. Under the Part B definition, a handicapped child is a child who has one of the impairments listed in the Act, who because of that impairment requires special education and related services. Under section 504, a handicapped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of that type of impairment, or is regarded as having that impairment (§ 84.3(j)).

The regulations for section 504 also deal with a number of subjects not covered by the Part B regulations (for example, barrier-free facilities and program accessibility; employment; postsecondary education and health, welfare and social services). On the other side, Part B contains a substantial number of administrative requirements not included under section 504 (for example, annual program plans and local applications) and requires more detailed procedures and policies in many instances (such as due process procedures).

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under Part B. For example, § 84.33(b)(2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. Section 84.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.35(d) indicates that a reevaluation procedure consistent with the Part B requirements is one means of meeting the reevaluation requirements under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (1) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *"

There is also a major difference between Part B and the section 504 regulations concerning the matter of exclusion of handicapped children from school. As of the effective date of the section 504 regulations (June 3, 1977), exclusion of handicapped children from school constitutes a violation of those requirements. However, under Part B, States are not required to serve all handicapped children aged 3–18 until September 1, 1978. As stated in Appendix A of the section 504 regulations:

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

SUBPART A—GENERAL

Subpart A sets forth the purposes and applicability of these regulations and includes definitions of statutory terms (e.g. free appropriate public education, special education, and related services) and other definitions related to those terms.

The following comments were received regarding Subpart A.

APPLICABILITY OF REGULATIONS TO STATE, LOCAL AND PRIVATE AGENCIES (§ 121a.2)

Comment: A commenter felt that the statement regarding the applicability of the regulations was not clear, and should be revised to indicate that the requirements apply to any public agency serving handicapped children, even if the agency does not receive Part B funds.

Response: A definition of "public agency" has been added to the regulations. The definition includes all political subdivisions in the State that are responsible for educating handicapped children. Throughout the regulation, the term "public agency" has been used to make it clear where the requirements do not apply only to State and local educational agencies. In addition, an explanatory comment was added after section 121a.2 to make it clear that the requirements under Part B are binding on each public agency in the State that has direct or delegated authority for the education of handicapped children, regardless of whether that agency receives Part B funds.

DEFINITIONS (§§ 121a.4–121a.15)

Comment: Hundreds of comments were received regarding definitions in the proposed rules. Commenters requested that new definitions be added, or sought changes in existing definitions, especially definitions of various disability categories and the various types of related services. In many instances, revisions were sought to conform to the most recent definitions adopted or used by professional associations.

Response: Definitions of terms used in the regulations are taken from various statutes, Congressional reports, or materials provided by professional associations and other groups. Where appropriate, the Office of Education has attempted to incorporate changes recommended by commenters, and has made other changes to clarify the definitions. In addition, the following new terms were added:

Definitions of "deaf-blind" and "multi-handicapped" were added because these are recognized categories of handicapped children in most States.

A definition of "qualified" was added in order to be able to use a consistent term in

referring to the qualifications of the various personnel.

The definition of "handicapped children" has been modified only by making certain clarifying changes. Although some commenters requested additional changes in the definitions of the various disability categories, it is felt that the definitions in this regulation must closely conform to current usage in the States and professions.

The related services definition was expanded to include "school health services." In addition, changes were made in the definitions of the individual terms included under "related services" (e.g., psychological services and recreation) to conform to recommendations of professional associations.

SUBPART B—STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

Subpart B includes the requirements relating to State annual program plans, local educational agency applications, participation by the Bureau of Indian Affairs, and public participation.

Two new sections (sections 121a.150 and 121a.239) have been added to require assurances from the State educational agencies and local educational agencies that the program under Part B will be operated in compliance with the section 504 regulations, including the requirements under section 606 of the Education of the Handicapped Act regarding employment of qualified handicapped individuals in programs assisted under the Act. (The Office for Civil Rights has been delegated authority for enforcing section 606.)

A substantial number of commenters were concerned with the following major issues in this subpart: (1) the amount of data required of State and local educational agencies; (2) the excess costs, nonsupplanting and comparability requirements; and (3) the public participation requirements. In addition, as with other subparts, many commenters objected to statutory requirements and sought interpretations of the statute and regulations.

ANNUAL PROGRAM PLANS

CONDITION OF ASSISTANCE (§ 121a.110)

Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19).

The five assurances required under section 434(b) of the GEPA cover proper administration, fiscal control and accounting, reports, supplanting, and submission of the annual program plan. Where Part B contains plan requirements covering the same subject matters, submission of those plan requirements is satisfied by the State's submission of the general application. They do not have to be submitted as part of the annual plan. The Part B plan provisions which do not have to be submitted in the annual program plan are referenced in 45 CFR § 100b.17(c)(2)(iv). Note that a substantive section on the nonsupplanting requirement for local educational agencies is set out in § 121a.230.

Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977-1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.120-121a.151 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act and section 434(b)(1)(B)(ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted")).

APPROVAL; DISAPPROVAL (§ 121a.113)

The following is clarification about the submission of draft annual program plans for review by the Office of Education and how this would affect the issuance of grant award documents:

A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.35.)

EXAMPLE: A State educational agency's proposed plan for a particular school year is received by the Bureau of Education for the Handicapped on June 1. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, as the earliest date of obligation under that plan.

EFFECTIVE PERIOD OF ANNUAL PROGRAM PLAN (§ 121a.114)

The Office of Education is proposing to use the period July 1-June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months, subject to submission or extension of the annual program plan for the following year. (This period includes the 12-month carryover provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1, 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds are located in 45 CFR Part 100b, Subpart B.

PUBLIC PARTICIPATION (§ 121a.120)

Comment: Commenters wanted this section to be expanded to require the States to describe in detail a number of additional specific steps to be taken in complying with the public participation requirements of the Act. For example, they wanted States to develop a roster of interested persons to whom plans and other documents would routinely be sent. The commenters felt that these steps would be necessary to insure full public participation.

Response: Requirements have been added (in §§ 121a.280 et seq.) to spell out in more detail the State's duties regarding public participation in development of the annual program plan (for example, indicating in the notice of public hearings of the plan the timetable for developing the final plan and submitting it to the Commissioner). A requirement has also been added to specify that the plan must be available for comment at least 30 days following the date notice is given.

Another revised section indicates that the public participation requirements for local educational agencies are to be comparable to those required of the State, except that public hearings are not required (§ 121a.234).

FULL EDUCATIONAL OPPORTUNITY GOAL REQUIREMENTS (§§ 121a.124-121a.126)

Comment: Commenters disagreed about the amount of data which should be required under this (and other) sections. Some commenters sought to have the regulations require a substantial amount of additional data (about the population of handicapped children and their placements) on the grounds that it is needed for effective monitoring. Others sought to have the amount of data to be reported substantially reduced as unnecessary and fulfilling no useful purpose.

Response: The final regulations eliminate the data requirements in proposed section 121a.24(a) for school year 1977-1978. Since the funds for FY 1978 became available for obligation by the Federal government on July 1, 1977, the States began submitting annual program plans for school year 1977-1978 before these regulations were published. Therefore, it would be inappropriate to impose a retroactive data requirement. No substantive change has been made in the data requirement for school years 1978-1979 and thereafter. The Office of Education believes that the remaining amount of data sought is necessary and adequate to provide information on what and how children are being served. Additional information may be sought on a case by case basis from each State where necessary to monitor compliance with Part B. In addition, requirements have been added to Subpart F to increase each State's monitoring and enforcement obligations.

Comment: Commenters requested that the data requirements regarding personnel needed to meet the full educational opportunity goal include various other professional groups, such as physical therapists, or use terms currently accepted by the professions, such as "therapeutic recreation specialists" rather than "recreation therapists."

Response: These changes have been made to cover the various personnel who provide special education or related services and to use terms currently recognized by the appropriate professional associations.

LOCAL EDUCATIONAL AGENCY APPLICATIONS

PARENT INVOLVEMENT (§ 121a.226)

Comment: Commenters wanted the regulations to require the establishment of a parent advisory committee in each school district.

Response: No change has been made. Extensive public and parental participation is already required under sections 121a.226 and 121a.234.

EXCESS COST REQUIREMENTS (§§ 121a.182–121a.186)

Comment: A substantial number of commenters requested clarification and explanation of the excess cost requirement.

Response: The section on excess costs has been broken out into five sections for easier reading. Section 121a.184 specifies that a local educational agency must spend a certain minimum amount for the education of handicapped children before Part B funds may be used. A detailed example of determining the minimum amount follows revised section 121a.184.

NONSUPPLANTING AND COMPARABLE SERVICES (§§ 121a.230–121a.231)

Comment: A substantial number of commenters requested clarification of these requirements. Some commenters proposed detailed procedures and urged that the regulations require the reporting of a substantial amount of data to monitor compliance with these requirements. Some commenters felt the comparability requirement should be met by comparing expenses for regular and special education.

Response: These sections have been substantially revised to attempt to explain these requirements. Detailed procedures and reporting requirements are not adopted at this time because local educational agencies are otherwise required to maintain auditable records to document their compliance with these and other requirements.

Regarding nonsupplanting, the regulation provides that the requirement applies to total aggregate funds and particular costs. A local educational agency meets the requirement if (1) the total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children is at least equal to the total amount or average per capita amount of State and local school funds actually expended for their education in the most recent preceding fiscal year for which information is available. Allowances may be made for decreases in enrollment of handicapped children and unusually large amounts of funds expended for long-term purposes (construction); and (2) Part B funds are not used to displace State or local funds for any particular cost.

The statutory requirement for comparability is implemented by prohibiting a local educational agency from using funds under Part B to provide services to handicapped children, unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency. This should insure that handicapped children who receive services with Part B funds are treated equally with handicapped children who do not receive services with Part B funds. It would be too difficult to make an objective comparison between special and regular education. The concern of the commenters who asked for this comparison should be met by the excess cost requirement, which provides that a local educational agency must spend a minimum amount, on the average, for each of its handicapped children.

Comment: Commenters requested that the regulations make it clear that the local applications must meet the requirements imposed on the State in Subpart B.

Response: A section has been added to make it clear that each local application must include additional procedures and other information which the State educational agency may require in order to meet the State annual program plan requirements in Subpart B. The requirement for local educational agencies to be consistent with the annual program plan is set forth in section 121a.236.

APPLICATION FROM SECRETARY OF INTERIOR (§§121a.260–121a.261)

These sections have been rewritten to clarify that the annual application by the Secretary of the Interior for schools operated for Indian children must meet the applicable requirements of section 614(a), include other material as agreed to by the Commissioner and the Secretary of the Interior, and meet monitoring and public participation requirements.

PUBLIC PARTICIPATION

See the comments on Section 121a 120.

SUBPART C—SERVICES

Subpart C contains regulations governing the major service components required under Part B of the Act. These include free appropriate public education, the full educational opportunity goal, priorities in the use of Part B funds, individualized education programs, direct services by the State educational agency, and the State comprehensive system of personnel development.

FREE APPROPRIATE PUBLIC EDUCATION

FREE APPROPRIATE PUBLIC EDUCATION REQUIREMENTS (§§121a.300–121a.303)

Comment: Commenters disagreed with the interpretation of "State law or practice" in the proposed regulations. Some commenters felt the exception to the requirement to make free appropriate public education (FAPE) available to children in the age ranges three through five and 18 through 21 applies only if State law (or a court order) specifically prohibits services, or only if the State's practice is to provide services to less than a majority of the State's handicapped children. Others felt the requirement does not apply to the lower and upper age ranges unless the State is in fact serving all nonhandicapped children in those age ranges.

Response: The requirement has been redrafted to clarify the use of the exception and to insure at a minimum that handicapped children in any of these age ranges are served to the extent nonhandicapped children are served (to be consistent with nondiscrimination requirements under section 504).

Section 121a.300 ("Timeliness for free appropriate public education") breaks "practice" down by individual public agency, disability category, and age group. This revision is designed to maximize the number of handicapped children aged 3–5 and 18–21 who receive services. It should reduce the reluctance of agencies wishing to serve children in those age groups, because services to a few handicapped children will not require services to all handicapped children in all of the disabilities.

Section 121a.300 also includes an amendment designed to insure that each time a public agency elects to serve a handicapped child, the child receives the full range of rights and services, whether or not FAPE is mandated for that age range.

FREE APPROPRIATE PUBLIC EDUCATION METHODS AND PAYMENTS (§ 121a.301–121a.303)

Comment: Commenters disagreed on which agencies or parties should bear the costs of educating a handicapped child, especially room and board costs. Commenters sought clarification of when the costs must be borne by the State or local educational agency.

Response: The proposed regulation on methods and costs for FAPE (proposed § 121a.201) has been redrafted and expanded as follows:

(1) A new paragraph has been added to section 121a.301; which states: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."

(2) Section 121a.302 states that if placement in a public or private residential program is necessary to provide FAPE to a handicapped child, the program (including non-medical care and room and board) must be at no cost to the child's parents.

Both of these changes have been made to conform to the regulations implementing section 504.

Other Changes: A new section 121a.303 has been added regarding the proper functioning of hearing aids. This section is based on a special study conducted by the Office of Education ("The Condition of Hearing Aids as Worn by Children in Public Schools," GPO publication date Summer, 1977).

FULL EDUCATIONAL OPPORTUNITY GOAL (§§ 121a.304–121a.306)

The statutory terms "free appropriate public education" and "full educational opportunity goal" are distinguished in this regulation as follows:

"Free appropriate public education" (FAPE) must (1) be made available to all handicapped children within the mandated time lines and age ranges set forth in the Act, and (2) include special education and related services which are provided in accordance with an individualized education program.

"Full educational opportunity goal" is broader in scope than "FAPE." It is an all-encompassing term, which (1) covers all handicapped children aged birth through twenty-one, (2) includes a basic planning dimension (including making projections of the estimated numbers of handicapped children), (3) permits each agency to establish its own timetable for meeting the goal, and (4) calls for the provision of additional facilities, personnel, and services to further enrich a handicapped child's educational opportunity beyond that mandated under the "FAPE" requirement. The term "goal" means an end to be sought. However, while an agency may never achieve its goal in the absolute sense, it must be committed to implementing this provision, and must be in compliance with the policies and procedures in the Annual Program Plan under this provision. Further, the agency is not relieved from its obligations under the "FAPE" requirement.

The proposed rule on full educational opportunity goal has been revised as follows: Proposed paragraph (a) (Program options) is now § 121a.305 and proposed paragraph (b) (Non-academic services) is now § 121a.306. A new § 121a.304 has been added which (1) requires each State educational agency to insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children, and (2) authorizes State and local educational agencies to use Part B funds to provide the facilities, personnel and services necessary to meet the goal.

A comment has been added following section 121a.304 which points to Congressional interest in having artistic and cultural activities included in programs supported under this part, subject to the priorities.

Comment: Many commenters asked that additional areas be added to the program options requirement (e.g., leisure education, cultural and performing arts, and occupational education). Other commenters requested that the term "consumer and homemaking education" be substituted for "home economics" in order to be consistent with the

vocational education amendments of 1976 (Pub. L. 94-482).

Response: No substantive change was made in this requirement. The program options included are examples and the list is not exhaustive. Under the regulation implementing section 504, any program provided to nonhandicapped students must also be made available to handicapped pupils. The language conforming to the vocational education amendments was added.

Comment: Commenters requested that under the requirement on nonacademic services the term "cocurricular" be substituted for "extra curricular" and that intramural, extramural, and interscholastic athletics be included in order to insure consistent use of terminology as it applies nationally. Another commenter suggested that specific language be included regarding participation of visually handicapped persons.

Response: The suggested terms were not adopted. This section conforms to the language in the final regulations under section 504. Also, the suggested language on visually handicapped was not included. This requirement applies to all handicapped individuals, including those with visual handicaps.

PHYSICAL EDUCATION (§ 121a.307)

Comment: Some commenters felt that the section on physical education (PE) needed to be clarified, particularly the conditions under which a handicapped child would not be required to participate in the regular PE program; (e.g., the child (a) is enrolled full-time in a separate facility, (b) needs specially designed PE, or (c) the parents and agency agree that the child should not participate). The main concern dealt with the parent-agency agreement, because it appeared to provide a loophole in which a child would not be required to participate in any PE activity.

Response: The statement on parent-agency agreement was deleted. With this change, a handicapped child attending a regular school would participate in the regular PE program, unless the child needs specially designed PE as prescribed in his or her individualized education program (IEP). Parent-agency agreement is inherent in the development of a child's IEP. The decision as to whether the child should be in the regular PE program or receive specially designed PE is made in the IEP meeting in which the parent and agency personnel are represented.

It should be noted that every handicapped child would participate in some type of PE activity. Specially designed PE could involve arrangements for a child to participate in some individual sport or physcial activity (e.g., weight lifting, bowling, or an exercise or motor activity program).

Other changes: Proposed section 121a.204 (Incidental use of property) has been deleted.

PRIORITIES IN THE USE OF PART B FUNDS

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations) and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State administration funds, each State and local educational agency must use its full entitlement under part B "in accordance with the priorities." The regulations which implement these priority requirements are included in sections 121a.320-121a.324.

PRIORITIES (§ 121a.321)

Comment: Many commenters were concerned that first priority expenditures cannot be used for inservice training for personnel who can serve those students, and stated that such inservice training activities may be an essential component toward achieving the first priority.

Response: The proposed rules have been redrafted and expanded in order to address the above concerns. A new section was added to make it clear that an agency may use Part B funds for inservice training concurrently with placing a first priority child in school (in an interim program, if a component of the child's program is missing). However, the provision of inservice training may not be used as a pre-condition for service to the child.

The intent of Congress with respect to the education of first priority children is both long-standing (dating back to Pub. L. 93-380) and very clear, as reflected in the following statements:

(1) The Congress has a responsibility "* * * to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated * * * These funds must be focused in such a way that we are assured that handicapped children are provided their right to education." (Congressional Record—Senate, June 18, 1975, p. S10969)

(2) "First priority for spending under the legislation is to provide services for handicapped children who are not now being served. The flexible approach in the Conference Report with respect to the current fiscal year, fiscal year 1977 and fiscal year 1978 will allow for concentrations of moneys so that this priority can be met." (Congressional Record—House of Representatives, November 18, 1975, p H12348)

(3) "There are millions of children with handicapping conditions who are receiving no services at all. And since we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second." (Congressional Record—Senate, June 18, 1975, p S10961)

Comment: Several commenters requested clarification regarding whether the requirements on the use of funds for priorities apply within or among local educational agencies (e.g., if an agency is serving all of its first priority children, could a State give that agency's entitlement to another agency which is not serving all of its first priority children?).

Response: No change has been made. The statute does not permit the State to take away a local educational agency's Part B funds solely because the local educational agency is serving all of its first priority children. For the limited circumstances where a local educational agency's funds may be reallocated, see section 121a.708.

Other changes: A new paragraph (c) has been added to section 121a.321, which provides that Part B funds cannot be used for preservice training. This addition was made to implement Congressional intent expressed in Senate Report No. 94-168, p. 34 (1975), in which it was stated that funds for preservice training are available under the training program under Part D of the Act, and that Part B funds should not be used for this purpose.

INDIVIDUALIZED EDUCATION PROGRAM

The requirements on individualized education programs (IEPs) in Subpart C have been reorganized and redrafted substantially, based largely on comments received. (These sections have been renumbered, starting with section 121a.340.) A summary of these changes is included below:

(1) A definition of IEP has been added which states that the term "IEP" means a written statement on a handicapped child that is developed and implemented in accordance with sections 121a.341-121a.349 of Subpart C.

(2) The proposed section entitled, "Scope" has been deleted and the substance combined with the section on "State educational agency responsibility."

(3) The proposed section on "Local educational agency responsibility" has been replaced by two new sections ("When IEPs must be in effect" and "Meetings").

(4) The section on "Participants in meetings" has been redrafted to adopt essentially verbatim the language in the Act and to add a new paragraph on participation of evaluation personnel.

(5) The proposed section on "Parent participation" has been amended to include specific provisions regarding notifying parents about the IEP meetings.

(6) The substance under the proposed section on "Content of IEP" has been replaced with the statutory language.

(7) The proposed section on "Private school placements" has been reorganized into two sections to conform to the two groups of private school handicapped children in Subpart D, and has been expanded to spell out in more detail the responsibilities of State and local educational agencies in administering this provision.

(8) A new section was added, entitled, "IEP—accountability."

TIMING OF IEP MEETINGS (§§ 121a.342-121a.343)

Comment: Many commenters felt that the final rules should provide more flexibility to agencies in terms of when IEP meetings are conducted.

Response: The following changes were made in the proposed rules in an attempt to clarify this provision. First, the regulations now specify the dates on which IEP's must be in effect (October 1, 1977, and the beginning of each school year thereafter). Second, except for new handicapped children (those initially evaluated after October 1, 1977), the timing of meetings to develop, review and revise IEPs is left to the discretion of each agency. (For a new handicapped child, a meeting must be held within thirty days of a determination that he or she needs special education.) The regulations are flexible on the schedule to be followed by public agencies in meeting the above dates.

PARTICIPANTS IN IEP MEETINGS (§ 121a.344)

Comment: A number of commenters recommended that personnel from specific disciplines be participants at IEP meetings (e.g., physicians, health care personnel, psychologists, and representatives from other agencies, such as Head Start). Some commenters felt that the meetings should include all direct service personnel who work with a handicapped child. Other commenters suggested cutting back on the number of people who participate.

Response: The final regulations only require the participants listed in the statute, except in the case of a child who has been evaluated for the first time. (NOTE: Participation of evaluation personnel in IEP meetings is covered under the next comment-response sequence.)

Generally, having a large group of people at an IEP meeting may be unproductive and

very costly, and could essentially defeat the purpose of insuring active, open parent involvement.

While it is necessary to insure that all direct services personnel who work with a handicapped child are informed about and involved in implementing the child's IEP, this does not mean that they should attend the IEP meetings. The mechanism for insuring the involvement of all IEP implementers is left to the discretion of each agency (e.g., the child's teacher, or principal, or supervisor could have that responsibility). However, this is a basic administrative procedure which can be handled outside of the context of the IEP meeting.

The statute does not require all IEP implementers to be involved in the meetings. In fact, the definition of IEP in section 602(19) of the Act includes only four people (e.g., a special education provider or supervisor, the teacher, the parent, and the child, where appropriate). Moreover, it was the intent of Congress that IEP meetings generally be small. This position is reflected in the following statement by Senator Randolph in the June 18, 1975 Congressional Record:

In answer to my colleague, it was the intent, and I believe, I can speak for the subcommittee and the committee in this matter, that these meetings * * * be small meetings; that is, confined to those persons who have, naturally an intense interest in a particular child, i.e., the parent or parents, and in some cases the guardian of the child. Certainly the teacher involved or even more than one teacher would be included. In addition, there should be a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.

These are the persons that we thought might well be included. That is why we have called them "individualized planning conferences". We believe that they are worthwhile, and we discussed this very much as we drafted the legislation.

While very large IEP meetings might generally be inappropriate, there may be specific instances where additional participants are essential. In order to enable other persons to be included, the Office of Education retained a provision from the proposed rules which authorized the attendance of "other participants, at the discretion of the agency or parents."

Comment: Some commenters recommended that members of the evaluation team participate in IEP meetings.

Response: A new paragraph has been added which states, in effect, that an evaluation person must participate in any IEP meetings conducted for handicapped children who have been evaluated for the first time (i.e., the preplacement evaluation required under section 121a.531 of Subpart E). Since the meeting is intended to develop an education program for the child, it is essential that someone at the meeting be familiar with the child's evaluation.

Comment: Several commenters recommended that the representative of the agency be qualified in the disability area in which the IEP is written.

Response: A comment has been added following section 121a.344 which suggests (but does not require) that either the teacher or the agency representative should be qualified in the area of suspected disability. At the time of the meeting, the public agency may not yet have hired a person qualified to provide special education with respect to that suspected disability.

PARENT PARTICIPATION (§ 121a.345)

Comment: Some commenters stated that documenting efforts to involve parents would be difficult and time consuming. One commenter felt it was important to retain the general statement requiring agencies to involve parents, but recommended that the details in the parent participation section be deleted from the final regulation. Another commenter recommended that the section be dropped because it is not required in the law and is "* * * utterly paternalistic. If a local education agency is foolish enough to keep inadequate records on transactions with parents, it alone stands in jeopardy; there is no damage to parents or to handicapped children."

Response: The comments have not been adopted. The Office of Education believes that it is important to retain this section in the final regulations, for the following reasons:

First, the section provides rules that allow agencies to proceed in conducting IEP meetings in cases where parents cannot or will not attend. Without this authorization, the IEP process might come to a halt in some cases, since the law states that an IEP must be developed at a meeting with the parents.

Second, the section is designed to protect agencies by setting the conditions under which they can proceed.

Third, the section is designed to protect the rights of the parents. The Congress intended that IEP meetings be utilized as an extension of the procedural protections guaranteed under Pub. L. 93-380. However, if the regulations provided an authorization for agencies to proceed without the parents, there is a potential problem that the authorization (without documentation) might be inappropriately applied in individual cases, which could result in parents' rights not being protected.

Comment: A few commenters suggested using surrogate parents if a child's parents could not attend an IEP meeting. One commenter recommended adding a provision to enable the parents to designate a person to represent them at a meeting.

Response: The Office of Education elected not to write regulations on either of these suggestions.

First, a surrogate parent is appointed only in accordance with the procedural safeguards in Subpart E. The provision was not meant to apply in situations when parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent. A surrogate parent is appointed only when the parents are unknown, unavailable or the child is a ward of the state. However, a surrogate parent appointed under appropriate circumstances would attend the IEP meetings and represent the child in all matters relating to the provision of a free appropriate public education to the child.

Second, with respect to parent designated representatives, the Office of Education does not feel that any change in the regulation is warranted. Parents unable to attend an IEP meeting, who are interested enough in their child's education to seek a third party representative, would have direct input in developing the child's IEP through individual or conference telephone calls or other methods authorized under paragraph (c) of section 121a.345.

Other changes. A new paragraph (f) has been added to require that parents be given a copy of the IEP on request. This should help to insure that the parents are fully informed of the program for their child, and will assist them in participating in future meetings on the IEP.

CONTENT OF IEP (§ 121a.346)

Comment: Hundreds of commenters responded to this section. Some commenters requested that additional services or other items be added. Other commenters recommended that the section be sharply cut back, because they felt that this went unnecessarily beyond the items listed in the statute. Many of the commenters wanted the specific service areas they represent added to the list of services to be provided in the IEP. Others felt that this went unnecessarily beyond the items listed in the statute.

Response: The Office of Education has elected to amend this section by adopting substantially verbatim the language from section 602(19) of the statute. The regulation retains one clarification from the proposed rules, that the individualized education program must include related services to be provided to the child, as well as special education and the extent to which the child can participate in regular education programs. However, given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate.

IEP—ACCOUNTABILITY (§121a.349)

Comment: In the preamble to the proposed rules, a statement was made that the IEP is not a legally binding document. Many commenters recommended that this statement should be included in the body of the final regulations. Other commenters felt that the statement needed to be clarified.

Response: The Office of Education has added a new section, which states, in effect, that each public agency must provide special education and related services in accordance with a handicapped child's IEP. However, Part B does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

COLLECTIVE BARGAINING

Comment: Numerous commenters recommended that the regulations deal with the fact that the required participation of teachers (and other agency staff) in the meetings to develop IEPs would require modification of collective bargaining agreements. Some commenters urged that the regulations require additional compensation for teachers to participate in these meetings, prescribe or limit any after-school-hours participation, and specify arrangements for relieving teachers from classroom duties for the meetings.

Response: No change has been made in the regulation. The requirement for teacher participation in developing IEPs is statutory. The Commissioner understands that collective bargaining agreements and individual annual contracts for teachers vary greatly among local educational agencies and may or may not deal with additional duties and compensation for after-hour activities. In some instances, especially in urbanized and highly unionized areas, collective bargaining agreements may have to be renegotiated to cover employee participation in IEPs. However, this is an area which is solely within the authority of the public agency and its employees (and their union representative, if any). It would be inappropriate and beyond the scope of the Commissioner's authority to prescribe how this requirement must be met. Where collective bargaining agreements must be modified, the public agency must negotiate the appropriate modifications to comply with the statute. The public agency is also responsible for insuring that the IEP meetings are conducted at a time reasonably convenient to parents. (In some cases this may be during school hours; in others, after hours.) The agency also must make its own arrangements for covering classrooms when teachers are absent.

DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

The direct services provision of this subpart includes sections on (1) use of local educational agency (LEA) funds, (2) nature and location of services, (3) use of the State's (SEA's) entitlement, and (4) a State matching requirement.

The section on the use of LEA allocations (renumbered section 121a.360) has been redrafted to combine the proposed paragraphs (a) and (b) into a single paragraph. This paragraph sets out the conditions under which an SEA may use an LEA's entitlement.

A new paragraph (b) has been added to section 121a.360, which states that in meeting the requirements of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

A new paragraph (c) has been added, which repeats the statutory provision that the excess cost requirement does not apply to State educational agencies.

Section 121a.360 (Nature and location of services) has been amended to correct an error made in the proposed rule. The proposed regulation stated that the least restrictive environment (LRE) provisions do not apply when the SEA provides direct services. The amended rule now states that the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions).

The regulation on "State matching" was not substantially changed. However, a comment was added after this section to make it clear that the requirement would be satisfied if the State can document that the amount of State funds expended on each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Comment: In the preamble to the proposed rules under the direct services provision, a point was made that an LEA would not be in compliance with the section 504 regulations if that agency did not make available a free appropriate public education (FAPE) to all of its handicapped children. A commenter, in responding to this statement, pointed out that the term FAPE has different meanings under section 504 and Pub. L. 94-142; and, therefore, an LEA would not have to meet the requirements of Pub. L. 94-142 in order to be in compliance with section 504.

Response. Under Part B, "FAPE" is a statutory term which requires services to be provided in accordance with an IEP. However, under the section 504 regulations, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement. (NOTE.—A more detailed description of the relationship between section 504 and Pub. L. 94-142 is included in this appendix.)

Other changes: A new section 121a.372 has been added to implement section 611(c)(3) of the Act. This section provides that the nonsupplanting requirement does not apply to the State's expenditure of its allocation beginning with funds appropriated for Fiscal Year 1979 and for each following fiscal year.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

GENERAL

The proposed rules in this section created some controversy over the amount of detail contained in the regulations. Comments ranged from requests for more specificity to suggestions that everything be deleted except the statutory language.

The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

SCOPE OF SYSTEM (§ 121a.380)

Comment: A commenter suggested that inservice education be available to all special, regular, and related service personnel.

Response: Paragraph (a) of section 121a.380 was changed to read "the inservice training of general and special educational instructional, related services, and support personnel."

Comment: A commenter suggested that all personnel preparation services be conducted in accredited institutions granting advanced degrees and that "no less than ten percent of the money under this Act be contracted to institutions of higher education." Another commenter recommended the earmarking of a percentage of funds for staff and program development.

Response: No change has been made in the regulations. The Office of Education believes that each State must have maximum latitude in decisions regarding the types of facilities and personnel that are used to implement the comprehensive system of personnel development.

With respect to targeting funds for training, the Office of Education feels that such a step would be inappropriate at this time.

Part B is a unique Federal statute in that it imposes requirements on States which must be implemented, regardless of the amount of Federal funds available. Given the scope and magnitude of the law, the Office of Education believes that each State should have maximum latitude in terms of how its Part B funds are used to implement the various statutory provisions, subject, of course, to the priority requirements in Subpart C.

DEFINITION OF "APPROPRIATELY AND ADEQUATELY PREPARED AND TRAINED" (PROPOSED §121a.261)

A number of comments were received on the definition of "appropriately and adequately prepared and trained" which was in § 121a.261 of the proposed rules. The definition has been deleted in the final regulations. Instead, the term "qualified" is used, as defined in § 121a.12.

Comment: A commenter suggested that nationwide certification requirements be mandated to allow for the mobility of personnel.

Response: No change has been made. The intent of the Act is to insure that all personnel necessary to carry out the purposes of the Act are qualified. The Act does not authorize the establishment of national certification standards.

Comment: A commenter suggested that early childhood be required as an area for certification.

Response: No change has been made. These personnel must be included under the State's comprehensive personnel development system.

Comment: Several commenters expressed the belief that certification should not be required for all personnel directly serving the handicapped, or that such a requirement would result in great expense for the State. Still others felt that competency based systems should be used as opposed to the requirement for certification, registration, or licensing.

Response: The statutory language "appropriately and adequately prepared and trained" has been interpreted, by use of the term "qualified," to mean certification, registration, or licensing. These are commonly accepted procedures for determining if personnel are "appropriately and adequately prepared and trained."

PARTICIPATION OF OTHER AGENCIES AND INSTITUTIONS (§ 121a.381)

The comments on the level and intensity of the "participation" required in this section ranged from the belief expressed that special meetings on components of the state plan are not required in the Act, therefore the "participation" envisioned in section 121a.381 should be eliminated, to the suggested requirement that organizations not only have an opportunity to participate, but that they "must participate." The comprehensive system of personnel development is such a specialized aspect of the Act, necessarily involving agencies not under the jurisdiction of the State that "participation" is fully warranted, though not mandated in the statute. Thus, the regulations set a requirement for the State to insure that those agencies with an interest in the preparation of personnel for the education of the handicapped have an opportunity to participate fully in the development, review, and updating of the system. This is a reasonable requirement, especially considering the critical effect the system will have on those agencies preparing the personnel. Rather than a burden on the State, the "participation" should provide the direct opportunity for the State to encourage the development of quality personnel preparation programs, a factor essential to the provision of a "free appropriate public education."

Comment: Several commenters suggested that "representatives from each group be included in the planning" as well as parents. One commenter suggested that disability categories and groups be listed in the proposed rule.

Response: The regulation has been altered to include representatives of handicapped and parent organizations. This wording should be sufficient to involve all relevant groups.

Comment: A commenter suggested the addition of a subsection (3) to section 121a.381(b) that would require the annual program plan to include a description of agency responsibilities with respect to research and evaluation of exemplary programs that could be implemented in local educational settings.

Response: Sections 121a.385 and 121a.386 have been modified to classify agency responsibilities.

INSERVICE TRAINING (§ 121a.382)

Comment: There were a number of contrasting points of view and suggestions on this section, ranging from requests to mandate greater detail in the proposed rules, to the suggestion that the section be deleted altogether. Those proposing greater detail suggested that specific knowledge and areas of learning be emphasized and that teachers be trained "by having them work one-to-one with specialists" and that "inservice training be mandated at the local level, a county being the largest unit possible, to prevent the State from using the money for ineffectual regional workshops." Also, there were suggestions that where academic credit is to be made available that this be done

only in institutions of higher education with State approved programs.

On the other extreme there were suggestions that this section "exceeds statutory requirements" and "federal rules should not say how a task is accomplished" and "(state) provides adequate training and inservice and does not need more obstacles and regulations."

Response: The statute clearly requires inservice education as a central part of the comprehensive system of personnel development and it is appropriate for the rules to detail the nature and extent of the inservice education that is required. This has been accomplished through the outlining of procedures which define inservice education, its parameters, and relationship to required needs assessments. However, the rules do not define the specific nature of the training to be accomplished. Thus, the rules have been designed to outline the foundation for an adequate program of inservice education, without stifling the creativity of State and local personnel in their efforts to plan and implement such a system.

Comment: A commenter suggested that the statement "in cooperation with institutions of higher education" be inserted in section 121a.383(b)(1).

Response: No change has been made. However, involvement of institutions of higher education is required under § 121a.381(a).

Comment: A number of commenters suggested the addition of specific disciplines and professionals to this section, constituting an itemized list of personnel to be trained or involved in the review of training needs.

Response: No change has been made. The State's plan must include all personnel who need training.

Comment: Several commenters suggested wording changes designed to clarify the text of the proposed rule on inservice training.

Response: Changes were made where necessary to bring the regulation into conformity with current usage.

Comment: There were a number of suggestions concerning the financial arrangements for conducting inservice training. Some commenters advocated the funding of parent groups to conduct inservice training. Others suggested financial support for trainees involved in their programs. One commenter urged that the rule allow for contracting with other than non-profit organizations. One suggested contracts with institutions of higher education to carry out personnel development programs. Another suggested incentives for teacher participation, including released time and college credit. One suggested that inservice be provided during contract time, not involving extra hours.

Response: No substantive changes have been made. All of the suggestions in the above comments are authorized under these regulations.

PERSONNEL DEVELOPMENT PLAN (§ 121a.383)

Comment: Several commenters asked for special attention to physical education and service delivery models which take into account problems of rural families.

Response: No change has been made. Specialized needs in physical education and the unique aspects of providing services in rural settings should be addressed as appropriate in the needs assessment and plan.

Comment: One commenter objected to including preservice training under this section.

Response: No change has been made. The term "inservice" education is used in the Act. However, since the Act clearly requires that a "comprehensive system of personnel development" be developed, such a system must include the consideration of preservice training.

NOTE.—The data required in sections 121a.124 and 121a.126 of Subpart B on the numbers of handicapped children and the kind and number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.383 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

§ 121f.9 *State personnel needs.*

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434)

DISSEMINATION (§121a.384)

Comment: One commenter suggested that "teachers organizations" be specified as recipients of information.

Responses: No change has been made. Teacher organizations are included under the phrase "other interested agencies and organizations."

SUBPART D—PRIVATE SCHOOLS

The proposed rules created a certain amount of confusion among commenters in distinguishing between handicapped children placed in or referred to private schools by the State or by local educational agencies and handicapped children whose parents choose to educate them in private schools. The major difference between these two groups of children is in who bears the cost of the private school.

A free appropriate public education must be made available to each handicapped child by the public agencies of the State. Subject to the requirements on least restrictive environment, this could include placement in or referral to a private school or facility. Such a placement or referral must be at no cost to the parent.

On the other hand, even if a free appropriate public education is available, the parent may choose not to accept it. The parent may choose to send the child to a private school rather than take advantage of the free public education. If this happens, the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

The regulations have been reorganized to make these distinctions clearer. The first set of sections (121a.400–121a.403) now cover children placed in or referred to private schools or facilities by a public agency in order to provide them with special education or related services. (These sections replace sections 121a.320–121a.323 of the proposed rules.)

Since the "State" includes all of its political subdivisions, the term "public agency" is used, as elsewhere in the regulations, to mean all of the political subdivisions of the State which are responsible for providing special education or related services to handicapped children.

The second set of sections (121a.450–121a.460) apply to handicapped children enrolled in private schools or facilities but who are not placed or referred there by a public agency to receive special education or related services. (These sections replace sections 121a.300–121a.306 of the proposed rules.)

The following comments were made regarding proposed Subpart D. Comments which asked for changes not authorized under the statute are not summarized. (Commenters who are concerned about the cost of room and board as a "related service" are referred to section 121a.302 and the discussion of that section in this preamble.) The comments are arranged in order of the final rules.

RESPONSIBILITY OF STATE EDUCATIONAL AGENCY (§ 121a.401)

Comment: A commenter asked that paragraph (a)(3) be deleted, which required that the special education given to a handicapped child placed by a public agency must meet the education standards of the State educational agency (SEA). The commenter stated that otherwise there would be conflicts between the SEA's standards and those of other agencies, in the day care area, for example.

Response. Paragraph (a)(3) cannot be deleted, since it is derived from a statutory requirement. However, it has been revised by using the language of the statute. This will broaden the types of standards that the SEA may apply, and therefore avoid conflict with other mandatory standards. Of course, those standards cannot override the provisions in Part B of the Act.

Comment: A commenter asked that provision be made for interstate referrals to private schools and communication among States regarding those referrals.

Response. No change has been made in the regulation. Referrals between States are to be handled under existing procedures. Unless a problem develops in this area that seriously interferes with the rights of handicapped children or their parents under Part B, the Office of Education is reluctant to regulate the mechanisms by which the States arrange to provide services.

IMPLEMENTATION BY SEA (§121a.402)

Comment: A commenter suggested that the State educational agency insure the monitoring of private schools, dissemination of standards to them, and involving them in developing State standards, rather than the State educational agency doing it directly.

Response: No change has been made. The statute places direct responsibility on the State educational agency to administer and monitor the requirements under Part B. While the State educational agency in many areas need only insure that the Part B requirements are met, monitoring must be done by the agency itself. Dissemination of standards could be done in a variety of ways. Involvement in development of State standards would have to be done directly by the State educational agency if it is the agency that develops those standards.

PLACEMENT OF CHILDREN BY PARENTS (§ 121a.403)

Comment: Commenters were concerned with the effect of this section on the rights of handicapped children in private schools and felt that the section was worded in a manner that would limit those rights.

Response: The section has been revised to make it clear that a free appropriate public education (FAPE) must be made available to

each handicapped child. This would include the development of an individualized education program and placement in the least restrictive environment. Free appropriate public education must be made available at no cost to the parents. If the parents felt that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case, the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450–121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private school by the agency), or of paying for the cost of the private school. Language has been added to clarify the public agency's duties under sections 121a.450–121a.460.

Other changes: Proposed section 121a.323 (Placements in another State) has been deleted. It would have required private schools to meet the standards of both the sending and receiving States. This would have been an unreasonable burden on the receiving State to enforce.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES (§§ 121a.450–121a.460)

Comments: A number of commenters felt that clarification was needed in these sections. There was also some concern expressed regarding the State's legal authority to provide services to children enrolled in private schools.

Response: The regulations have been amended to conform more closely to those under Title I of the Elementary and Secondary Education Act of 1965 (education of educationally deprived children) (45 CFR, Section 116a.23). As under Title I, a balance is drawn between the statutory requirement to provide services, and the constitutional necessity of avoiding excessive entanglements between public agencies and church-related institutions. It is also important for the Office of Education to have a uniform policy regarding services to private school children under all Federal education programs it administers. The amendments to the proposed rules should serve all of these purposes.

SUBPART E—PROCEDURAL SAFEGUARDS

This subpart implements the procedural safeguards set forth in the Act, including due process procedures for parents and children, protection in evaluation procedures, least restrictive environment, confidentiality of information, and procedures of the Office of Education.

A substantial number of detailed comments were received on these sections. Many concerned the statute rather than the regulations or did not state what changes in the regulations were desired. Others requested revisions which did not appear to involve substantive changes. Some comments sought substantially more detailed specification of due process rights while others indicated that the statute itself was so detailed in the due process area that the regulations should not go beyond the statute.

As stated earlier in this preamble, the Office of Education's position, while incorporating a number of the suggestions in the final regulations, is still to adopt minimum regulations in this area at this time, review experience under the regulations, and then made a determination as to whether more detailed regulations are required.

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

DEFINITIONS (§ 121a.500)

Comment: Commenters recommended that the phrase "unless it is clearly not feasible to do so" be deleted from the definition of consent and that additions be made to make it clear that consent may be revoked and may not be made a precondition to the child's right to participate in basic educational programs. The effect of deleting the phrase would be to require that a consent is not valid unless the parent is informed in every case of the information relevant to the consent.

Response: The phrase has been deleted. The deletion of the phrase will help to assure an informed consent in every case, regardless of the parent's language or other mode of communication. A phrase has been added to make it clear that parents have the right to revoke consent. A separate section 121a.504 states that consent may not improperly be made a precondition of services. While public agencies must obtain consent for preplacement evaluations or for initial placement, a public agency may not coerce parents to consent by withholding or threatening to withhold other regular education services or extracurricular activities unless the parent consents.

Comment: Several commenters requested changes in the definition of "evaluation" to indicate that an evaluation must be conducted by qualified personnel, that the findings must be reduced to writing, and that it must take into account the child's assets as well as deficits.

Response: No change has been made. The suggestion reagarding qualified personnel is covered under section 121a.532. The Office of Education expects that evaluations will be in writing and that a child's assets will be considered. If a problem develops in this area, the Office of Education will reconsider the necessity for further regulations.

GENERAL RESPONSIBILITY OF PUBLIC AGENCIES (§ 121a.501)

Comment: Commenters suggested that parents have the right to complain and that agencies should be required to respond to them outside of the context of a hearing.

Response: No change has been made in the regulation. However, agencies should certainly seek to respond to complaints by informal discussions and negotiations. A comment section has been added which notes that mediation may be useful in some instances. In any case, negotiations may not delay a hearing if a parent has requested it.

INDEPENDENT EDUCATIONAL EVALUATION (§ 121a.503)

Comment: Commenters disagreed as to whether the parent's right to an independent evaluation should be broadened or narrowed.

Response: The section has been rewritten to require public agencies to provide parents information, upon request, of where an independent educational evaluation may be obtained. Also, "public expense" has been defined. However, the interpretation in the proposed regulations is retained. The evaluation must be at public expense if the parent disagrees with the evaluation by the public agency, unless the public agency initiates a hearing to show that its evaluation is appropriate. If upheld, the expense of the independent evaluation does not have to be borne by the agency. The independent evaluation must be considered in any hearing.

There are several competing interests which the regulation seeks to balance. The statutory right of the parent to an independent educational evaluation must be preserved. On the other hand, the public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations. Also, for the independent evaluation to be useful, it must meet the same criteria as evaluations conducted by public agencies under this part.

PRIOR NOTICE; PARENT CONSENT AND CONTENT OF NOTICE (§§ 121a.504–121a.505)

Comment: Commenters sought further specificity as to the detail of information provided to parents in the notice. Other commenters felt that the requirements were too demanding. Some commenters asked that consent be required for preplacement evaluation and prior notice for reevaluation; and that consent be extended to include permission for placement. Other commenters sought to delete the consent requirement on the grounds that educational judgments should be final.

Response: The basic notice requirements in sections 121a.504 and 121a.505 were not changed. However, the following changes were made in the consent requirements:

(1) Consent was expanded to include permission for initial placement of a handicapped child in a special education program. Many commenters had requested this addition; and the Office of Education agrees that this requirement is as essential as consent for preplacement evaluation.

(2) The proposed consent rule was changed from consent for all evaluations to consent for the initial or preplacement evaluation. This change is essentially consistent with the section 504 final regulations (45 CFR Part 84, § 84.35(a)). The Office of Education agrees with commenters that there is no need to require consent for reevaluation. If a handicapped child is initially placed in accordance with section 121a.504, and if his or her individualized education program is annually reviewed in accordance with section 121a.343 of Subpart C, a requirement is not necessary. However, prior notice would have to be provided.

Comment: Commenters were especially concerned that clarification be added regarding procedures for overriding parents' refusal to consent.

Response: A subsection has been added to set out procedures for dealing with parental refusal to consent (see section 121a.504(c) and the comment following that section).

The procedures are designed not to interfere with existing State laws which may require consent. Where State law does not require consent, the parent is afforded a due process hearing under this Part. These rules should provide protection to the parent, the child, and the public agency.

IMPARTIAL DUE PROCESS HEARING (§ 121a.506)

Comment: A commenter asked that the regulations specify that the public agency must pay for the hearing.

Response: The change requested by the commenter has not been made. Since the statute requires that the public agency must afford parents an opportunity for a hearing, the agency must bear the cost of the hearing, except for paying for parents' representatives and witnesses. However, section 121a.506 has been amended to require agencies to provide parents with information about free or low-cost legal and other relevant services that are available.

IMPARTIAL HEARING OFFICER (§ 121a.507)

Comment: Commenters sought to have three-person panels, including parents, serve as the hearing officials. Some sought to allow and others sought not to allow school board officials from serving as hearing officials. Com-

menters also asked that lists of hearing officers be required, including their qualifications.

Response: A requirement has been added that each public agency keep a list of persons who serve as hearing officers and a statement of their qualifications. This should help to ensure that the requirement for impartiality is met. No other substantive change has been made. A three-person panel could be used under the existing rules, as long as the conditions of impartiality are met. However, a parent of the child in question and school board officials are disqualified under section 121a.508.

HEARING RIGHTS (§ 121a.508)

Comment: Commenters disagreed as to whether hearing rights set forth in the proposed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

Response: The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

HEARING DECISION; APPEAL (§ 121a.509)

Comment: A commenter sought to add a requirement that specifies that the hearing officer has the power to order any educational program for the child and that his or her power not be limited to accepting or rejecting the program by the public agency or parent.

Response: No change is necessary. The hearing officer has the function to decide what placement is appropriate, if that is the subject of the hearing.

ADMINISTRATIVE APPEAL; IMPARTIAL REVIEW (§ 121a.510)

Comment: Commenters disagreed on whether to reduce or expand the requirements in this section. Some commenters wanted short, specific timelines set out for various actions and specification of the rights that apply at the review level.

Response: The section has been revised to specify other duties and powers of the reviewing official, in addition to those already set out. For example, the official may seek additional evidence if necessary, including holding a new hearing and affording the parties an opportunity for written as well as oral argument (at the reviewing official's discretion). The reviewing official must give a copy of the written findings and decision to the parties. These duties and powers are regarded as necessary to insure that a full review will be conducted and that all parties will be informed of the result of the review. Revisions to timelines for any hearing or review are set out in section 121a.512.

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

TIMELINESS AND CONVENIENCE OF HEARINGS AND REVIEWS (§ 121a.512)

Comment: Commenters wanted clarification of the 45-day time limit for commencing and completing a hearing and review set out in the proposed regulations. They disagreed on whether the time should be shortened or lengthened.

Response: The section has been revised to set a 45 day time limit for a hearing and a 30 day limit for a State level review. In both instances, a decision must be reached and mailed to each of the parties within the time limits set. A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party. The Office of Education believes reasonable outside time limits must be set to insure resolution of any dispute quickly so that the child's special education may proceed. Discretion for specific extensions is consistent with normal judicial and administrative practice.

CHILD'S STATUS DURING PROCEEDINGS (§ 121a.513)

Comment: Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or, if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

SURROGATE PARENTS (§ 121a.514)

Comment: Commenters requested that the regulations clarify when surrogates may be appointed. One reason given was to insure that agencies do not attempt to appoint surrogates when parents are uncooperative or nonresponsive.

Response: The section has been revised to make it clear that the requirements for appointing surrogates apply only when no parent can be identified, the agency after reasonable efforts cannot discover the whereabouts of a parent, or the child is a ward of the State. Agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.

Comment: Commenters requested that the regulations further specify procedures to be used for the appointment of surrogates, including administrative proceedings with notice to interested parties and the right of interested parties to seek a review of the decision.

Response: No change has been made. State procedures for the appointment of surrogates will be followed. Disagreements about the choice of surrogates may be the subject of a due process hearing under section 121a.506.

Comment: A number of commenters suggested that the regulations provide more detail about the qualifications of the surrogates (for example, requiring training and a commitment to becoming acquainted with the child).

Response: No change has been made. The Office of Education believes these concerns are covered by section 121a.514(c)(2) which requires that the surrogate have knowledge and skills that insure adequate representation of the child.

Comment: A number of commenters were concerned about the legal liability of surrogates. Some commenters wanted the regulations to protect surrogates from any legal liability.

Response: No change has been made. The legal liability of surrogates will be determined under State law relating to such matters as breach of fiduciary duty, negligence, and conflict of interest. The Federal government has no authority to limit legal liability.

Comment: A number of commenters sought clarification regarding which agency employees could serve as surrogates. For example, one commenter wanted the regulations to indicate whether the head of a State institution could serve as the surrogate.

Response: The regulation has been reworded to make it clear that no employee of any agency involved in the education or care of the child may serve as the surrogate parent.

PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory testing procedures for use in the evaluation and placement of handicapped children. The requirements for public agencies to follow in carrying out this provision are set forth in sections 121a.530-121a.534 of Subpart E. (These section numbers have been changed to correspond with other number changes in Subpart E.)

The evaluation procedures in the proposed rules have been changed to conform to the corresponding requirements in the final regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84, § 84.35) and in response to other comments received. (Many of the comments dealing with the language and substance of the proposed evaluation procedures are covered by the above conforming changes.) A summary of the changes in these procedures is included below:

(1) Proposed section 121a.431 ("Evaluation; change in placement") has been replaced with new section 121a.531 ("Preplacement evaluation"). This corresponds to section 84.35(a) of Part 84.

(2) Proposed section 121a.432 ("Evaluation procedures") has been divided into two sections (section 121a.532 "Evaluation procedures" and section 121a.533, "Placement procedures"). The new section on evaluation procedures (a) incorporates essentially verbatim the language of section 84.35(b) of Part 84, (b) adds two additional requirements from section 612(5)(C) of the Act which are not in Part 84 (e.g., the provision on native language, and the requirement that "No single procedure is used as the sole criterion for determining an appropriate educational program for a child"), and (c) requires that the evaluation be made by a "multidisciplinary team * * * including at least one teacher or other specialist with knowledge in the area of identified disability * * *"

(3) The new section on placement procedures incorporates essentially verbatim the language in section 84.35(c) of Part 84. In addition, the section ties the development

of an individualized education program to the placement procedures.

The following additional comments were made regarding evaluation procedures:

Comment: Several commenters felt that the regulations should require State and local educational agencies to develop procedures for the conduct of evaluations. This would make it possible to determine the adequacy of the evaluations and to insure uniformity in basic procedures.

Response: A paragraph was added to section 121a.530 (General) which requires the State educational agency to insure that each public agency establishes and implements evaluation—placement procedures.

Comment: Several commenters felt that timelines should be set for implementing the evaluation process (e.g., for initial referral to evaluation and placement).

Response: No change has been made. The Office of Education has elected to impose very few absolute timelines in the regulations for this part, because of the potential administrative and legal problems they can cause. Imposing timelines can actually delay the provision of a service (for example, if the time periods are regarded as both minimum and maximum times for implementing a procedure).

A child should be evaluated as soon as possible following referral. Any undue delay in providing the evaluation would raise the question of the State and local educational agencies' compliance with sections 121a.128 and 121a.220 (identification and evaluation of all handicapped children).

Comment: Some commenters requested clarification regarding whether a reevaluation is needed, as required by proposed section 121a.431(a)(2), if the parents and agency agree that the child should be transferred from a special education program to a full time regular class placement.

Response: This specific section has been deleted in the final regulations. However, any changes in a child's placement (including a transfer to a regular class) would not be made until after a meeting is held to review the child's individualized education program in accordance with the requirements under sections 121a.340–121a.349 of Subpart C. If the parents and agency agree that the child no longer needs special education, a reevaluation would not be necessary. Section 121a.531 requires an evaluation before initial placement only. Reevaluations are covered under section 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Section 612(5)(B) of the Act requires States to establish policies and procedures to insure that "to the maximum extent appropriate, handicapped children * * * are educated with nonhandicapped children * * *." The regulations for implementing this provision are set out in sections 121a.550–121a.556 of Subpart E.

A new paragraph was added to section 121a.550 which requires the State to insure that all public agencies establish and implement procedures in accordance with the requirements of this subpart. In addition, a new section, entitled "Nonacademic settings" was added. This section is taken from a new requirement in the section 504 regulations (45 CFR Part 84, § 84.34).

GENERAL (§ 121a.550)

Comment: A number of commenters requested that provisions be made for special support in the regular classroom in order to accommodate handicapped children (e.g., including reducing the pupil-teacher ratio and assigning aides to the room).

Response: No change was made, since the statute already authorizes the use of supplementary aids and services as a means of enabling a handicapped child to be educated with nonhandicapped children.

CONTINUUM OF ALTERNATIVE PLACEMENTS (§ 121a.551)

Comment: Many commenters responded to this requirement. Some felt that terms other than "continuum" should be used (e.g., "range of programs" and "variety of services"). A large number of commenters felt that "continuum" carried negative connotations (e.g., statements were made that the concept undermines the ideals of Pub. L. 94–142, that it implies best-to-worst, etc.). Other commenters felt that it discriminated against residential or private schools, and suggested that efforts be made to counteract this bias.

Response: No change has been made in this section. The term "continuum," as with "least restrictive environment" (LRE), is commonly used by agencies, advocates, and parents. However, there is nothing to prohibit an agency from using terms such as those included above in administering these provisions.

As with "LRE," the term that is used is not as important as the basic provision and how that provision is implemented. The purpose of a continuum is to be able to accommodate to differences between handicapped children in terms of the degree of special assistance they need to receive a free appropriate public education. This matter was dealt with directly in the June 26, 1975 Report of the House of Representatives on HR 7217 (H. Rept. No. 94–332, p. 9):

The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school or institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

When it is clear that, because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the LRE provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

Even with respect to severely handicapped children, it may be possible to meet the "regular education setting" goal by having a separate class or separate wing in a regular school building.

PLACEMENTS (§ 121a.552)

Comment: Many commenters were concerned that there may be an overzealous implementation of the LRE provision without regard to the needs of individual handicapped or nonhandicapped children.

Response: No substantive change has been made in this section, because the Office of Education feels that the section includes necessary safeguards to insure protection against the above concerns. With respect to those concerns, the overriding rule is that each child's placement must be determined annually and be based on his or her individualized education program.

With respect to concerns about the harmful effect of placing handicapped children in regular classes, the analysis of the section 504 regulations indicates: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *" (45 CFR Part 84—Appendix, paragraph 24)

Comment: A commenter requested that a new provision be added which requires State and local educational agencies to utilize community-based early childhood development programs for 3–5 year old handicapped children. The main intent of the new provision is "aimed solely at assuring maximum appropriate mainstreaming."

Response: No change was made in the section. The existing provisions are considered to be adequate to cover the intent of this request.

CONFIDENTIALITY OF INFORMATION

NOTICE TO PARENTS (§ 121a.561)

Comment: Commenters asked that the detailed content of the notice requirements be deleted as excessive.

Response: No change has been made. The Office of Education believes the provisions require that States provide necessary information to inform parents about the type of information collected about handicapped children to meet the requirements of this part.

ACCESS RIGHTS (§ 121a.562)

Comment: Commenters requested that this section be expanded to require that access to records be given in no case less than five days prior to meetings to develop individualized education programs or any hearing and to permit authorized representatives of the parent to inspect the record. A commenter felt the 45-day outside time limitation could be misinterpreted to mean an agency need not comply at all after 45 days from the date of the request.

Response: Language has been added to make it clear that an agency must comply with a request for access before any meeting regarding an individualized education program. This will help insure that interested parents are able to familiarize themselves with their child's records prior to any meeting and be able to participate more knowledgeably. The prohibition against unnecessary delay places an obligation on the agency to make the records available in a timely manner so that the Office of Education does not believe it is necessary to specify a specific time limitation. Section 121a.562 has been amended to give parents the right to have an authorized representative inspect their child's education records.

The 45-day time limitation is not subject to the misinterpretation the commenter fears. This language is from the Family Educational Rights and Privacy Act, section 438 of the General Education Provisions Act (specifically section 432(a)(1)(A)), to which these regulations are tied (by statute).

FEES (§ 121a.566)

Comment: A commenter felt the first copy of a record should be given free upon request from the parents.

Response: No change has been made. The prohibition against charging a fee if it would effectively prevent the parents from inspecting and reviewing the record is based on a requirement in the Family Educational Rights and Privacy Act, to which these regulations are limited by statute (section 612

(2)(C)). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so.

HEARING PROCEDURES (§ 121a.570)

Comment: A commenter requested clarification of who conducts a hearing.

Response: The section states that the procedures under § 99.22 (the hearing procedures in the regulations for the Family Educational Rights and Privacy Act) be used. Section 99.22(b) states the hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

CONSENT (§ 121a.571)

Comment: Commenters requested that "advanced students," "persons acting as practicum advisors," and researchers be given access to records without consent.

Response: No change has been made. The Family Educational Rights and Privacy Act specifically lists parties and conditions where records may be released without parental consent.

SAFEGUARDS (§ 121a.572)

Comment: A commenter requested a list of positions rather than a list of names of employees who may have access to personally identifiable information.

Response: The requirement has been modified to require a list of names and positions to more fully inform parents and the public of the categories of individuals given access to data as well as the specific individuals who may have access.

DESTRUCTION OF INFORMATION (§ 121a.573)

Comment: A number of commenters were concerned about the destruction requirements. The principle concern was that detailed records might be needed by the handicapped individuals to show proof of need for further services from other agencies. One recommendation was that the parent and child be notified of the existence of the records at the time of graduation and informed that they would be destroyed only upon request of the parent or child. Another commenter suggested that records be maintained, but that parents be given the option to have them destroyed.

Response: The requirement has been revised to permit the parents to request that the information be destroyed and to require the public agency to inform the parents of the destruction option and their right to have the records destroyed upon request. The notice would normally be given at the time a child graduates or otherwise leaves the agency. The purpose of the destruction option is to insure that nonessential records about a child's behavior, performance, and abilities, which may possibly by stigmatizing and are highly personal, are not kept after they are no longer needed for educational purposes. Destruction of these records is the best protection against improper or unauthorized disclosures. However, the handicapped child or his or her parents may need certain records for other purposes (such as proof of eligibility for benefits).

Comment: Commenters asked that notice be given to a child who has reached the age of majority.

Response: No change has been made. Section 121a.574 requires the State educational agency to have policies and procedures regarding children's privacy rights. Where education records are maintained by an agency covered under the Family Educational Rights and Privacy Act, these rights must include transfer of the rights of parents to the child when he or she reaches 18 or the post-secondary education level.

Other Changes: The regulations have been revised to make it clear that the records covered under this Act are the same as the type of records covered under the Family Educational Rights and Privacy Act. Consistency in coverage is necessary to avoid undue administrative burdens on public agencies covered by both laws.

OFFICE OF EDUCATION PROCEDURES

General: The requirements in these sections largely repeated the statute. Perhaps for this reason, few comments were received on the Office of Education procedures.

WAIVER OF REQUIREMENT REGARDING SUPPLEMENTING AND SUPPLANTING WITH PART B FUNDS (§ 121a.589)

Comment: A commenter requested that the special study to determine if a waiver of the requirement should be granted include a review of whether grievance procedures are operational. Other commenters disagreed on the need for this study.

Response: A requirement has been added to have the study cover the adequacy of the State's due process procedures, as this is an important part of insuring that grievances are heard and to determine if parents and other parties are satisfied with the adequacy of the State's programs for handicapped children.

WITHHOLDING PAYMENTS (§ 121a.590)

Comment: Commenters asked for definitions of "substantial compliance" and "failure to comply." Commenters also urged that the Office of Education, the Office for Civil Rights, and Departmental audit officials apply the same criteria.

Response: No change has been made. The Office of Education believes these terms will have to be defined on a case-by-case basis.

The Office of Education and the Office for Civil Rights will coordinate and cooperate in enforcing requirements under this Part and Part 84 (the regulations for section 504 of the Rehabilitation Act of 1973) where identical requirements are involved. The Office of Education will make every effort to insure that auditing officials understand and apply any criteria used by program officials.

SUBPART F—STATE ADMINISTRATION

This subpart has been expanded with requirements set out under the major headings: State Educational Agency Responsibilities, Use of Funds, and State Advisory Panel.

STATE EDUCATIONAL AGENCY RESPONSIBILITIES

Provisions on State educational agency responsibilities have been redrafted (and relocated from proposed section 121a.34) in response to comments, to better summarize general administrative and supervisory responsibilities in section 612(6) and other sections of the Act. A section on complaint procedures, which was included in previous regulations for Part B (prior section 121a.14) and inadvertently not included in the proposed regulations has been added.

Comment: Commenters requested addition of a new section on State educational agencies' responsibilities for monitoring, evaluation, and enforcement activities to insure compliance throughout the State with the requirements of this part. The commenters made specific suggestions for implementing such a section, including collection of data, conduct of on-site visits, audit of fund utilization, comparison of written individualized education programs with programs actually provided, meetings with parents and parent groups, public hearings, development of detailed criteria for evaluating program quality and effectiveness, and detailed procedures for enforcing requirements against noncomplying agencies.

Response: A new section has been added to require each State educational agency to develop procedures and specific timelines for monitoring and evaluating public agencies involved in the education of handicapped children. These are minimal requirements. Adoption of the other suggestions made by the commenters is encouraged but not required.

ALLOWABLE COSTS (§ 121a.621)

Comment: A number of commenters requested that the limitation on State administrative funds be raised and that provisions be added to allow local educational agencies to use funds for administrative costs.

Response: No change has been made on the State limit as it is a statutory limitation.

Comment: Commenters requested that the regulations require each State educational agency to use its funds for specific purposes. One recommendaiton was that ten percent of the administrative funds be used to train persons in local communities to assist and represent parents and to prepare and disseminate to parents information about their rights under these regulations. Another was that they be used to disseminate instructional material.

Response: No change has been made. The Office of Education does not believe it is appropriate to dictate to States how to use their limited administrative funds.

STATE ADVISORY PANEL

ESTABLISHMENT (§ 121a.650)

Comment: One commenter recommended that local panels be required.

Response: No change has been made. The statute only requires a State advisory panel. A State may, of course, decide to establish local panels.

MEMBERSHIP (§121a.651)

Comment: A substantial number of commenters requested additions to the list of representatives to be included on the panel, including professional groups, legal advocacy groups, and employees of State and local agencies. Some commenters recommended that handicapped individuals or their parents make up specific percentages of the panel.

Response: A provision has been added to make it clear that a State may expand the advisory panel to include additional persons in the groups listed (which are statutory) and representatives of other groups. The Office of Education does not believe it is appropriate to prescribe specific percentages, as the States should have some discretion to determine the proper mix of representatives. A comment has been added to indicate factors a State may consider in determining balanced membership of the panel.

ADVISORY FUNCTIONS AND ADVISORY PANEL PROCEDURES (§§ 121a.652—121a.653)

Comment: Commenters recommended that the regulations indicate that the panel must comment publicly on the State annual program plan as well as on any rules and regulations regarding education of handicapped children, review annual evaluations, and act as ombudspersons to hear complaints.

Response: A change has been made to require the panel to comment on the annual program plan. The annual program plan is an extremely important document and this addition makes it clear that the advisory panel must be involved in reviewing it. The other recommendations are legitimate activities but not ones the Federal government believes should be required by these regulations at this time.

Comment: Commenters requested that the regulations provide that panel members be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

Response: This change has been made. It is reasonable to require reimbursement for expenses so that persons will be able to participate without financial sacrifice.

SUBPART G—ALLOCATIONS OF FUNDS; REPORTS

ALLOCATIONS

This major section of Subpart G is entirely statutory; therefore, there are no comments of substance on which to respond.

REPORTS—ANNUAL REPORT OF CHILDREN SERVED (§§ 121a.750–121a.754)

The following comments were received regarding the annual report by the States of the number of children receiving special education and related services. This report is the basis for each State's allocation of funds under Part B, and serves as a mechanism for the Commissioner to meet some of his reporting requirements to Congress under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

AMOUNT OF INFORMATION REQUIRED IN THE REPORT

Comment: Commenters varied in their views on what information should be included in the report. It was suggested that additional information be collected for compliance purposes. Objections were made to the requirement for reporting information by disability category, and for reporting the 0-2 year old population. On the other hand, some commenters recommended that additional categories be added to the report, particularly for deaf-blind children and for multihandicapped children.

Response: Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once, since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

The annual report of children served is not a compliance document. It is only used to determine each State's allocation and to assist the Commissioner in meeting his reporting requirements to the Congress under section 618. Under section 611 of the Act, allocations are based on the number of handicapped children in each State receiving special education and related services. Compliance with requirements such as "least restrictive environment" will be achieved through other mechanisms, including the State's annual program plan, the local educational agency's application, and monitoring by the State educational agency and the Office of Education.

As explained in the preamble to the proposed rules published in the FEDERAL REGISTER on September 8, 1976, the report requirements are the minimum needed by the Commissioner to carry out the Act. (See 41 FR 37814.) While the Commissioner is concerned about the possible harmful effects of "labeling" children, the Act requires that the Commissioner report a substantial amount of information, to Congress by disability category. For this reason, and for the other reasons stated in the September 8, 1976, FEDERAL REGISTER, there appears to be no workable alternative to retaining the categories in the States' annual reports. The various disability categories, as well as the requirements to use them in the Commissioner's reports to the Congress, are statutory.

WHO MAY BE COUNTED

Comment: Commenters disagreed as to whether handicapped children should be counted if their special education is paid for solely from private sources or solely from Federal funds (such as children living on military bases). Some thought that only publicly-funded special education should qualify, while others argued that since all children have a right to a free appropriate public education the source of funding (other than the parent) should not matter.

Response: Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid for solely by the Federal government, unless the child is in one of the age groups 3–5 or 18–21, and there are no local or State funds available for nonhandicapped children in that age group.

Children funded solely by the Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the State for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

Comment: Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a child who receives special education may be counted, but not a child who receives only "related services." This was viewed as an overly restrictive reading of the Act.

Response: No change has been made in the regulations. While no system is perfect, enrollment is a legitimate way of determining the number of handicapped children receiving special education on October 1 and on February 1, the two dates on which the Act requires the count of children served. It would not be practical to make an actual head count of children in classrooms and other facilities where services are provided.

With respect to children who only receive "related services," this is governed by statutory language. "Related services" are only those "required to assist a handicapped child to benefit from special education." (Section 602(17) of the Act.) If a child does not need special education, there can be no "related services," as that term is defined in the Act. However, section 121a.14 permits a State to define certain services as "special education," if those services are "specially designed instruction to meet the unique needs of a handicapped child." (This is taken from the definition of "special education" in section 602(16) of the Act.)

REALLOCATION OF LOCAL EDUCATIONAL AGENCY FUNDS (§ 121a.708)

Comment: Commenters requested criteria be added for when funds may be reallocated.

Response: No criteria have been added as determinations will be made on a case-by-case basis.

APPENDIX B—INDEX TO PART 121a

ADMINISTRATION

See: Monitoring.
Annual program plan requirements—§§ 121a.-112; 121a.134; 121a.138; 121a.141; 121a.142; 121a.145.
Certification of State authority—§ 121a.112.
Direct Service by State educational agency—§ 121a.360.
Local application requirements—§§ 121a.228; 121a.236; 121a.240.
Local education agency definition—§ 121a.8.
State administration—Subpart F.

ADVISORY PANEL (STATE)

Annual program plan requirement—§ 121a.-147.
General requirements—§§ 121a.650–121a.653.

ALLOCATIONS

Annual program plan condition of assistance—§ 121a.110.
Application by local agency condition of assistance—§ 121a.180.
Consolidated applications—§ 121a.191.
Count of children—See Reports.
Interior Department for Indian children—§ 121a.709.
Local agency allocation—See Reports.
Formula—§§ 121a.705–121a.707.
Reallocation—§ 121a.708.
Use by the State—§ 121a.360.
Outlying areas—§ 121a.710.
Recovery for misclassified children—§ 121a.-141.
State allocation:
Formula—§§ 121a.701–121a.703; 121a.705–121a.706.
Hold harmless—§ 121a.704.
Use for administration—§§ 121a.620–121a.-621.
Use of—See other headings.
Withholding—See: Hearings.
From the local agency—§ 121a.194.
From the State—§§ 121a.590–121a.593.

ANNUAL PROGRAM PLAN

Approval; disapproval—§ 121a.113.
Certifications—§ 121a.112.
Condition of assistance to State—§ 121a.110.
Contents—§§ 121a.111; 121a.112; 121a.120–121a.151.
Effective period—§ 121a.114.
General requirements—§§ 121a.110–121a.114.
Public participation—See: Public Participation.
Submission by State—§ 121a.110.

APPLICABILITY OF REGULATIONS—§ 121a.2

APPLICATION BY LOCAL AGENCY

Annual program plan requirement—§ 121a.-144.
Approval or disapproval by State educational agency—§§ 121a.193; 121a.360.

Second priority children—amendment of application—§ 121a.324.
Submission by local agency—§ 121a.180.
Condition of assistance to local agency—§ 121a.180.
Consolidated application—§§ 121a.190–121a.192.
Content—§§ 121a.220–121a.240.
Excess costs—See: Excess Costs.
Public participation—See Public Participation.

AUDITS

See: Monitoring.

COMPLAINTS

State educational agency procedures—§ 121a.602.
See: Hearings.

COMPARABLE SERVICES

Local application requirement—§ 121a.231.

CONSENT

Defined—§ 121a.500.
Disclosure of information—§ 121a.571.
Initial placement—§ 121a.504(b).
Placement status during a proceeding—§ 121a.513.
Preplacement evaluation of child—§ 121a.504(b).

CONFIDENTIALITY OF INFORMATION

Annual program plan requirement—§ 121a.129.
Definitions—§ 121a.560.
General requirements—§§ 121a.560–121a.572.
Local application requirements—§ 121a.221.

CONSOLIDATED APPLICATIONS

See: Application of local agency.

COUNT OF CHILDREN

Annual report of children served—§§ 121a.750–121a.754.
Allocations:
State entitlement—§§ 121a.701–121a.702.
Local educational agency entitlement—§ 121a.707.
Outlying areas entitlements—§ 121a.710.

DEFINITIONS—§§ 121a.4–121a.15

DUE PROCESS

See: Confidentiality of Information.
Evaluation.
Hearings.
Notice.
Procedures for parents and children—§§ 121a.500–121a.514.

EDUCATION

See: Free Appropriate Public Education.
Full Educational Opportunity Goal.
Individualized Education Program.
Personnel Development.
Physical Education.
Special Education.
Related Services.

EVALUATION

Advisory panel function—§ 121a.652.
Annual program plan requirements—§§ 121a.128; 121a.133; 121a.146.
Education programs—§ 121a.146.
Handicapped children:
Consent required for—§ 121a.504.
Defined—§121a.500.
Hearings—See Hearings.
Independent educational evaluation—§ 121a.503.
Information on achievement—§ 121a232.
Notice required—§§ 121a.504–121a.505.
Protection—§§ 121a.129, 121a.133, 121a.221, 121a.530–121a.534.
State responsibility—§ 121a.128.
Hearing aids—§ 121a.303.
Individualized education programs—§ 121a.146.
Personnel development—§ 121a.386.
Private school children service needs—§ 121a.453.
State educational agency activities—§§ 121a.146; 121a.601.
Training—See: Personnel development, this heading.

EXCESS COSTS

Generally—§§ 121a.182–121a.186.
Local application requirement—§ 121a.229.
Not applicable to State educational agency—§ 121a.360.

FREE APPROPRIATE PUBLIC EDUCATION

See: Individualized Education Programs.
Related Services.
Special Education.
Time Limits and Timetables.
Annual program plan requirements—§§121a.121–121a.122.
Defined—§ 121a.4.
Generally—§§ 121a.300–121a.303; 121a.307.
Initiation or change—See: Notice.
State practice exception—§ 121a.300.
State use of local agency's allocation—§ 121a.360.
Priorities—§§ 121a.320–121a.324.

FULL EDUCATIONAL OPPORTUNITY GOAL

Annual program plan requirements—§§ 121a.123–121a.126.
General requirements—§§ 121a.304–121a.306.
Local application requirements—§§ 121a.222–121a.223.

HANDICAPPED CHILDREN

Defined—§ 121a.5.

Rights

See: Confidentiality of Information.
Due Process.
Evaluation.
Free Appropriate Public Education.
Hearing.
Identification, Location, Evaluation.
Individualized Education Program.
Least Restrictive Environment.
Notice.
Private School Children.
Special Education.
Related Services.

HEARINGS

Disapproval of annual program plan—§ 121a.113.
Disapproval of local application—§ 121a.194.
Office of Education procedures—§§ 121a.580–121a.593.
Parents and children:
Identification, evaluation, placement—§§ 121a.506–121a.514.
Confidentiality of information—§§ 121a.568–121a.570.
Public hearings before adopting annual program plan—§§ [illegible] 280–121a.284.
Withholding payments from a State—§ 121a.590.

IDENTIFICATION, LOCATION, EVALUATION

See: Evaluations.
Annual program plan requirement—§ 121a.128.
Local application requirement—§ 121a.220.
Private school children—§ 121a.453.

INDIAN CHILDREN

Application from Secretary of Interior—§§ 121a.260–121a.263.
Count—§§ 121a.753.
Payments to Secretary of Interior—§ 121a.709.

INDIVIDUALIZED EDUCATION PROGRAM

Accountability—§ 121a.349.
Annual program plan requirement—§ 121a.130.
Content—§ 121a.346.
Defined—§ 121a.340.
Effective dates—§ 121a.342.
First priority children—§ 121a.322.
Free appropriate public education definition—§ 121a.4.
General requirements—§§ 121a.340–121a.349.
Least restrictive environment—§ 121a.552.
Local application requirement—§ 121a.235.
Meetings—§§ 121a.343–121a.345.
Parent participation—§ 121a.344.
Placement—§§ 121a.533; 121a.552.
Private school children—§§ 121a.347–121a.348; 121a.401.
Reevaluation—§ 121a.534.

LEAST RESTRICTIVE ENVIRONMENT

Annual program plan requirement—§ 121a.132.
General requirements—§§ 121a.550–121a.556.
Local application requirement—§ 121a.227.
Nature and location of State services—§ 121a.361.
Nonacademic services and settings—§§ 121a.306; 121a.553.
Physical education—§ 121a.307.
Placement decisions—§§ 121a.513; 121a.533.
Program options—§ 121a.305.

MATCHING—§ 121a.371

MONITORING

Annual program plan requirements—§§ 121a.128(b)(5); 121a.130(b)(2); 121a.135.
Auditing count of children served—§ 121a.754.
Confidentiality of information—§ 121.575.
Identification, location, evaluation—§ 121a.128(b)(5).
Individualized education programs—§ 121a.130(b)(2).
Least restrictive environment—§ 121a.556.
Private school children—§ 121a.402(a).
State educational agency responsibility—§ 121a.601.

NONDISCRIMINATION

Annual program requirement—§ 121a.150.
Evaluation materials and procedures—§ 121a.530.
Local application requirement—§ 121a.239.
Nonacademic services—§ 121a.306.
Private school children—§ 121a.458.
Program options—§ 121a.305.
Testing materials and procedures—§ 121a.530.

NOTICE

Confidentiality of information—§§ 121a.561, 121a.673.
Individualized education program meeting—§ 121a.345.
Intitiation or change of identification, evaluation, placement, or free appropriate public education—§§ 121a.504–121a.505.
Notice of opportunity for a hearing—See: Hearings.
Notice of procedural safeguards—§ 121a.505.
Public notice of withholding payments—§ 121a.592.

PERSONNEL DEVELOPMENT

Annual program plan requirement—§ 121a.139.
Comprehensive system of personnel development—§§ 121a.380–121a.387.
Included in State support services—§ 121a.370.
Least restrictive environment—§ 121a.555.
Local application requirement—§ 121a.224.
Personnel needs—§§ 121a.126; 121a.223.
Preservice training—§ 121a.321.

Trained personnel for evaluation materials—§ 121a.532.
Training regarding confidentiality of information—§ 121a.572.
Use of Part B funds for training—§§ 121a.321, 121a.322.

PHYSICAL EDUCATION

Included in special education—§ 121a.14.
Required—§ 121a.307.

PLACEMENTS

See: Evaluation.
Least Restrictive Environment.
Private schools.

PRIORITIES

See: Evaluation.
Indentification, Location, Evaluation.
Annual program plan requirement—§ 121a.-127.
Definitions:
First priority children—§ 121a.320(a).
Second priority children—§ 121a.320(b).
General requirements—§§ 121a.320–121a.324.
Local application requirement—§ 121a.225.
State direct and support services—§ 121a.370.

PRIVATE SCHOOL CHILDREN

Annual program plan requirement—§ 121a.-140.
Confidentiality of information—§ 121a.560.
Cost of residential placement—§ 121a.302.
Handicapped children placed or referred by public agencies—§§ 121a.400–121a.403.
Handicapped children not placed or referred by public agencies—§§ 121a.450–121a.460.
Individualized education program—§§ 121a.-347–121a.348.
Least restrictive environment—§ 121a.554.
Part B applicability to private schools—§ 121a.2.
Physical education—§ 121a.307.

PROCEDURAL SAFEGUARDS

See: Complaints.
Consent.
Hearings.
Notice.
Surrogate Parents.
Annual program plan requirements—§§ 121a.131; 121a.136.
Local application requirement—§ 121a.237.

PUBLIC PARTICIPATION

See: Hearings.
Annual program plan requirements—§§ 121a.120; 121a.137; 121a.280–121a.284.
Local application requirements—§§ 121a.226; 121a.234.
Secretary of Interior application—§ 121a.261.
State advisory panel—§§ 121a.650–121a.654.

RECORDS

See: Confidentiality of Information.
Annual program plan requirement—§ 121a.-143.
Comparable services—§ 121a.231.
Count of children served—§ 121a.754.
Excess costs—§ 121a.183.
Individualized education programs—§ 121a.-130.
Local application requirement—§ 121a.233.
Parents may examine—§ 121a.502; 121a.562.
Parents not participating in meetings—§ 121a.345.

RELATED SERVICES

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.13.

REPORTS

Annual report of children served—§§ 121a.-750–121a.754.
Local application requirements—§§ 121a.232; 121a.233.
State advisory panel—§ 121a.652.

SPECIAL EDUCATION

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.14.

STATE ADVISORY PANEL

Annual program plan requirement—§ 121a.-147.
General requirements—§§ 121a.650–121a.653.

STATE DIRECT AND SUPPORT SERVICES

Annual program plan requirement—§ 121a.-51.
General requirements—§§ 121a.360–121a.372.

SUPPLANTING

Applicability to State educational agency—§ 121a.372.
Local application requirement—§ 121a.230.
Private schools—§ 121a.460.
Waiver of requirement—§ 121a.589.

SURROGATE PARENTS

Definition of parent—§ 121a.10.
Duty of public agency to assign—§ 121a.514.
Responsibilities—§ 121a.514.
Selection—§ 121a.514.

TESTING

See: Evaluation.

TIME LIMITS AND TIMETABLES

Annual program plan effective period—§ 121a.114.
Evaluation of educational programs—§ 121a.-146.
Free appropriate public education—§§ 121a.-122; 121a.300.
Full educational opportunity goal—§§ 121a.-125; 121a.222.
Hearing decisions—§§ 121.512; 121a.583.
Individualized education programs—§§ 121a.-342; 121a.343.
Public participation in the annual program plan—§ 121a.280–121a.284.
Reevaluation—§ 121a.534.
Report of children served—§ 121a.750–121a.-754.
State monitoring of public agencies—§ 121a.-601.
State review of hearing decision—§ 121a.512.

TRAINING

See: Personnel Development.

USE OF PART B FUNDS

Allocation formulas:
Consolidated applications—§§ 121a.190–121a.191.
Entitlements—§§ 121a.700–121a.710.
Annual program plan requirements—§§ 121a.148; 121a.149.
Department of the Interior (Indian children)—§ 121a.262.
Excess costs—§§ 121a.182–121a.186.
Local application requirement—§ 121a.238.
State and local educational agencies:
Free appropriate public education—§§ 121a.301–121a.302.
Full educational opportunity goal—§ 121a.-304(b).
Priorities—§§ 121a.320–121a.324.
Private school children—§§ 121a.450–121a.-460.
State educational agencies:
Allowable costs—§ 121a.621.
Federal funds for State administration—§ 121a.620.
Matching—§ 121a.371.
State advisory panel—§ 121a.652.
Use of local allocation for direct services—§§ 121a.360–121a.361.
Use of State educational agency allocation for direct and support services—§ 121a.-370.
Supplanting—§§ 121a.230; 121a.372; 121a.589.
Training—See: Personnel Development.

5. A new Part 121m is added to read as follows:

PART 121m—INCENTIVE GRANTS

Sec.
121m. 1 Scope; purpose.
121m. 2 General provisions regulations.
121m. 3 Eligibility.
121m. 4 Application.
121m. 5 Application contents.
121m. 6 Amount of grant.
121m. 7 Participation by children not counted under Part B of the Act.
121m. 8 Excess costs.
121m. 9 Administration.
121m. 10 Annual evaluation report.

AUTHORITY: Sec. 619 of Pub. L. 91–230, as amended, 89 Stat. 793 (20 U.S.C. 1419), unless otherwise noted.

§ 121m.1 Scope; purpose.

(a) This part applies to assistance under section 619 of the Act.

(b) The Commissioner awards a grant to each State which provides special education and related services to handicapped children ages three, four, or five.

(c) The State shall use funds provided under this part to give special education and related services to handicapped children in the age groups named in paragraph (b) of this section.

(d) The terms "special education" and "related services" have the meanings defined in § 121a.12 and § 121a.13 of this chapter.

(20 U.S.C. 1419(c).)

§ 121m.2 General provisions regulations.

Assistance under this part is subject to the requirements in Parts 100, 100b, 100c, and 121 of this chapter (including definitions and fiscal, administrative, property management, and other matters).

(20 U.S.C. 1419.)

§ 121m.3 Eligibility.

A State is eligible to receive a grant if:

(a) The Commissioner has approved its annual program plan under Part 121a of this chapter; and

(b) The State provides special education and related services to any handicapped children aged three, four, or five.

(20 U.S.C. 1419(a).)

§ 121m.4 Application.

To receive funds under this part, a State must submit an application to the Commissioner through its State educational agency.

(20 U.S.C. 1419(b).)

§ 121m.5 Application contents.

An application must include the following material:

(a) A description of the State's goals and objectives for meeting the educational needs of handicapped children ages three through five. These goals and objectives must be consistent with the State's full educational opportunity goal under § 121a.123 of this chapter.

(b) A description of the objectives to be supported by the grant in sufficient

detail to determine what will be achieved with the grant.

(c) A description of the activities to be supported by the grant. The activities must be related to the objectives under paragraph (b) of this section and must be described in sufficient detail to determine how the grant will be used.

(d) A description of the impact the proposed activities will have on handicapped children ages three through five. This description must include evidence that the proposed activities are of sufficient size, scope, and quality to warrant the amount of the expenditure. The application must indicate the number of children to be served and the number of handicapped children who will be benefitted indirectly. If children are to be benefitted indirectly, there must be a rationale that demonstrates the benefit.

(e) The number of local educational agencies or intermediate educational units, and the number and names of other agencies which will provide contractual services under the grant, the activities they will carry out, and the reasons for selecting these agencies.

(f) The dollar amounts that will be spent for each major activity described.

(g) A description of the procedures the State will use to evaluate the extent to which the activities met the objectives described under paragraph (b) of this section.

(20 U.S.C. 1419(b).)

§ 121m.6 Amount of grant.

(a) The amount of a grant is $300 multiplied by the average number of children ages three through five counted during the current school year under §§ 121a.750–121a.754 of this chapter.

(b) If appropriated funds are less than enough to pay in full the grants under this part, the amount of each grant is ratably reduced.

(20 U.S.C. 1419(a), (d).)

§ 121m.7 Allowable expenditures.

(a) The State educational agency may use funds under this part to give special education and related services to handicapped children ages three through five who are not counted under §§ 121a.750–121a.754 of this chapter if the State educational agency insures that those children have all of the rights afforded under part 121a of this chapter.

(b) The State educational agency may use up to five percent of its grant for the costs of administering the funds provided under this part.

(20 U.S.C. 1419(c).)

Comment. In carrying out the provisions of this part some activities are considered particularly appropriate for the use of these funds: (1) Providing parents with child development information; (2) assisting parents in the understanding of the special needs of their handicapped child; (3) providing parent counseling and parent training, where appropriate, to enable parents to work more effectively with their children; (4) providing essential diagnosis and assessment; (5) providing transportation essential to the delivery of services; (6) providing speech therapy, occupational therapy, or physical therapy.

§ 121m.8 Excess costs.

(a) If local or State funds are available to pay for the education of nonhandicapped children of the same age as the handicapped children served with funds under this part, funds equal to that amount must also be made available for these handicapped children.

(b) If no local or State funds are available for nonhandicapped children of the same age, funds under this part may be used to pay for all of the costs directly attributable to the education of the handicapped children.

(20 U.S.C. 1419(c).)

§ 121m.9 Administration.

(a) The State educational agency shall administer the funds provided under this part.

(b) The State educational agency may use the funds itself, or may contract with local educational agencies, intermediate educational units, or other agencies.

(20 U.S.C. 1419(a).)

§ 121m.10 Annual evaluation report.

(a) Within 90 days after the end of the grant period, the State educational agency shall submit a report to the Commissioner on the activities carried out under this part during that period.

(b) The report must contain:

(1) The results of the evaluation under § 121m.5(g), and

(2) In brief narrative form, the impact that these funds have had on the State's educational services to handicapped children ages three, four, and five.

(20 U.S.C. 1419(c).)

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federal register

THURSDAY, DECEMBER 29, 1977
PART III

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

■

ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

Procedures for Evaluating Specific Learning Disabilities

[4110-02]

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

Procedures For Evaluating Specific Learning Disabilities

AGENCY: Office of Education, HEW.

ACTION: Final rule.

SUMMARY: These regulations provide procedures for evaluating specific learning disabilities. The regulations supplement basic evaluation requirements under the regulations for part B of the Education of the Handicapped Act which were published August 23, 1977. Upon the effective date of these regulations, the two percent limit (the "cap") on the number of children with specific learning disabilities who may be counted for allocation purposes under part B is removed.

EFFECTIVE DATE: As required by section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)), these amendments have been transmitted to Congress concurrently with publication in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of transmission, subject to the provisions concerning Congressional action and adjournment.

FOR FURTHER INFORMATION CONTACT:

Daniel Ringelheim, Director, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Avenue SW. (Room 4046, Donohoe Building), Washington, D.C. 20202. Telephone: 202-472-2265.

Or

Frank S. King, State Plan Officer, Field Services Branch, Division of Assistance to States, Bureau of Education for the Handicapped, 400 Maryland Avenue SW., (Room 4946, Donohoe Building), Washington, D.C. 20202. Telephone: 202-245-9815.

SUPPLEMENTARY INFORMATION:

RULEMAKING HISTORY—PUBLIC PARTICIPATION

Because of the potential impact that these regulations could have on the education of specific learning disabled (SLD) children throughout the Nation, and on the agencies that serve them, the Office of Education recognized the need for intensive public participation in the development of the regulations, and has taken steps to insure maximum public involvement throughout the entire rulemaking process. Experts and citizens representing advocate groups, including parents and professionals, were invited to participate in meetings where the primary issues regarding the development of these regulations were identified and discussed.

Following the series of meetings, a draft concept paper was developed. The concepts contained in that paper were shared at a special meeting with State educational agency representatives from 34 States. The purpose of this activity was to attempt to ascertain if the concepts contained in the draft paper presented any major philosophical and implementation problems for States.

On November 29, 1976, the proposed rules were published in the FEDERAL REGISTER (41 FR 52404). Written comments and recommendations on the proposed rules were invited for a 120 day comment period. Public hearings were held in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta during that period. This comment period on the proposed regulations extended beyond the period of the annual international conference of the Association for Children with Learning Disabilities, where the proposed regulations were a major topic of both presentations and discussions at that conference. Many sessions on the proposed regulations were conducted by Office of Education personnel and others. During the comment period, over 980 letters were received. In addition 88 formal presentations were made at the hearings. All written and verbal comments were reviewed and considered by the Office of Education in preparing these final regulations.

The tapes of the hearings and copies of written comments are available for public inspection at the Bureau of Education for the Handicapped, Room 4921, Donohoe Building, 400 6th Street SW., Washington, D.C. 20202.

SUMMARY OF PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABLED CHILDREN

These regulations have been developed to comply with section 5(b) of Pub L. 94-142, which required the Commissioner to develop procedures for evaluating children who have a specific learning disability (SLD). Upon the effective date of these SLD regulations, they will be incorporated into the general regulations under part B of the Education of the Handicapped Act published in August (45 CFR Part 121a).

The part B regulations set out basic procedures which public agencies are required to use in evaluating all handicapped children, including, for example, the following requirements: (1) That tests and other evaluation materials are provided and administered in the child's native language or other mode of communication; (2) That no single procedure is used as the sole criterion for determining an appropriate educational program for a child; and (3) That the evaluation is made by a multidisciplinary team including at least one teacher or other specialist with knowledge in the area of suspected disability.

These SLD regulations set out additional procedures which apply only to the evaluation of children suspected of having a specific learning disability. Following is a summary of these additional requirements:

First, the multidisciplinary team must include the child's regular teacher. (If the child has no regular teacher, a person qualified to teach a child of that age would be assigned to the team.) The team also must include a person qualified to conduct individual diagnostic examinations. (Within the SLD population, there are children who primarily display problems of language development. For this population, qualified specialists in speech and language disorders represent an appropriate professional resource.)

Second, criteria are set out for use by the team in determining the existence of a specific learning disability. This determination is made based on (1) whether a child does not achieve commensurate with his or her age and ability when provided with appropriate educational experiences, and (2) whether the child has a severe discrepancy between achievement and intellectual ability in one or more of seven areas relating to communication skills and mathematical abilities.

These concepts are to be interpreted on a case by case basis by the qualified evaluation team members. The team must decide that the discrepancy is not primarily the result of (1) visual, hearing, or motor handicaps; (2) mental retardation; (3) emotional disturbance; or (4) environmental, cultural, or economic disadvantage.

The regulations also set out procedures for observing the child's performance and for preparing a written report of the results of the evaluation.

MAJOR CHANGES FROM PROPOSED REGULATIONS

The following major changes have been made from the proposed regulations:

(1) The formula has been deleted;

(2) The "50 percent" figure for determining "severe discrepancy" has been deleted;

(3) Provisions duplicating requirements in final regulations for general evaluation procedures and for medical examinations under Part B have been deleted.

(4) The monitoring sections have been deleted, since State educational agency (SEA) monitoring responsibilities are covered under § 121a.601 of the Part B regulations. The Commissioner has established these detailed monitoring responsibilities of the SEAs and will monitor each State's compliance with these and other requirements of Part B.

The statute provides that when these final regulations take effect, the two percent cap on the number of children with specific learning disabilities who may be counted for allocation purposes is removed (section 5(c)). Therefore, § 121a.-702.(a)(2) of the Part B regulations, which repeated the statutory cap requirement, is deleted.

ACTION TAKEN OF PUBLIC COMMENTS

The Office of Education conducted a careful review of the public comments received and summarized them by topic.

Of the 982 letters of comment and 88 presenters at the public hearings, the most frequently expressed concern was with the inclusion of the use of a formula as a part of the diagnostic criteria. With the exception of the composition of the evaluation team, there were relatively few comments on other portions of the proposed regulations.

Only a few commenters made suggestions for a different approach to be used to determine the existence of specific learning disabilities. Each of these suggestions was determined to be inappropriate for use in these regulations because it was based on unproven theories or on current practice for which no professional consensus is available.

ANALYSIS OF REGULATIONS

The appendix to the Part B regulations is amended by (1) a discussion of significant comments received on these regulations and the action taken with respect to those comments, and (2) an explanation of the basis for any changes made from the proposed rules published on November 29, 1976.

TECHNICAL CORRECTIONS TO PART 121a REGULATIONS PUBLISHED ON AUGUST 23, 1977

(1) In the definition of "specific learning disability" (§ 121a.5(b)(9)), the phrase "of emotional disturbance" was inadvertently omitted. This has been corrected, and the revised definition is set out in amendment No. 1, below.

(2) The following comment and response regarding Civil Action is contained in the Part 121a Regulations published on August 23, 1977:

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The legislative history cited is nongermane as it was made in reference to the Senate Bill (S. 6) which did not contain the final statutory provision on civil actions. The provision on civil action was added as a Conference substitute. The issue of exhaustion of remedies will be up to the courts to resolve.

The statement made by the Office of Education regarding the legislative history cited by the commenter was incorrect, since the legislative history referred to occurred during consideration of the Conference Report. Therefore, a correction has been made to that statement, as set out in amendment No. 4, following.

NOTE.—The Office of Education has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Analysis (previously referred to as an Inflationary Impact Statement) under Executive Order 11821 and OMB Circular A-107.

(Catalog of Federal Domestic Assistance Number 13.449, Education of Handicapped Children, Part B.)

Dated: October 18, 1977.

ERNEST L. BOYER,
U.S. Commissioner of Education.

Approved: December 19, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health, Education, and Welfare.

Part 121a of Title 45 of the Code of Federal Regulations is amended as follows:

1. Section 121a.5 is amended by revising paragraph (b)(9) to read as follows:

§ 121a.5 Handicapped Children.

* * * * *

(b) * * *

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

* * * * *

§ 121a.702 [Amended]

2. Section 121a.702 is amended by deleting paragraph (a)(2).

3. The following new sections are added:

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

§ 121a.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 121a.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note.)

§ 121a.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;
(ii) Listening comprehension;
(iii) Written expression;
(iv) Basic reading skill;
(v) Reading comprehension;
(vi) Mathematics calculation; or
(vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;
(2) Mental retardation;
(3) Emotional disturbance; or
(4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note.)

§ 121a.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note.)

§ 121a.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;
(2) The basis for making the determination;
(3) The relevant behavior noted during the observation of the child;
(4) The relationship of that behavior to the child's academic functioning;
(5) The educationally relevant medical findings, if any;
(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and
(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(20 U.S.C. 1411 note.)

4. Appendix A is amended as follows:

a. The response under "CIVIL ACTION (§ 121a.511)," appearing at 42 FR 42512, is amended to read as follows:

Response. No change has been made. The Office of Education has decided not to regulate on this question. The issue of exhaustion of remedies will be up to the courts to resolve.

The following paragraphs have been added immediately preceding the capital letter heading LEAST RESTRICTIVE ENVIRONMENT, appearing at 42 FR 42513:

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

Sections 121a.540–121a.543 provide procedures for evaluating specific learning disabilities which supplement the basic evaluation requirements set out above ("PROTECTION IN EVALUATION PROCEDURES," §§ 121a.530–121a.534). These additional procedures were written to comply with section 5(b) of Pub. L. 94–142, which required the Commissioner to develop regulations that establish (1) criteria for determining whether a particular disorder or condition may be considered a specific learning disability, (2) diagnostic procedures for use in identifying SLD children, and (3) monitoring procedures for use in determining whether public agencies are complying with the criteria and diagnostic procedures.

The following major changes have been made from the proposed regulations published on November 29, 1976 (The reasons are set forth below in the discussion of specific comments.):

(1) The formula has been deleted;

(2) The "50 percent" figure for determining "severe discrepancy" has been deleted;

(3) Provisions duplicating requirements in final regulations for general evaluation procedures and for medical examinations under Part B have been deleted.

(4) The monitoring sections have been deleted, since State educational agency (SEA) monitoring responsibilities are covered under § 121a.601 of the Part B regulations. The Commissioner has established these detailed monitoring responsibilities of the SEAs and will monitor each State's compliance with these and other requirements of Part B.

The statute provides that when these final regulations take effect, the two percent cap on the number of children with specific learning disabilities who may be counted for allocation purposes is removed (section 5(c)). Therefore, § 121a.-702(a)(2) of the Part B regulations, which repeated the statutory cap requirement, is deleted.

The following comments were made regarding the SLD proposed regulations:

USE OF FORMULA

Comment. Many commenters objected to the formula proposed for establishing a severe discrepancy between ability and achievement. Their concerns fell primarily into four areas:

(1) The inappropriateness of attempting to reduce the behavior of children to numbers;

(2) The psychometric and statistical inadequacy of the procedure;

(3) The fear that use of the formula might easily lend itself to inappropriate use to the detriment of handicapped children;

(4) The inappropriateness of using a single formula for children of all ages, particularly pre-school children.

Response. The formula has been deleted. Because of the above and other concerns, the Office of Education conducted a study to determine the effectiveness of the formula. While the findings showed that the formula has a certain degree of operational validity, they also identified pronounced technical limitations in its application, including all four concerns listed above.

Given the type and number of technical limitations, it has been determined that the formula should not be included in the final regulations.

Comment. A few commenters recommended alternative formulae for use in determining the existence of a severe discrepancy between ability and achievement.

Response. None of these formulae were adopted. Each was found to have the same types of technical limitations as the formula in the proposed rules.

USE OF OTHER APPROACHES

Comment. A few commenters suggested other approaches to defining specific learning disabilities. Among the suggestions for alternate approaches were those which:

(1) Required that a major discrepancy between verbal and performance scores on the WISC be established in order for a child to be considered as having a specific learning disability;

(2) Required that each area of information processing be subdivided into discrete functions and analyzed in terms of their effects on achievement. If the areas of discrepant functioning were determined to be critical to successful achievement, then a child could be considered as having a specific learning disability.

Response. Neither of these alternative approaches has been adopted. It was determined that the approaches could not be validated without engaging in extensive additional research.

COMPOSITION OF THE EVALUATION TEAMS

Comment. Many commenters had recommendations for requiring additional participants on the evaluation team. This was particularly true of speech and language pathologists who stated that a high percentage of children evaluated for specific learning disabilities have speech and language problems. A significant number of comments on the topic of the team composition were received from members of the field of reading as well.

Response. The general requirements for evaluation in § 121a.532 provide for appropriate selection of individuals to serve on the multi-disciplinary team. Therefore, no substantive change was made. For children with language and speech problems as part of, or associated with, specific learning disabilities, speech and language pathologists represent an appropriate professional resource.

Comment. Some commenters wanted the parents of the child in question to be part of the evaluation team.

Response. No change has been made. The comprehensive evaluation of children necessarily involves the collection of a variety of information, including information from the parents concerning their perceptions of the child's behavior. Such a practice is considered routine and basic to any evaluation and therefore unnecessary to be specifically listed. It might be emphasized that parents have the right under other sections of these Part B regulations to (1) participate in the development of the individual education program of their child, (2) request a due process hearing in the event they disagree with the findings of the evaluation team, (3) have access to all records pertaining to their child, and (4) have other due process safeguards.

SLD CRITERIA AND PROCEDURES

Comment. A few commenters felt that Congressional mandate in section 5(b) of Pub. L. 94–142, which required the Commissioner to establish criteria and procedures for use in identifying specific learning disabilities, was not adequately met by the regulations.

Response. The Office of Education has satisfied the Congressional mandate in the following manner:

First, criteria have been developed for determining the existence of a specific learning disability (i.e., it must be established (a) that a severe discrepancy exists between ability and achievement; (b) that there is a severe achievement problem in one or more of seven areas relating to communication skills and mathematical abilities; and (c) that the discrepancy is not the result of other known handicapping conditions or of environmental, cultural, or economic disadvantages).

Second, comprehensive diagnostic procedures have been established, which are to be used in concert with the above criteria. These procedures include (a) the basic evaluation requirements in sections 121a.530–121a.534 which must be used in evaluating all handicapped children (including those suspected of having a specific learning disability), and (b) the additional procedures (set out in §§ 121a.540–121a.543) to be used in evaluating SLD children.

Third, with respect to monitoring procedures, these are already included throughout the Part B regulations. The Commissioner has established State educational agency monitoring procedures under § 121a.601, and will monitor each State's compliance with these and other requirements of Part B.

EXCLUSION CONDITIONS

Comment. Some commenters stated that children should not be excluded from consideration as having a specific learning disability if their severe academic discrepancy is primarily the result of: (1) a visual, hearing, or motor handicap; (2) mental retardation; (3) emotional disturbance; or (4) environmental, cultural, or economic disadvantage.

Response. No change has been made. These exclusions are statutory.

Comment. Commenters asked for definitions of visual handicaps, motor handicaps, and other "exclusion" terms.

Response. The term "visually handicapped" and other handicapping conditions are defined in § 121a.5. Motor handicap is considered as being included in the definition of orthopedically impaired. Other terms will be applied on a case-by-case basis by professional team members.

THEORY OF THE PROCEDURAL APPROACH

Comment. Commenters requested information on the theoretical basis for the approach taken.

Response. Those with specific learning disabilities may demonstrate their handicap through a variety of symotoms such as hyperactivity, distractability, attention problems, concept association problems, etc. The end result of the effects of these symptoms is a severe discrepancy between achievement and ability. If there is no severe discrepancy between how much should have been learned and what has been learned, there would not be a disability in learning. However, other handicapping and sociological conditions may result in a discrepancy between ability and achievement. There are those for whom these conditions are the primary factors affecting achievement. In such cases, the severe discrepancy may be primarily the result of these factors and not of a severe learning problem. For the purpose of these regulations, when a severe discrepancy between ability and achievement exists which cannot be explained by the presence of other known factors that lead to such a discrepancy, the cause is believed to be a specific learning disability.

It was on this basic concept that these regulations were developed.

CERTIFICATION REQUIREMENTS

Comment. A few commenters questioned the need for certification by the team as to the existence of specific learning disabilities.

Response. No change has been made. By specifying the procedures to be used in determining the existence of a specific learning disability and because the team has all of the data on which to make an appropriate decision, heavy reliance was placed on the judgment of the evaluation team. Since the team has a great deal of latitude in making the determination of the existence of a specific learning disability, it was apparent that the team should document its decision and should clearly indicate the basis on which the determination was made.

SPECIFIC AREAS OF ACHIEVEMENT TO BE REVIEWED

Comment. A few commenters expressed concern that spelling not be listed as one of the eight areas of function which could be evaluated to establish a severe discrepancy between ability and achievement. It was stated that a severe discrepancy in spelling would not necessarily be indicative of a specific learning disability and that the component factors of spelling could be included under one or more of the other seven factors. Some of those commenters stated that when spelling was one of the factors to be evaluated the requirement should be that a severe discrepancy in two or more areas would have to be indicated.

Response. Though "spelling" is listed in the statute, the components of spelling can be assumed under the other seven areas of function. Spelling as a category per se has been deleted from the final regulations.

MAINTENANCE OF 2 PERCENT CAP ON COUNT

Comment. Some commenters indicated that (1) since specific learning disabilities are difficult to define based on current knowledge and (2) because of the need for extensive research to be conducted before a universally accepted definition can be created, the requirement in the Act that limits the number of children eligible to be counted as learning disabled for the purpose of generating the Part B entitlement should be extended. The suggestion was that the cap on counting these children for allocation purposes would remain until such time as it was possible to differentiate all of the specific learning disabilities.

Response. Under the statute, the cap is removed upon the effective date of these regulations. It is generally agreed by parents and professionals alike that the isolation of various labels used by different theorists, as cited in the legislative history, are overlapping and represent assumptions about conditions which cannot with current technology be successfully determined or discretely categorized. Other categories of handicapping conditions as defined have no cap. Since there may in fact be more than two percent of the school age population in some States that are handicapped by specific learning disabilities, such a limitation is inequitable. Such a procedure would not help provide a basis for the determination of whether a child has a specific learning disability, and would not provide assistance in helping to resolve questions of appropriate diagnosis or placement in the event of due process hearings. For these reasons, it is better to adopt the regulations and lift the cap.

NEED FOR ADDITIONAL RESEARCH

Comment. Several commenters pointed out the need for additional research in the area of specific learning disabilities.

Response. As stated in the preamble to the proposed regulations, this need is almost universally acknowledged. The Bureau of Education for the Handicapped and other HEW agencies will continue to support research on the nature and treatment of specific learning disabilities.

MEDICAL EVALUATION

Comment. A few commenters expressed concern that medical examinations were not mandated for every child suspected of having a specific learning disability.

Response. Medical services that are necessary for diagnostic purposes are covered by the definition of related services in § 121a.13.

MORE DETAIL

Comment. Commenters asked for more detail on some of the requirements, for example, a more extensive description of length of observation and specific behaviors to be observed.

Response. No change has been made. The Office of Education believes the evaluation procedures are already very extensive and should prevent mislabeling.

[FR Doc.77-36597 Filed 12-28-77;8:45 am]

4/19/76

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

PART 60-741 – AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS

(Reprint from Federal Register Vol. 41, No. 75, Pages 16147 through 16155 – April 16, 1976)

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

PART 60–741—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS

Redesignation

On June 11, 1974, the Department of Labor published regulations (39 F.R. 20566) implementing section 503 of the Rehabilitation Act of 1973, Public Law 93–112, which requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals. Although the regulations were effective on the date of publication, interested persons were encouraged to submit comments. Those comments have been reviewed and analyzed.

On December 7, 1974, the President signed Public Law 93–516, which amends Public Law 93–112. On August 29, 1975, the Department of Labor published proposed amendments (40 F.R. 39887) to 20 CFR Part 741 to incorporate the 1974 amendments to the Act, to make the regulations consistent with the Act, and to incorporate some of the suggestions submitted concerning the regulations published on June 11, 1974.

The purpose of the amendments published today is to incorporate the 1974 amendments to the Act into the regulations to make the regulations consistent with those amendments, and to incorporate some of the suggestions submitted by representatives of the concerned public during the comment period which ended on October 14, 1975. These amendments to the existing regulations are also necessary to improve administration and enforcement of the Act, and to give contractors more specific and detailed information regarding the extent of their obligation. The more significant amendments are as follows:

1. The definition of handicapped individual has been amended consistent with the amended definition in the Act, and the reference to the source of rehabilitation has been omitted. Under that definition, a handicap is any impairment which substantially limits one or more of a person's major life activities.

2. A definition of "substantially limited" is added to clarify the meaning of that phrase for the purposes of these regulations.

3. A definition of qualified handicapped individual is added to assure that persons who are protected under the Act are those qualified to work rather than those who qualify solely to meet the definition of handicapped.

4. The affirmative action clause is revised to eliminate the three-part structure based upon contract amount and/or length of performance, so that the same clause will be utilized in all covered contracts. Contractors have commented that the existing clause is confusing and imprecise, and creates confusion as to which portions are applicable to which subcontracts. The obligation to prepare an affirmative action program is removed from the contract clause and transferred to a separate section. The requirement for the submission of an annual report has been deleted. The recordkeeping requirement has been transferred to a separate section and the time for preserving records has been reduced to one year. Many comments pointed out that requiring maintenance of records for three years increased the contractor's recordkeeping burden without any apparent benefit to the program.

5. A new section is added obligating all non-exempt contractors holding contracts of $50,000 or more with 50 or more employees to prepare and maintain at their places of business the affirmative action program. The dollar amount is reduced from $500,000 to $50,000 to make the amount consistent with the Office of Federal Contract Compliance Program's Revised Order No. 4 (41 CFR Part 60–2) since most contractors indicated that the programs, while separate, were prepared together, using much common data. The proposed requirement for disseminating a summary of the affirmative action program to applicants and employees has been deleted. It is considered sufficient to require that the affirmative action program be available for inspection by applicants and employees (see section 60–741.5(b)). Many comments pointed out that it was difficult to determine

which individuals were entitled to affirmative action. A new section 60–741.5(c) has been added to make clear to whom the affirmative action obligation runs.

6. The affirmative action policy section has been expanded to include more detailed explanation of the steps contractors may take to fulfill their affirmative action obligation. While no goals and timetables or utilization analyses are required, recruitment, outreach, internal administration and other duties similar to those required in OFCCP's Order No. 4 are added. The existing section which requires the Assistant Secretary to issue criteria for good faith efforts has been revoked. Provisions have been added which require that all job qualification requirements must be job-related and all information obtained from medical examinations or preemployment inquiries into an applicants physical or mental condition must be used in accordance with job-related standards. The provisions in the proposal requiring written standards for every job and detailed recordkeeping of each employment transaction involving a handicapped individual have been deleted as being unnecessarily burdensome and unworkable for many contractors. Contractors will be required to conduct a review of all job qualification requirements to ensure that they are job-related, however, and will have the burden of proving job-relatedness when those qualification requirements become an issue in specific cases.

7. Because the new definition of handicapped individuals no longer relies on a connection with rehabilitation facilities under Title I and III of the Act, the certification section has been deleted. Complainants before the Department of Labor need submit only a signed statement of their impairment. However, if there is any reason to question that statement, complainants may be required to provide additional information. This section also permits contractors to require applicants or employees to document their claims of disability, and permits physical examinations at the contractor's expense. Any documentation required must be based Guides to the Evaluation of Permanent on the American Medical Association Impairment.

8. The accommodation section has been amended to delete the requirement that contractors provide in the affirmative action program some examples of accommodations which may be necessary. The comments pointed out that it is very difficult for contractors to know in advance what accommodations may be required for specific employees. In addition, the accommodation section has been amended to delete the reference to "resulting personnel problems" as a factor to be considered in assessing whether an accommodation is required. This language was found confusing and misleading.

9. The provision requiring contractor certification, which was to have been inserted in all contracts after January 1, 1976, has been revoked.

10. The evaluation section authorizes investigations by the Director of OFCCP to determine compliance as well as evaluations of agency performance.

11. In view of the foregoing amendment regarding investigations, the Department will require compliance agencies to conduct investigations from time-to-time at the request of the Director to ensure that contractors in the agencies' assigned industries are fully cognizant of their obligations under the Act and this Part, and to report to the Director any information which comes to their attention that contractors are not in compliance therewith. Other modifications in the hearing procedures are made consistent with this amendment.

12. There is a new provision that contracts with sheltered workshops may not be deemed affirmative action unless the contractor uses the sheltered workshops as a source of trainees for its own workforce. The remaining amendments are primarily explanatory or correct inconsistencies in terminology or structure.

In view of the fact that responsibility for enforcement of section 503 of the Rehabilitation Act of 1973 has been placed in the Office of Federal Contract Compliance Programs and all other OFCCP regulations are contained in Title 41 CFR, Chapter 60, for administrative convenience and clarity the regulations governing the affirmative action obligations of contractors and subcontractors for handicapped workers formerly found in 20 CFR Part 741 are redesignated as Part 60–741 of 41 CFR and are revised as follows:

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

Sec.	
60–741.1	Purpose and application.
60–741.2	Definitions.
60–741.3	Coverage and waivers.
60–741.4	Affirmative action clause.
60–741.5	Applicability of the affirmative action program requirement.
60–741.6	Affirmative action policy, practices and requirements.
60–741.7	Determination of handicap.
60–741.8	Listing of employment openings
60–741.9	Labor unions and recruiting and training agencies.

Subpart B—General Enforcement and Compliance Procedure

60–741.20	Subcontracts.
60–741.21	Adaptation of language.
60–741.22	Incorporation by reference.
60–741.23	Incorporation by operation of the Act and agency regulations
60–741.26	Complaint procedures.
60–741.27	Noncompliance with the affirmative action clause.
60–741.28	Actions for noncompliance.
60–741.29	Formal hearings.
60–741.30	Notification of agencies.
60–741.31	Contractor ineligibility list.
60–741.32	Disputed matters related to the affirmative action program.

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Appendix B
Appendix C

AUTHORITY: Sec. 503, Pub. Law 93-112, 87 Stat. 393 (20 U.S.C. 793), as amended by Sec. 111, Pub. Law 93-516, 88 Stat. 1619 (29 U.S.C. 706) and Executive Order 11758.

Subpart A—Preliminary Matters, Affirmative Action Clause, Compliance

§ 60-741.1 Purpose and application.

The purpose of the regulations in this Part is to assure compliance with section 503 of the Rehabilitation Act of 1973, which requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals The regulations in this Part apply to all government contracts and subcontracts for the furnishing of supplies or services or for the use of real or personal property (including construction) for $2,500 or more. Compliance of a contractor with the provisions of this Part will not necessarily determine its compliance with the requirements of section 504 of the Rehabilitation Act of 1973 and compliance with section 504 will not necessarily determine compliance with section 503 and the regulations in this Part.

§ 60-741.2 Definitions.

"Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

"Affirmative action clause" means the contract provisions set forth in § 60-741.3.

"Agency" means any contracting and/or compliance agency of the government.

"Assistant Secretary" means the Assistant Secretary of Labor for Employment Standards or his or her designee.

"Compliance agency" means any agency which the Director requests to conduct investigations and such other responsibilities in connection with the administration of the Act as the Director may request, as appropriate, including the responsibility to ensure that contractors are fully cognizant of their obligations under the Act and this Part and to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this Part.

"Construction" means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any government contract.

"Contracting agency" means any department, agency, establishment or instrumentality of the United States, including any wholly owned government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor.

"Government" means the government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: utility, construction, transportation, research, insurance, and fund depository, irrespective of whether the government is the purchaser or seller. The term "government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally-assisted contracts.

"Handicapped individual" means any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment or (3) is regarded as having such an impairment. For purposes of this Part, a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap. (See Note A attached for guidelines on the applications of this definition.)

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Person" means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract, and, for the purposes of Subpart B of this Part, includes any person who has held a contract subject to the Act.

"Qualified handicapped individual" means a handicapped individual as defined in § 60-741.2 who is capable of performing a particular job, with reasonable accommodation to his or her handicap.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor, or who provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

"Rules, regulations, and relevant orders of the Secretary of Labor" as used in paragraph (b) of the affirmative action clause means rules, regulations, and relevant orders of the Secretary of Labor or his or her designee issued pursuant to the Act.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person holding a subcontract and, for the purpose of Subpart B of this Part, any person who has held a subcontract subject to the Act.

"United States" as used herein shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, the Panama Canal Zone, American Samoa and the Trust Territory of the Pacific Islands.

§ 60-741.3 Coverage and waivers.

(a) General—(1) Transactions for less than $2,500. Contracts and subcontracts for less than $2,500 are not covered by the Act. No agency, contractor or subcontractor shall procure supplies or services in less than usual quantities to avoid the applicability of the affirmative action clause.

(2) Contracts and subcontracts for indefinite quantities. With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the affirmative action clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than $2,500. The applicability of the affirmative action clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the affirmative action clause shall be applied to such contract whenever the amount of a single order is $2,500 or more. Once the affirmative action clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) Work outside the United States. The requirements of the affirmative action clause are waived with respect to contracts and subcontracts with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) Contracts with state or local governments. The requirements of the affirmative action clause in any contract or subcontract with a state or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(5) Facilities not connected with contracts. The Director may waive the requirements of the affirmative action clause with respect to any of a prime contractor's or subcontractor's facilities which he or she finds to be in all respects separate and distinct from activities of

the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor or subcontractor.

(b) Waivers—(1) Specific contracts and classes of contracts.

The head of an agency, with the concurrence of the Director, may waive the application to any contract or subcontract of any part of or all the affirmative action clause when he or she deems that special circumstances in the national interest so require. The agency head, with the concurrence of the Director, may also grant such waivers to groups or categories of contracts or subcontracts of the same type where it is (i) in the national interest, (ii) found impracticable to act upon each request individually, and (iii) where such waiver will substantially contribute to convenience in administration of section 503 of the Act.

(2) National security. Any requirement set forth in the regulations in this Part shall not apply to any contract or subcontract whenever the head of the contracting agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination the head of the agency will notify the Director in writing within 30 days.

(c) Withdrawal of waiver. When a waiver has been granted for any class of contracts or subcontracts under this section other than contracts granted waivers under paragraph (b)(2) of this section, the Director may withdraw the waiver for a specific contract or subcontract or group of contracts or subcontracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

§ 60–741.4 Affirmative action clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract).

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provisions of this clause in every subcontract or purchase order of $2,500 or more unless exempted by rules, regulations, or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

§ 60–741.5 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract every government contractor or subcontractor holding a contract of $50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with § 60–741.5 of this Part. This program may be integrated into or kept separate from other affirmative action programs of the contractor. Contractors presently holding government contracts shall update their affirmative action programs within 120 days of the effective date of this Part.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c) (1) The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the Act and the regulations in this Part. If an applicant or employee so identifies himself or herself the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate accommodation. (An acceptable form for such an invitation is set forth in Note B attached.)

(2) Nothing in this section shall preclude an employee from informing a contractor at any future time of his or her desire to benefit under the program.

(3) Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of whose handicap the contractor has actual knowledge: *Provided*, that the contractor is not obligated to search the medical files of any applicant or employee to determine the existence of a handicap.

(4) Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

(d) The full affirmative action program shall be available for inspection to any employee or applicant for employment upon request. The location and hours during which the program may be obtained shall be posted at each facility.

§ 60–741.6 Affirmative action policy, practices and procedures.

(a) *General requirements.* Under the affirmative action obligation imposed by section 503 of the Rehabilitation Act of 1973, contractors are required to take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) *Proper consideration of qualifications.* Contractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications of known handicapped applicants and employees for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. To the extent that it is necessary to modify their personnel procedures, contractors shall include the development of new procedures for this purpose in their affirmative action program required under this Part. These procedures must be designed so as to facilitate a review of the implementation of this requirement by the contractor or the government. (Note C attached is an example of an appropriate set of proce-

dures. The procedures in Note C are not required and contractors may develop other procedures which are appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical or mental job qualification requirements to ensure that, to the extent qualification requirements tend to screen out qualified handicapped individuals, they are job related and are consistent with business necessity and the safe performance of the job.

(2) Whenever a contractor applies physical or mental job qualification requirements in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification requirements tend to screen out qualified handicapped individuals, the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the job. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph.

(3) Nothing in this section shall prohibit a contractor from conducting a comprehensive medical examination prior to employment provided that the results of such an examination shall be used only in accordance with the requirements of this section. Whenever a contractor inquires into an applicant's or employee's physical or mental condition or conducts a medical examination prior to employment or change in employment status information obtained in response to such inquiries or examination shall be kept confidential except that:

(i) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals and regarding accommodations; and

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

(iii) Government officials investigating compliance with the Act shall be informed.

(d) *Accommodation to physical and mental limitations of employees.* A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) business necessity and (2) financial cost and expenses.

(e) *Compensation.* In offering employment or promotions to handicapped individuals, the contractor may not reduce the amount of compensation offered because of any disability income, pension or other benefit the applicant or employee receives from another source.

(f) *Outreach, positive recruitment, and external dissemination of policy.* Contractors shall review their employment practices to determine whether their personnel programs provide the required affirmative action for employment and advancement of qualified handicapped individuals. Based upon the findings of such reviews, contractors shall undertake appropriate outreach and positive recruitment activities, such as those listed below. It is not contemplated that contractors will necessarily undertake all the listed activities or that their activities will be limited to those listed. The scope of a contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(1) The contractor should develop internal communication of its obligation to engage in affirmative action efforts to employ qualified handicapped individuals in such a manner as to foster understanding, acceptance and support among the contractor's executive, management, supervisory and all other employees and to encourage such persons to take the necessary action to aid the contractor in meeting this obligation.

(2) The contractor should develop reasonable internal procedures to ensure that its obligation to engage in affirmative action to employ and promote qualified handicapped individuals is being fully implemented.

(3) The contractor should periodically inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified handicapped individuals.

(4) The contractor should enlist the assistance and support of recruiting sources (including state employment security agencies, state vocational rehabilitation agencies or facilities, sheltered workshops, college placement officers, state education agencies, labor organizations and organizations of or for handicapped individuals) for the contractor's commitment to provide meaningful employment opportunities to qualified handicapped individuals. (A list of numerous national organizations serving the handicapped, many of which have state or local affiliates, is found in the "Directory of Organizations Interested in the Handicapped" published by the Committee for the Handicapped People-to-People Program, Washington, D.C.)

(5) The contractor should engage in recruitment activities at educational institutions which participate in training of the handicapped, such as schools for the blind, deaf, or retarded.

(6) The contractor should establish meaningful contacts with appropriate social service agencies, organizations of and for handicapped individuals, vocational rehabilitation agencies or facilities, for such purposes as advice, technical assistance and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have the authority to approve or disapprove the acceptability of affirmative action programs.

(7) The contractor should review employment records to determine the availability of promotable and transferable qualified known handicapped individuals presently employed, and to determine whether their present and potential skills are being fully utilized or developed.

(8) The contractor should include handicapped workers when employees are pictured in consumer, promotional or help wanted advertising.

(9) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(10) The contractor should take positive steps to attract qualified handicapped persons not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for handicapped individuals described in subsection (f)(4).

(g) *Internal dissemination of policy.* A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees, who may have had limited contact with handicapped persons in the past. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor should adopt, implement and disseminate this policy internally as follows:

(1) Include it in the contractor's policy manual.

(2) Publicize it in the company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of the contractor's policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Include articles on accomplishments of handicapped workers in company publications.

(9) Post the policy on company bulletin boards, including a statement that employees and applicants are protected from coercion, intimidation, interference or discrimination for filing a complaint or assisting in an investigation under the Act.

(10) When employees are featured in employee handbooks or similar publications for employees, include handicapped employees.

(h) *Responsibility for implementation.* An executive of the contractor should be designated as director or manager of company affirmative action activities under these regulations. His or her identity should appear on all internal and external communications regarding the company's affirmative action programs. This executive should be given necessary top management support and staff to manage the implementation of this program, including the following activities:

(1) Develop policy statements, affirmative action programs, and internal and external communication techniques. The latter techniques should include regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed. In addition, supervisors should be advised that:

(i) Their work performance is being evaluated on the basis of their affirmative action efforts and results, as well as other criteria.

(ii) The contractor is obligated to prevent harassment of employees placed through affirmative action efforts, as set forth in § 60–741.51.

(2) Identify problem areas in conjunction with line management and known handicapped employees, in the implementation of the affirmative action programs, and develop solutions. This is particularly important for the accommodations requirements.

(3) Design and implement audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's objectives have been attained.

(iv) Determine whether known handicapped employees have had the opportunity to participate in all company sponsored educational, training, recreational and social activities.

(v) Ensure that each location is in compliance with the Act and the regulations in this Part.

(4) Serve as liaison between the contractor and enforcement agencies.

(5) Serve as liaison between the contractor and organizations of and for handicapped persons, and arrange for the active involvement by company representatives in the community service programs of local organizations of and for the handicapped.

(6) Keep management informed of the latest developments in the entire affirmative action area.

(7) Arrange for career counseling for known handicapped employees.

(i) *Development and execution of affirmative action programs.* (1) Job qualification requirements reviewed pursuant to subsection (c) of this section should be made available to all members of management involved in the recruitment, screening, selection, and promotion process.

(2) The contractor should evaluate the total selection process including training and promotion to ensure freedom from stereotyping handicapped persons in a manner which limits their access to all jobs for which they are qualified.

(3) All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to ensure that the commitments in its affirmative action program are implemented.

(4) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(5) A special effort should be made to include qualified handicapped persons on the personnel relations staff.

(6) Handicapped employees should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(7) Recruiting efforts at all schools should incorporate special efforts to reach handicapped students.

(8) An effort should be made to participate in workstudy programs with rehabilitation facilities and schools which specialize in training or educating handicapped individuals.

(9) The contractor should use all available resources to continue or establish on the job training programs.

(j) *Sheltered workshops.* Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified handicapped individuals in the contractor's own workforce. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become qualified as "qualified handicapped individual" as defined in § 60–741.2.

§ 60–741.7 Determination of handicap.

(a) Any handicapped individual filing a complaint with the Director under this Part shall submit with his or her complaint a signed statement specifying the handicapping impairment or situation (see Section 60–741.2 definition of "handicapped individual"). If the Director determines that further documentation is necessary, he or she may require the complainant to provide additional information.

(b) Any contractor requiring a determination of an applicant's or employee's handicap may require the applicant or employee to provide medical documentation of the impairment or, in the alternative, may require the applicant or employee to undergo a medical examination at the contractor's expense.

(c) Any determination of handicap required pursuant to paragraph (b) of this section must meet the requirements of § 60–741.5(c) and must be for the purpose of affirmative action and proper job placement. Information obtained therefrom shall not be used to exclude or otherwise limit the employment opportunities of qualified handicapped individuals.

(d) All medical documentation required under this section shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, provided that the Guides shall be used only to determine the existence of impairment without regard to the degree of impairment.

§ 60–741.8 Listing of employment openings.

Contractors should request state employment security agencies to refer qualified handicapped individuals for consideration under their affirmative action programs.

§ 60–741.9 Labor unions and recruiting and training agencies.

(a) Whenever performance in accordance with the affirmative action clause or any matter contained in the regulations in this Part may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such agreements shall be given an adequate opportunity to present their views to the agency, or to the Director.

(b) The Director shall use his or her best efforts, directly or through contractors, subcontractors, local officials, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to assist in, the implementation of the purposes of the Act.

Subpart B—General Enforcement and Complaint Procedure

§ 60–741.20 Subcontracts.

Each nonexempt prime contractor and subcontractor shall include the affirmative action clause prescribed in § 60–741.3 in each of their nonexempt subcontracts. The clause may be incorporated by reference in accordance with § 60–741.22.

§ 60–741.21 Adaptation of language.

Such necessary changes in language may be made to the affirmative action clause (see § 60–741.3) as shall be appropriate to identify properly the parties and their undertakings.

§ 60–741.22 Incorporation by reference.

The affirmative action clause and the regulations contained in this Part may be incorporated by reference in all contracts and subcontracts.

§ 60–741.23 Incorporation by operation of the Act and agency regulations.

By operation of the Act, the affirmative action clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this Part to include such a clause, whether or not it is physically incorporated in such contracts and whether or not there is a written contract between the agency and the contractor.

§ 60–741.24 Duties of agencies.

(a) General responsibility. Each agency shall cooperate with the Director in the performance of his or her responsibilities under the Act. Such cooperation shall include the responsibility to ensure that contractors are fully cognizant of their obligations under the Act and this Part, to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this Part, and to take such actions for noncompliance as set forth in § 60–741.31 as may be ordered by the Director.

(b) Designation of agency official. The head of each agency, or his or her designee, shall identify and submit to the Director the name, address and telephone niumber of the official within the agency who is primarily responsible for implementation of this program within the agency.

§ 60–741.25 Evaluations by the Director.

The Director shall be primarily responsible for undertaking such investigations of complaints and other matters as well as evaluations of contractor and agency performance as may be necessary to assure that the purposes of section 503 of the Rehabilitation Act of 1973 are being effectively carried out.

§ 60–741.26 Complaint Procedures.

(a) Place and time of filing. Any applicant for employment with a contractor or any employee of a contractor may, personally or by an authorized representative, file a written complaint with the Director alleging a violation of the Act or the regulations in this Part. Such complaint must be filed within 180 days from the date of the alleged violation, unless the time for filing is extended by the Director for good cause shown.

(b) Referral to contractor. When a complaint is filed by an employee of a contractor and the contractor has an applicable internal review procedure, the complaint shall be referred to the contractor for processing under that procedure. The complaint and all actions taken thereunder shall be kept confidential by the contractor. If there has not been a resolution of the complaint under that procedure satisfactory to the complainant within 60 days of the referral, the Department of Labor or the designated agency will proceed as provided in this section.

(c) Contents of complaints. Complaints must be signed by the complainants or their authorized representatives and must contain the following information: (1) Name and address (including telephone number) of the complainant, (2) name and address of the contractor or subcontractor who committed the alleged violation, (3) a description of the act or acts considered to be a violation, (4) a signed statement that the individual is handicapped or has a history of a handicap or other documentation of impairment or was regarded by the contractor as having an impairment, and (5) other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known federal agency with which the employer has contracted.

(d) Incomplete information. Where a complaint contains incomplete information, the Director or the agency designated by the Director for investigation of the complaint shall seek the needed information from the complainant. If the information is not furnished to the agency or the Director within 60 days of the date of such request, the case may be closed.

(e) Investigations. The Department of Labor or the designated agency shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) Name and address of each person interviewed, (2) a summary of his or her statement, (3) copies or summaries of pertinent documents, (4) a narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolution.

(f) Responsibilities of agencies. Agencies shall conduct investigations of complaints in accordance with specific requests of the Director.

(g) Resolution of matters. (1) If the complaint investigation shows no violation of the Act or regulations in this Part, or if the agency or the Director decides not to initiate administrative or legal proceedings against the contractor, the complainant shall be so notified. Within 30 days, the complainant may request review by the Director of such a finding or decision.

(2) Where an investigation indicates that the contractor has not complied with the requirements of the Act or this Part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor or subcontractor can be found to be in compliance, it must make a specific commitment, in writing, to take corrective action to meet the requirements of the Act and this Part. The commitment must indicate the precise action to be taken and dates for completion. The time period allowed should be no longer than the minimum period necessary to effect such changes. Upon approval of such commitment by the Director or the agency, the contractor may be considered in compliance on condition that the commitments are kept. Where the matter has been referred to an agency for investigation and resolution, the contractor and the complainant shall be advised that the resolution is subject to review by the Director and may be disapproved if it is determined that such resolution is not sufficient to achieve compliance.

(3) Where the complaint investigation indicates a violation of the Act or regulations in this Part, (and the complaint has not been resolved by informal means) the Director, or the agency with the approval of the Director, shall afford the contractor an opportunity for a hearing in accordance with § 60–741.29.

§ 60–741.27 Noncompliance with the affirmative action clause.

Noncompliance with the prime contractor's or subcontractor's obligations under the affirmative action clause is a ground for taking appropriate action for noncompliance as set forth in § 60–741.29 by the agency, the Director, prime contractor, or subcontractor. Any such noncompliance shall be reported in writing to the Director by the agency as soon as practicable after it is identified.

§ 60–741.28 Actions for noncompliance.

(a) General. In every case where any complaint investigation indicates the existence of a violation of the affirmative action clause or these regulations, the matter should be resolved by informal means, including conciliation, and persuasion, whenever possible. This will also include establishing a corrective action program in accordance with § 60–741.26 (g)(2). Where the apparent violation is not resolved by informal means, the Director or the agency shall proceed in accordance with the enforcement procedures contained in this Part.

(b) Judicial enforcement. In addition to the administrative remedies set forth herein, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–741.4 including appropriate injunctive relief.

(c) Withholding progress payments. With the prior approval of the Director so much of the accrued payment due on the contract or any other contract between the government prime contractor and the federal government may be withheld as necessary to correct any violations of the provisions of the affirmative action clause.

(d) Termination. A contract or subcontract may be cancelled or terminated, in whole or in part, for failure to comply with the provisions of the affirmative action clause.

(e) Debarment. A prime contractor or subcontractor or a prospective contractor or subcontractor may be debarred from receiving future contracts for failure to comply with the provisions of the affirmative action clause.

§ 60–741.29 Formal hearings.

(a) Hearing opportunity. An opportunity for a formal hearing shall be af-

forded to a prime contractor or a subcontractor or a prospective prime contractor or subcontractor by the agency or Director in any of the following circumstances:

(1) An apparent violation of the affirmative action clause by a contractor or subcontractor, as shown by any investigation, is not resolved by informal means and a hearing is requested; or

(2) The Director, or an agency upon prior notification to the Director, proposes to cancel or terminate the contract or withhold progress payments, or cause the contract to be canceled or terminated or progress payments to be withheld, in whole or in part, on a contract or contracts, or to require cancellation or termination of a contract or subcontract or withholding of progress payments; or

(3) The Director, or an agency with the approval of the Director, proposes to declare a prime contractor or subcontractor ineligible for further contracts or subcontracts under the Act.

(b) Hearing practice and procedure. (1) Hearings conducted by the Office of Federal Contract Compliance Programs under this Part shall be governed by the rules of practice and procedure contained in 41 CFR Part 60-30 except that the Director shall perform all the duties and functions assigned to the Secretary by that Part.

(2) The practice and procedure for hearings conducted by agencies shall be consistent with the requirements of this section.

(A) Written notices of proposed action for noncompliance, signed by the appropriate agency official, shall be sent to the last known address of the prime contractor or subcontractor by certified mail, return receipt requested. If the contractor does not receive such notice, a copy of such notice shall be published in the FEDERAL REGISTER. The notice shall contain a precise jurisdictional statement, a short and plain statement of the matters furnishing a basis for the action for noncompliance, an enumeration of the actions being requested, and a citation of the provisions pursuant to which the requested action may be taken. The prime contractor or subcontractor shall be afforded at least 14 days from receipt of the notice of proposed action for noncompliance in which to file an answer to the notice and a request for a hearing with the agency and the contractor shall be so informed in the notice. The answer shall admit or deny specifically, and in detail, matters set forth in each allegation of the notice unless the prime contractor or subcontractor is without knowledge, in which case the answer shall so state, and the statement shall be deemed a denial. Matters not specifically denied shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. The hearing request shall be included as a separate paragraph of the answer.

(B) Reasonable notice of the hearing shall be sent by certified mail, return receipt requested, to the last known address of the prime contractor or subcontractor complained against. Such notice shall contain the time, place, and nature of the hearing and a statement of the legal authority pursuant to which the hearing is to be held. Hearings shall be before a hearing officer designated by or at the direction of the agency head. Each party shall have the right to counsel or other representative, a fair opportunity to present evidence and argument, and to cross-examine. Whenever a formal hearing is based in whole or in part on matters subject to the collective bargaining agreement and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party. Whenever a hearing is held on a complaint under § 60-741.27 any person or organization shall be permitted to participate upon a showing that such person or organization has an interest in the proceedings and may contribute materially to the proper disposition thereof. The hearing officer shall make his or her proposed findings and conclusions upon the basis of the record.

(C) If, at the end of the 14-day period referred to in this section, no answer including a hearing request has been filed or the answer does not raise issues of fact or law, the agency head may cancel or terminate or cause to be canceled or terminated, or withhold progress payments with respect to any one or more contracts or subcontracts, or parts thereof, held by the prime contractor or subcontractor complained against, or enter an order declaring such contractor or subcontractor ineligible for further contracts, subcontracts, or extensions or other modifications of existing contracts, until the contractor or subcontractor has satisfied the Director that it has established and will carry out personnel and employment policies and practices in compliance with the provisions of the Act, affirmative action clause, and the regulations.

(D) When the hearing is conducted by an agency, the hearing officer shall make recommendations to the head of the agency who shall make a decision whether action for noncompliance will be taken against the contractor or subcontractor. No decision by the head of the agency, or his or her representative, shall be final without the prior approval of the Director. Parties shall be furnished with copies of the hearing officer's recommendations, and shall be given an opportunity to submit their views.

§ 60-741.30 Notification of agencies.

The Director shall notify the heads of all agencies of any action for noncompliance taken against any contractor after such actions have been taken. No agency may issue a waiver under § 60-741.24(b)(1) to any contractor subject to such action without prior approval of the Director.

§ 60-741.31 Contractor ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this Part and the Act.

§ 60-741.32 Disputed matters related to the affirmative action program.

The procedures set forth in the regulations in this Part govern all disputes relative to a contractor's compliance with the affirmative action clause and the requirements of this Part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart C—Ancillary Matters

§ 60-741.50 Reinstatement of ineligible contractors and subcontractors.

Any prime contractor or subcontractor debarred from further contracts or subcontracts under the Act may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the affirmative action clause.

§ 60-741.51 Intimidation and interference.

The sanctions and penalties contained in this regulation may be exercised by the agency or the Director against any prime contractor or subcontractor, who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the Act.

§ 60-741.52 Recordkeeping.

(a) Each contractor and subcontractor shall maintain for a period not less than one year records regarding complaints and actions taken thereunder, and such employment or other records as required by the Director or agency or by this Part and shall furnish such information in the form required by the Director or agency or by the Director deems necessary for the administration of the Act and regulations issued under this Part.

(b) Failure to maintain complete and accurate records as required under this section or failure to update annually the affirmative action program as required by § 60-741.5(b) constitutes noncompliance with the contractor's or subcontractor's obligations under the affirmative action clause and is a ground for the imposition of appropriate sanctions.

§ 60-741.53 Access to records of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its places of business, books, records and accounts pertinent to compliance with the Act, and all rules and regulations promulgated pursuant

thereto for the purposes of complaint investigations, and investigations of performance under the affirmative action clause of the contract or subcontract. Information obtained in this manner shall be used only in connection with the administration of the Act.

§ 60–741.54 Rulings and interpretations.

Rulings under or interpretations of the Act and the regulations contained in this Part 741 shall be made by the Secretary or his or her designee.

Effective date. The regulations in this Part shall become effective on May 17, 1976.

Signed at Washington, D.C. this 9th day of April, 1976

W. J. USERY, JR.,
Secretary of Labor.

R. C. CHASE,
Deputy Assistant Secretary for Employment Standards.

LAWRENCE Z. LORBER,
Director, Office of Federal Contract Compliance Programs.

APPENDIX A—GUIDELINES ON THE APPLICATION OF THE DEFINITION "HANDICAPPED INDIVIDUAL"

The Rehabilitation Act of 1973, as amended, defines a handicapped individual for the purposes of the program as any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment.

"Life activities" may be considered to include communication, ambulation, self-care, socialization, education, vocational training, employment, transportation, adapting to housing, etc. For the purpose of section 503 of the Act, primary attention is given to those life activities that affect employability.

The phrase *"substantially limits"* means the degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited.

"has a record of such an impairment" means that an individual may be completely recovered from a previous physical or mental impairment. It is included because the attitude of employers, supervisors, and coworkers toward that previous impairment may result in an individual experiencing difficulty in securing, retaining, or advancing in employment. The mentally restored, those who have had heart attacks or cancer often experience such difficulty. Also, this part of the definition would include individuals who may have been erroneously classified and may experience discrimination based on this misclassification. This group may include persons such as those who have been misclassified as mentally retarded or mentally restored.

"is regarded as having such an impairment" refers to those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers, or supervisors who have an effect on the individual securing, retaining or advancing in employment.

APPENDIX B

This employer is a government contractor subject to section 503 of the Rehabilitation Act of 1973, which requires government contractors to take affirmative action to employ and advance in employment qualified handicapped individuals. If you have such a handicap and would like to be considered under the affirmative action program, please tell us. Submission of this information is voluntary and refusal to provide it will not subject you to discharge or disciplinary treatment. Information obtained concerning individuals shall be kept confidental, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of handicapped individuals, and regarding necessary accommodations, (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment, and (iii) government officials investigating compliance with the Act shall be informed.

If you are handicapped, we would like to include you under the affirmative action program. It would assist us if you tell us about (1) any special methods, skills and procedures which qualify you for positions that you might not otherwise be able to do because of your handicap, so that you will be considered for any positions of that kind, and (2) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations.

APPENDIX C

The following is a set of procedures which contractors may use to meet the requirements of § 60–741.6(b).

(1) The application or personnel form of each known handicapped applicant should be annotated to identify each vacancy for which the applicant was considered, and the form should be quickly retrievable for review by the agency, the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

(2) The personnel or application records of each known handicapped employee should include (i) the identification of each promotion for which the handicapped employee was considered, and (ii) the identification of each training program for which the handicapped employee was considered.

(3) In each case where a handicapped employee or applicant is rejected for employment, promotion or training, a statement of the reasons should be appended to the personnel file or application form. This statement should include a comparison of the qualifications of the handicapped applicant or employee and the person(s) selected, as well as a description of the accommodations considered. This statement should be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion or training and the contractor undertakes any accommodation which makes it possible for him or her to place a handicapped individual on the job, the application form or personnel record should contain a description of that accommodation.

[FR Doc.76–11094 Filed 4–15–76;8:45 am]

Section 504

Rehabilitation Act of 1973

29 U.S.C. 794

Section 794. Nondiscrimination under Federal grants

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 93-112, Title V, Section 504, Sept. 26, 1973, 87 Stat. 394.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-112, see 1973 U.S. Code Cong. and Adm.News. p. 2076.

federal register

WEDNESDAY, MAY 4, 1977

PART IV

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

NONDISCRIMINATION ON BASIS OF HANDICAP

Programs and Activities Receiving or Benefiting from Federal Financial Assistance

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This regulation implements section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, with regard to federal financial assistance administered by the Department of Health, Education, and Welfare. Section 504 provides that "no otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The regulation, which applies to all recipients of federal assistance from HEW, is intended to ensure that their federally assisted programs and activities are operated without discrimination on the basis of handicap. The regulation defines and forbids acts of discrimination against qualified handicapped persons in employment and in the operation of programs and activities receiving assistance from the Department. As employers, recipients must make reasonable accommodation to the handicaps of applicants and employees unless the accommodation would cause the employer undue hardship. As providers of services, recipients are required to make programs operated in existing facilities accessible to handicapped persons, to ensure that new facilities are constructed so as to be readily accessible to handicapped persons, and to operate their programs in a nondiscriminatory manner.

EFFECTIVE DATE: June 3, 1977.

FOR FURTHER INFORMATION, CONTACT:

John Wodatch, Director, Office of New Programs, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201, 202-245-1821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Public Law 93-112) Congress enacted section 504, which provides that "no otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financal assistance." In the same statute, Congress defined the term "handicapped individual" solely with relationship to employment; section 7(6) of the 1973 Act defined the term "handicapped individual" as "any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services * * *." However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974 (Public Law 93-516), Congress amended the definition of "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For purposes of section 504 of the Act, a "handicapped individual" is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life. The Secretary intends vigorously to implement and enforce that mandate.

THE PROBLEM OF DISCRIMINATION

From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.

There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved. The rulemaking process in which the Department has engaged has, however, provided a basis for an initial resolution of those issues. The Secretary believes the resulting regulation offers genuine promise of providing an effective and workable program for ending discrimination against handicapped persons.

RULEMAKING HISTORY

On May 17, 1976, the Department published a Notice of Intent to Issue Proposed Rules, seeking public comment on fifteen identified critical issues. 41 FR 20296. A draft proposed rule was attached to the Notice of Intent, as was a statement of the estimated economic and inflationary impact of the draft proposal, prepared in accordance with the requirements of Executive Order 11821.

Over three hundred written comments were received in response to the Notice of Intent. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country.

On July 16, 1976, the Department published a Notice of Proposed Rulemaking analyzing comments received on the critical issues identified in the Notice of Intent and setting forth a revised proposed regulation for public comment. 41 FR 29548. The initial 60-day comment period was extended in response to numerous requests until October 14, 1976. Additional comments received since that date have also been considered to the extent feasible. A total of more than 700 comments were received in response to the July 16 Notice of Proposed Rulemaking; they have been analyzed along with approximately 150 comments sent in response to May 17 Notice that were received too late to be analyzed during the first comment period. Finally, an additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the writ-

ten comments. Copies of these transcripts, as well as the written comments, are available for public inspection in Room 5400, 330 Independence Avenue, S.W., Washington, D.C. 20201.

The Secretary believes that both the written comments and the views expressed at the public meetings have illuminated the complex issues involved in implementing section 504 in an effective and workable fashion. The Secretary's response to the comments of interested parties, and the explanation for changes in the proposed regulation, are set forth in the section-by-section analysis of each subpart of the regulation, which appears as Appendix A to the regulation. As that analysis explains, a number of provisions in the proposed regulation have been eliminated as duplicative or unnecessary; others have been shortened or clarified. The goal throughout has been to design a regulation that preserves the essential elements of a strong and effective program for ending discrimination, while avoiding the imposition of unnecessary or counterproductive administrative obligations on recipients.

OVERVIEW OF REGULATION

The regulation is divided into seven subparts. Subpart A (General Provisions) defines the important terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employes and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addition and alcoholism.

Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

Subparts A, B, and C of the regulation, as well as subpart G—which incorporates by reference the Department's procedures under title VI of the Civil Rights Act of 1964—apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

Subpart D is concerned with preschool, elementary, and secondary education. Its provisions have been closely coordinated with those of the Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education to each qualified handicapped child in the most normal setting appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.

Subpart E deals with postsecondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids: Groups of colleges may not establish consortia exclusively for handicapped students.

Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers may satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes.

EXECUTIVE ORDER 11914

Under Executive Order 11914 (41 FR 17871, April 28, 1976), the Department is required to issue general standards for other departments and agencies of the Federal government to follow in promulgating regulations implementing Section 504. This responsibility will be fulfilled promptly and independently from this regulation. The Department does, however, expect to incorporate the definition of handicapped person adopted in § 84.3 (j) of this regulation in the standards for determining what persons are covered by the Act. The Secretary also anticipates that the relevant provisions of Subparts A, B and C of the regulation will be the basis for guidelines, pursuant to the Executive Order, as to what are discriminatory practices.

ECONOMIC IMPACT

The Department has previously certified, in issuing the Notice of Intent and the Notice of Proposed Rulemaking, that the economic and inflationary impact of the proposed regulation had been carefully evaluated in accordance with OMB Circular A-107. That analysis, which was printed at 41 FR 20312 (May 17, 1976), has been revised and updated, and is available on request.

SECTION-BY-SECTION ANALYSIS OF REGULATION

Appended to the final regulation is a section-by-section analysis of the regulation, which describes the basis and purpose of each section, discusses significant comments, and explains the basis for any changes made from the proposed regulation published in July 1976.

In consideration of the foregoing, Part 84, to read as set forth below, is hereby ordered to be added to Title 45 of the Code of Federal Regulations.

Dated: April 28, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary, Department of Health, Education, and Welfare.

Subpart A—General Provisions

Sec.
84.1 Purpose.
84.2 Application.
84.3 Definitions.
84.4 Discrimination prohibited.
84.5 Assurances required.
84.6 Remedial action, voluntary action, and self-evaluation.
84.7 Designation of responsible employee and adoption of grievance procedures.
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Subpart B—Employment Practices

84.11 Discrimination prohibited.
84.12 Reasonable accommodation.
84.13 Employment criteria.
84.14 Preemployment inquiries.
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Subpart C—Program Accessibility

84.21 Discrimination prohibited.
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84.23 New construction.
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Subpart D—Preschool, Elementary, and Secondary Education

84.31 Application of this subpart.
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84.38 Preschool and adult education programs.
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84.41 Application of this subpart.
84.42 Admissions and recruitment.
84.43 Treatment of students; general.
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84.45 Housing.
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84.47 Nonacademic services.
84.48–84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

84.51 Application of this subpart.
84.52 Health, welfare, and other social services.
84.53 Drug and alcohol addicts.
84.54 Education of institutionalized persons.
84.55–84.60 [Reserved]

Subpart G—Procedures

84.61 Procedures.
84.62–99 [Reserved]

APPENDIX A—ANALYSIS OF FINAL REGULATION

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93–516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94–142, 89 Stat 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

Subpart A—General Provisions

§ 84.1 Purpose.

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

§ 84.2 Application.

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

§ 84.3 Definitions.

As used in this part, the term:

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

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

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

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

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

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

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

(1) Funds;

(2) Services of Federal personnel; or

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

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

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

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

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

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

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

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

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

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

(k) "Qualified handicapped person" means:

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

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

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

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

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

§ 84.4 Discrimination prohibited.

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

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

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

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

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

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

(v) Aid or perpetuate discrimination against a qualified handicapped person

by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

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

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

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

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

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

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

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

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

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) A recipient that employs fifteen or more persons shall, for at least three years followed completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

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

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

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

§84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

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

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

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

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

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

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

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

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

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

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

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

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

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

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

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

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

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

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

(8) Employer sponsored activities, including social or recreational programs; and

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

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

§ 84.12 Reasonable accommodation.

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

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

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

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

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

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

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

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accu-

rately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

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

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

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

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

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

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

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

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

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

§§ 84.15—84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

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

§ 84.22 Existing facilities.

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

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

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

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

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

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

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

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

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

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

§ 84.23 New construction.

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

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

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)),[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§§ 84.24–84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

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

§ 84.32 Location and notification.

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

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

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

§ 84.33 Free appropriate public education.

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

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

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

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

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

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

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

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

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

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

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

§ 84.35 Evaluation and placement.

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

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

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

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

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

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such

sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

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

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guaradian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

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

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

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

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

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

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

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33(b)(1), within the recipient's program.

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

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

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

§ 84.42 Admissions and recruitment.

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

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

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

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

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

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

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

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

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

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct peri-

odic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

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

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

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

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

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

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

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

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

§ 84.45 Housing.

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

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

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

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

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

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

§ 84.47 Nonacademic services.

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

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of §84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

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

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

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

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

§ 84.52 Health, welfare, and other social services.

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

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

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

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

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

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

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

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

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

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

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

§ 84.53 Drug and alcohol addicts.

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

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55–84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6–80.10 and Part 81 of this Title.

§§ 84.62–84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient".* Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipients whose sole source of federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance".* In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

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

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person".* Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

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

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

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent,

or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

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

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

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

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

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

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

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

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

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

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and are implemented in § 84.53 of this regulation.

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

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

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several

commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) (formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

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

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriate to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new bunildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5 (a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

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

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees, and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

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

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

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that

grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

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

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paperwork burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8 (a) has been revised to list possible, rather than required, means of notification. Section 84.8(b), requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10 (a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

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

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this reguiation. In addition, many recipients subject to this regulation receive federal procurement contracts in excess of $2500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirement of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the federal government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to and understandable by recipients of HEW funds.

17. *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria

and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 84.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

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

19. *Specific acts of Discrimination.* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure) and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed § 84.18, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

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

20. *Existing facilities.* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

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

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

All recipients that provide health, welfare, or other social services may also comply with § 84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes this "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.

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

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

staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The Secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.4(c)(2)(iv), prohibiting unnecessarily separate treatment; § 84.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 84.43(d), applying the same standard to postsecondary education.

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

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

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

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§ 84.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

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

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs; §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

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

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

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be con-

sistent with the requirements of § 84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 84.33(b)(2) has been added, which allows this requirements to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

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

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

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 84.34 and 84.36.

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

Section 84.34(c) (formerly § 84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

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

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

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 84.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the

provisions of § 84.34, be provided in the most integrated setting appropriate.

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

Finally, the one-year transition period provided in former § 84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under § 84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

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

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision, and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

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

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational re-

habilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons, pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health and related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed § 84.52) has been consolidated with the section regulating providers of welfare and social services (proposed §84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration. Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* As already noted, § 84.53 has been combined with proposed § 84.53 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 84.4 (b)(ii) and 84.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in § 84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§ 84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised § 84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated § 84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For Example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactile devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regula-

tion as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or services. Thus, although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be resonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

SUBPART G—PROCEDURES

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

APPENDIX B—ENFORCEMENT PROCEDURES

Sections 80.6-80.10 and Part 81 of Title 45 of the Code of Federal Regulations are reprinted here without change for the convenience of the reader:

§ 80.6 Compliance information.

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

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

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

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

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 Conduct of investigations.

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

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

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

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

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

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

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

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

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible De-

partment official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

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

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

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

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.10 Decisions and notices.

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

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

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

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

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

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

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

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

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

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

PART 81—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

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SOURCE: The provisions of this Part 81 appear at 32 F.R. 16156, Nov. 2, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 Scope of rules.

The rules of procedure in this part supplement §§ 80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health, Education, and Welfare, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§ 81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 Use of gender and number.

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

§ 81.4 Suspension of rules.

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

Subpart B—Appearance and Practice

§ 81.11 Appearance.

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

§ 81.12 Authority for representation.

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

§ 81.13 Exclusion from hearing for misconduct.

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

Subpart C—Parties

§ 81.21 Parties; General Counsel deemed a party.

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

(b) The General Counsel of the Department of Health, Education, and Welfare shall be deemed a party to all proceedings.

§ 81.22 Amici curiae.

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

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

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

§ 81.23 Complainants not parties.

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

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

§ 81.31 Form of documents to be filed.

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

§ 81.32 Signature of documents.

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

§ 81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 81.107.

§ 81.34 Service—how made.

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

§ 81.35 Date of service.

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

§ 81.36 Certificate of service.

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

Subpart E—Time

§ 81.41 Computation.

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

§ 81.42 Extension of time or postponement.

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

§ 81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.9 of this title.

§ 81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted.

Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.53 Amendment of notice or answer.

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

§ 81.54 Request for hearing.

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

§ 81.55 Consolidation.

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

§ 81.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.57 Responses to motions and petitions.

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

§ 81.58 Disposition of motions and petitions.

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

Subpart G—Responsibilities and Duties of Presiding Officer

§ 81.61 Who presides.

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

§ 81.62 Designation of hearing examiner.

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

§ 81.63 Authority of presiding officer.

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

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

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

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

(d) Administer oaths and affirmations.

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

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

(g) Examine witnesses and direct witnesses to testify.

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

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

(j) Issue initial or recommended decisions.

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

Subpart H—Hearing Procedures

§ 81.71 Statement of position and trial briefs.

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

§ 81.72 Evidentiary purpose.

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

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 Exhibits.

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

§ 81.75 Affidavits.

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

§ 81.76 Depositions.

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

§ 81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 Evidence.

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

§ 81.79 Cross-examination.

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

§ 81.80 Unsponsored written material.

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

§ 81.81 Objections.

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

§ 81.82 Exceptions to rulings of presiding officer unnecessary.

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

§ 81.83 Official notice.

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

§ 81.84 Public document items.

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

§ 81.85 Offer of proof.

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

§ 81.86 Appeals from ruling of presiding officer.

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

Subpart I—The Record

§ 81.91 Official transcript.

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

§ 81.92 Record for decision.

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

Subpart J—Posthearing Procedures, Decisions

§ 81.101 Posthearing briefs: proposed findings and conclusions.

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

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

§ 81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible De-

partment official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 Exceptions to initial or recommended decisions.

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

§ 81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

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

§ 81.105 Oral argument to the reviewing authority.

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

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

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

§ 81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the mailing of a final decision referred to in § 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 Conduct.

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

§ 81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 Ex parte communications.

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

§ 81.114 Expeditious treatment.

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

§ 81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 Filing of ex parte communications.

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

Subpart L—Posttermination Proceedings

§ 81.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

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

Subpart M—Definitions

§ 81.131 Definitions.

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health, Education, and Welfare, with respect to action by that official under § 81.106.

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

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, the rules in this Part 81 shall apply as if these amendments were not in effect.

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MONDAY, MAY 8, 1978
PART II

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

federal register

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS

Handicapped Children Residing on Indian Lands or Whose Parents Are in the Military and Educationally Deprived Children

[4110-02]

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 115—SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS

Final Regulation

AGENCY: Office of Education, Department of Health, Education, and Welfare.

ACTION: Final regulation.

SUMMARY: This document sets forth the requirements governing the awarding of Federal assistance to school districts related to certain types of children receiving free public education in areas affected by Federal activities. They are being promulgated to bring current regulations into conformance with the amendment to Pub. L. 81-874 made by Pub. L. 93-380. The effect of the regulation is to provide entitlements for handicapped children residing on Indian lands or whose parents are in the uniformed services and for educationally deprived children who live in and/or whose parents are employed on federally assisted low-rent public housing property.

EFFECTIVE DATE: Pursuant to section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)), this regulation has been transmitted to the Congress concurrently with the publication in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action and adjournment.

FOR FURTHER INFORMATION CONTACT:

William L. Stormer, Division of School Assistance in Federally Affected Areas, telephone 202-245-8427.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 305(a)(1) of the Education Amendments of 1974 revised section 3 of Pub. L. 81-874, which covers the computation of entitlements based on numbers of federally-connected children and section 305(a)(2) revised section 5, which covers the allocation of payments authorized under Pub. L. 81-874, the Impact Aid Program.

Section 3(d)(2)(C) of the Act provides for increased assistance for handicapped children who reside on Indian lands or who have a parent in the uniformed services. The regulation explains the method of computing entitlements for these children and establishes certain requirements for using these funds. Section 5(e)(3) of the Act provides that funds may be paid to an applicant agency for special programs for educationally deprived children. These funds are paid on the basis of the number of children who reside in and/or with a parent employed on eligible low-rent housing property. These two entitlements relating to handicapped children and children associated with low-rent housing are treated, respectively, in Subpart H, formerly published as § 115.28, and in Subpart I, formerly published as § 115.29 in the notice of proposed rulemaking.

1. MAJOR AMENDMENTS TO THE REGULATION

A. *Subpart H—Handicapped Children and Children With Specific Learning Disabilities.*

Subpart H sets forth provisions affecting the determinations for increased entitlements under section 3(d)(2)(C) of the Act and the use of funds attributable to these payments. Certain terms such as "handicapped children" and "children with specific learning disabilities" are defined in § 115.70(c). These are the definitions used in the Education of the Handicapped Act. Eligibility requirements for counting children for these purposes are that these children must have a parent on active duty in the uniformed services or reside on Indian lands and must be receiving services suited to their educational and related needs on the basis of the statutory requirements for these services (§ 115.71(a)).

In determining whether programs for children counted under this provision would meet the statutory requirement of being "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational and other related needs of such children,' the standards of the State in which the local educational agency is situated would apply (§ 115.73(a)). However, these State standards must conform to the policies and procedures established under sections 612 and 613 of the Education of the Handicapped Act (§ 115.73(b)). Applicants seeking to count children under this provision are required under § 115.73(b) to submit an assurance that these children are receiving appropriate services, and this assurance would have to be certified by the division in the State educational agency charged with the supervision of the programs under local auspices. Thus, in certifying programs which provide services for children counted under this provision of Pub. L. 81-874, each State shall apply its own standards for the programs so long as the State standards comply with the requirements of sections 612 and 613 of the Education of the Handicapped Act.

Section 412(b) of the General Provisions Act (20 U.S.C. 1225(b)) is applicable to Pub. L. 81-874 funds attributable to handicapped children or children with specific learning disabilities. Application of this provision will permit recipient local educational agencies to use funds through the fiscal year following the fiscal year for which the funds were appropriated.

B. *Subpart I—Entitlements Related to Low-Rent Public Housing.*

Subpart I sets forth requirements to ensure that payments made under Pub. L. 81-874 based on the number of children residing on or residing with a parent employed on low-rent public housing property, as determined under section 5(e) of the Act, are used for special programs and projects designed to meet the special educational needs of educationally deprived children from low-income families.

Section 115.81(b) establishes the following order of priority for the use of these funds:

(1) To be used for Title I, ESEA programs and projects that would be diminished or discontinued because of the new Title I allocation formula adopted under Pub. L. 93-380, where such a determination is possible; or

(2) To provide Title I programs and projects in eligible Title I areas which otherwise would be unfunded;

(3) To supplement existing Title I programs;

(4) To provide Title I-type programs for educationally deprived children in attendance areas of the local educational agency that do not meet the eligibility requirements under Title I, ESEA.

With regard to the first priority, it is recognized that it may not be possible for a school district to attribute the elimination or reduction of a particular program to the adoption of the new Title I, ESEA formula. In these instances, these funds must be used in unfunded eligible attendance areas, if any. Only when these needs have been fully met may the funds be used to provide Title I-type programs. Furthermore, if there are no unfunded eligible areas, the school district may use funds in accordance with the last two priorities. School districts are encouraged to serve ineligible areas in the order established for Title I. The use of these funds to further Title I purposes is prescribed in the legislative history of the provisions (S. Rept. 93-1026, p. 162 (1974)).

In administering section 5(e), the Office of Education utilizes the personnel and organizational structure already involved in the provision of Title I-type services in order to avoid a duplication of administrative func-

tions. Applications are submitted through the State educational agency, according to procedures under § 115.11. However, it will be necessary for the applicant to obtain certification from the State Title I component regarding the applicant's assurances that these funds are to be used in Title I or Title I-type programs in conformity with this regulation. Monitoring is to be done by the State educational agency Title I monitoring component. This will avoid duplication of monitoring in programs where most of these funds are expected to be used.

3. COMMENTS ON THE PROPOSED REGULATION

Interested parties were given 30 days in which to submit written comments, suggestions, or objections regarding the proposed final regulation. (The Notice of Proposed Rulemaking was published in the FEDERAL REGISTER on December 5, 1975.) A summary of the comments and responses follows. The comments are arranged in order of the subparts of the final regulation to which they apply. For additional clarity, reference section numbers are included in this response to comments as they appear in the regulation followed by the section numbers in brackets [ ] as they appeared in the notice of proposed rulemaking.

A. *Subpart H—Entitlements Related to Handicapped Children. Comment.* One commenter declared that § 115.71 [§ 115.28], on entitlements related to handicapped children of uniformed services personnel, was inconsistent with recent Federal legislation on education of the handicapped and should conform to it. The commenter, however, did not specify the particulars to which he referred.

Response. No change has been made in the regulation. The regulation is consistent with the Education of the Handicapped Act, from which the definitions in § 115.70 [§ 115.23] of "handicapped children" and "children with specific learning disabilities" are taken.

Comment. Two commenters observed that § 115.71 [§ 115.28(c)(1)] restricts eligibility for being counted for the purpose of an increased entitlement under section 3(d)(2)(C) of the Act to handicapped children and children with learning disabilities, limiting eligibility to those who have a parent on active duty in the uniformed services and excluding children who live on Indian lands. The commenters referred to section 3(d)(2)(C)(i) of Pub. L. 81-874 with respect to those children for whom a determination is made under section 3(a)(2) and stated that section 3(d)(2)(C) did not mention uniformed services. They also pointed out that children residing on Indian lands comprise the second of two groups of children and are in addition to those with a parent on active duty in the uniformed services for whom a determination is made under clause (2) of section 3(a). The commenters argued that the law, on the surface, did not allow a ruling that would authorize a distinction between the treatment of the handicapped children of uniformed services personnel and handicapped children living on Indian lands.

Response. The regulation has been changed. The interpretation of the commenters was sustained in *Chinle Common School District v. Mathews*, Civil No. 76-1273 (DC, D.C., 1976). The regulation allows school districts to be compensated for handicapped children of uniformed services personnel or for those who reside on Indian lands under section 3(d)(2)(C).

Comment. One commenter remarked that the submission of information required in § 115.72 [§ 115.28(d)] should be undertaken if and when requested by the Commissioner. The section states that an applicant which claims an increased entitlement under section 3(d)(2)(C) of the Act shall be required to submit information the Commissioner may deem necessary to substantiate compliance with this condition. The commenter said that this information may not be needed from all applicants requesting an increase in entitlement.

Response. The regulation has been clarified to meet the concerns of the commenter. An applicant need not submit the information in the application but may be asked to do so later to assure compliance with the regulation.

Comment. One commenter stated that § 115.73(b) [§ 115.29(c)], in effect, imposed a State plan on local educational agencies, and the commenter declared that the law did not require State approval for each administrative action by a local educational agency, and that no Congressional committee had contemplated or discussed the idea of a State plan for aid under Pub. L. 81-874.

Response. No change has been made in the regulation. The regulation provides for the application of State standards to the programs provided by local educational agencies in which the handicapped children and children with specific learning disabilities are participating. Legislative history indicates that Congress contemplated that State standards would be sufficient for certifying these programs if they were in line with Education of the Handicapped Act requirements.

House Report No. 93-805 states, on page 45, with reference to the programs provided by local educational agencies for eligible children, that the determination of size, scope, and quality shall be based upon the individual State's standards for certification of these programs, and that each State must certify the particular programs. That report further indicates that the Commissioner must also require satisfactory assurance that all local educational agency programs for handicapped children counted under that part are in compliance with requirements now set forth under sections 612 and 613 of the Education of the Handicapped Act.

For the purposes of Pub. L. 81-874, the State merely has to certify conformance of the applicant's program with the policies and procedures required under the Education of the Handicapped Act.

Comment. One commenter objected to the citation in § 115.73(b) [§ 115.28(f)] of section 613(a) of the Education of the Handicapped Act stating the citation did not apply to Pub. L. 81-874 since it set forth procedures for qualifying for a grant under a State plan which Pub. L. 81-874 did not require.

Response. A clarification has been made in the wording in the regulation. As the previous response indicates, the legislative history makes clear that Congress intended that programs for handicapped children and children with learning disabilities under section 3(d)(2)(C) of the Act were to conform to policies and procedures required under the Education of the Handicapped Act.

B. *Subpart I—Low-rent Housing Entitlements. Comment.* Two commenters brought up the question of children eligible to be counted in computing entitlements pertaining to low-rent public housing, but who do not attend school in the district in which they live, or who attend school outside the area eligible for Title I aid. One commenter said a statement was needed under § 115.82 [§ 115.29] to the effect that "the money follows the child," as he said was provided by Title I regulations. The other commenter said that these children were excluded from sharing in any benefits from funds that their presence helped to bring to the school district.

Response. No change has been made in the regulation. Section 3(a) of Pub. L. 81-874 states that children, in order to be included among the number for whom a determination is made for the entitlement computations, are to have been in average daily attendance at the schools of the applicant agency that provided free public education for them. The use of payments made to a local educational agency under section 5(e) may include the provision of educational benefits to educationally deprived children from low-income families who do not live or work on low-rent public housing property. The statute does not limit the use of funds to children counted for entitlement purposes. It is possible that children may not receive services even though

their enrollment occasioned payments to their school district.

Comment. One commenter raised the issue whether children of families receiving welfare payments and living in public housing projects should be classified under section 3(a) or 3(b) of the Act. The commenter said that the proposed regulation failed to provide guidance on that question. The commenter argued that students living in housing projects whose parents receive welfare should be counted under section 3(a). The commenter said that counting those students under section 3(a) rather than 3(b) would agree with the intent of Congress because it would restore funds lost to local school systems through the change made by Pub. L. 93-380 in the formula for the distribution of assistance under Title I of the Elementary and Secondary Education Act. The commenter also said that including children under 3(a) would be consistent with the distinction drawn by section 3 of Pub. L. 81-874 between parents who lived and worked on Federal property and those who met only one of those conditions because, usually being unemployed, those parents make no indirect contribution to the tax revenues of local educational agencies. Families on welfare living on low-rent public housing property are more like the families classified under section 3(a) than 3(b).

Response. No change has been made in the regulation. Whether a child living in low-rent public housing with a parent who receives welfare payments should be counted under section 3(a) of the Act is governed by the provision of that section and not section 5(e)(3). The legislative history of section 3 clearly indicates that children living in federally assisted low-rent public housing are not to be considered section 3(a) children without a second "Federal connection" (H. Rept. 93-805, p. 42 (1974)). To include a child living in low-rent public housing in the number determined under section 3(a), the child's parent must be employed on Federal property or be on active duty in the uniformed services.

Comment. A commenter said that § 115.81 [§ 115.29] made the public housing provisions a categorical Title I program. The commenter said that although the reports mentioned services to the kinds of children designated in Title I, legislation was not included in Pub. L. 81-874. If Congress had intended funds to be paid under Title I procedures for students in public housing, Part C of Title I would have been completely retained, and provisions for public housing students would have been added as an additional program.

Response. No change has been made in the regulation. The legislative history clearly relates the use of these payments to Title I or Title I-type services.

Comment. One commenter expressed concern that §§ 115.74 [§ 115.23] and 115.81 [§ 115.29] on entitlements relative to handicapped children and to low-rent public housing might require a local educational agency to budget and spend funds in the amount of estimated entitlements for these categorical purposes before actual receipt of even partial payments for those entitlements. The commenter said that such a requirement would be an extreme hardship for any local educational agency, particularly during periods when borrowing costs are excessive.

Response. No change has been made in the regulation. The comment appears directed not to the regulation, but to the practical consequences of Pub. L. 81-874 funds being unavailable for payment until sometime later in the school year. Payments will be made in accordance with established procedures. However, school districts may use these funds in the fiscal year following the year for which they were allocated. This gives the recipient school district the choice of holding the funds for future expenditure or of reimbursing itself for funds already spent.

Comment. One commenter stated that the provisions in § 115.86 [§ 115.29] relating to low-rent public housing entitlements were stated too generally. The commenter asked whether funds had to be expended within a given period and whether evaluations like those of Title I would be necessary. The commenter felt the intent of the legislation would be lost if it had to conform both to Pub. L. 81-874 and to Title I, ESEA.

Response. The regulation has been rewritten in part to be more specific and to reflect changes made in response to public comments or administrative reconsideration of the proposed rule. Funds must be expended by the end of the fiscal year succeeding the fiscal year for which they were allocated. Evaluations like those required under Title I must be made annually [§ 115.86]. It is clear from the legislative history that Congress intended that section 5(e) funds would provide a Title I-type program. Thus, it is appropriate that basic Title I-type provisions apply to the use of these funds in order that purposes similar to those of Title I will be fulfilled.

Comment. A commenter said the regulation in § 115.84(b) [§ 115.29] seemed to require a value judgment in determining whether any needs were unmet in Title I, ESEA areas. He said there were always many unmet needs because the application of Federal Title I and State requirements restricted possible program endeavors to a very narrow range of eligible reading activities.

Response. No change in the regulation has been made. There is a presumption of unmet needs in eligible areas which have approvable projects but do not have Title I assistance. Until those needs are filled, funds resulting from entitlements relative to low-rent public housing may not be spent in non-Title I attendance areas.

Comment. A commenter cited section 421(c)(2)(B) of the General Education Provisions Act to contest that either Pub. L. 81-874 or Title I, ESEA gave State educational agencies authority over the use of funds for Pub. L. 81-874. Section 421(c)(2)(B) of the General Education Provisions Act prohibits any limitation on the use of funds to carry out any applicable program other than limitations imposed by the law authorizing the appropriation or a law controlling the administration of the program.

The commenter further pointed out that section 421(c)(1)(C) of the General Education Provisions Act forbids the commingling of funds from two different appropriations and provides conditions for the approval of an application for funds from an appropriation that is based upon criteria other than those for which provision is made in the law authorizing the appropriation. The commenter said nothing in Pub. L. 81-874 gives any State agency approval authority or imposes Title I, ESEA requirements. In the opinion of the commenter, section 5(e)(3) simply provides that funds derived from entitlements based on children from low-rent public housing must be used for special programs and projects designed to meet the special educational needs of educationally deprived children from low-income families. In addition, the commenter argued that the imposition by § 115.81 [§ 115.29] of rigid priorities on the types of projects to be funded was based on an expression of intent that was not the law, that could not override section 421(c)(1) of the General Education Provisions Act, and that could not be used to create a new administrative mechanism and impose new requirements.

Response. No change has been made in the regulation. While certain requirements of the regulation may not be explicitly set out in the statute, they are, nevertheless, clearly set forth in the legislative history of the statute. The purpose of interpreting and implementing any statute is to effect the will of the legislature. To disregard the express will of Congress as reflected in the Committee reports, in this instance, would operate to defeat the purposes for which this provision was adopted. Therefore, this regulation does not conflict with section 421(c)(2)(B) of the General Education Provisions Act. Furthermore, since the funds provided under section 5(e)(3) of Pub. L. 81-874 will be subject to separate accountability from funds

provided under Title I, ESEA, the use of these funds in jointly funded projects would not constitute commingling.

Comment. One commenter expressed support for the priorities in § 115.81(b) [§ 115.29(b)(1)] regarding the use of funds under section 5(e) and for the ban stated in § 115.81(e) [§ 115.29(c)] against the consolidation of those funds with other payments under the Act or with funds from other sources. The commenter also stated a concern that the phrase "shall serve only * * * educationally deprived children from low-income families" was subject to an interpretation that would require children from low-income families served with funds authorized under the Act to be segregated from other educationally disadvantaged pupils. The commenter characterized as potentially inconsistent the use of the word "only" and the stipulation that the criteria for the participation of the children approximate those with respect to Title I, ESEA.

The commenter pointed out that under Title I, ESEA, schools and not children are selected to receive funds on the basis of the poverty of the residents of the area, and the children in those schools participate on the basis of educational need whether or not their families are impoverished. The commenter said that he did not believe that Congress intended section 5(e)(3) to result in the stigmatization or identification of low-income students receiving remedial services. The commenter expressed the view that section 5(e)(3) deals with the design of programs rather than the delivery of services and does not compel the restriction of compensatory services only to low-income children.

Response. The regulation has been changed in response to the comment. There is no indication of Congressional intent to exclude from the services of these projects, children who are educationally deprived in other ways besides being from low-income families. The evident intent that the provisions of Title I, ESEA and section 5(e) be coordinated implies the inclusion not only of children from low-income families, but also of all educationally deprived children in participation in the benefits of these programs.

Comment. A commenter said he interpreted § 115.29(b)(2) of the proposed rule to mean that the amount of payment would be used to benefit all children of low-income families. This would involve dual criteria for serving the same children as served by Title I, ESEA. He recommended changing the phrase "may consider" in the last sentence of the section to "shall only consider" to restrict the provision of services to the children of the stated categories.

Response. The regulation has been changed so that educationally deprived children from low-income families are not distinguished from other educationally deprived children. All educationally deprived children may be served in programs assisted by section 5(e) funds. A local educational agency is not required to make low-income determinations under this program.

Comment. One commenter hoped the text of § 115.81(b) [§ 115.29(d)] could be republished in proposed rather than in final form after a determination had been made with respect to the sections of the Act and regulations of Title I of the Elementary and Secondary Education Act that do not apply to the activities authorized by Pub. L. 81-874.

Response. No change in the regulation is necessary. Certain sections of the Title I regulations and statutory provisions were mentioned in the notice of proposed rulemaking as possibly inapplicable to this regulation. Some interested parties did respond to the request for further suggestions, objections, and comments as to which of these Title I provisions should apply. The public interest would not be served to delay the final promulgation of this regulation and thereby keep recipients from receiving authoritative guidance in making plans for the use of funds during the school year.

Comment. Certain comments addressed the applicability of particular Title I, ESEA requirements to activities conducted in accordance with section 5(e) of the Act regarding public low-rent housing funds. One commenter opposed the suggested exclusion of 45 CFR 116.4(b), which allows spending one percent of the Title I allocation on State administrative expenses. The commenter felt that including this section would emphasize the States' obligation to monitor the compliance of local educational agencies in restricting use of funds to special programs and projects designed to meet the special educational needs of educationally deprived children from low-income families. The commenter pointed out that, although Pub. L. 93-380 authorized no funds for State administrative costs, the notice of proposed rulemaking stated, "The Office of Education plans to utilize the personnel and organizational structure already involved in the provision of Title I-type services in order to avoid a duplication of administrative functions." The commenter said it was appropriate to treat State administrative expenses directly attributable to the monitoring of programs under section 5(e)(3) as permissible Title I State administrative expenses.

Another commenter protested that the one percent allowance was not nearly enough to provide the services and meet the demands that the Office of Education placed on the State educational agency for the administration of Title I, ESEA, and insisted that a more realistic amount be specified.

Response. No change has been made in the regulation. Funds appropriated for Pub. L. 81-874 are provided entirely for making payments to eligible local educational agencies. There is no authority for the Commissioner to allocate any funds to which local educational agencies are entitled to State educational agencies. Therefore, no question remains in regard to the Commissioner's authority to provide more than 1 percent. The States have already assumed certain administrative duties and expenses for which it is not reimbursed by Pub. L. 81-874 funds.

Comment. A commenter said it was not understood why the principle in § 116.20 regarding Title I, ESEA, and in section 434(c) of the General Education Provisions Act, providing that further payments not be made to delinquents until they complied with the terms of their grants, should not apply to misexpenditures of section 5(e)(3) funds and Title I funds.

Response. No change has been made in the regulation. Section 434(c) of the General Education Provisions Act applies to all applicable Federal education assistance programs, including Pub. L. 81-874. Therefore, it is not necessary to provide for this in the regulation.

Comment. A commenter argued that it was unnecessary to exclude from section 5(e)(3) the applicability of provisions of 45 CFR 116.36(a) with respect to expenditures for property. The specific reference to the purposes of Title I in section 5(e)(3) could be interpreted to mean the purpose common to both Title I and section 5(e)(3) in meeting the special educational needs of educationally deprived children.

Response. The regulation has been amended in accordance with the suggestion of the commenter.

Comment. A commenter felt § 115.81 [§ 115.29] should be amended to allow the expenditure in the current fiscal year of funds allocated in the previous year, as in the case under Title I, ESEA regulations.

Response. The regulation has been changed in response to the comment.

Comment. A commenter recommended a change in § 115.81(f) [§ 115.29] to extend the effectiveness of the provisions under Title I in regard to indirect cost of the operation of programs under section 5(e).

Response. The regulation has been changed to provide that Part 100c of Title 45 CFR dealing with indirect cost apply to programs under section 5(e).

Comment. A commenter said, in reference to § 115.84 [§ 115.29(e)], that

$11 million made it worth the while of his local educational agency to endure the extreme complexity and time consumption of the application process under Title I and the expense of the application, monitoring, reporting, and evaluation processes required by the law. Declaring his understanding that funds under Pub. L. 81-874 must remain identifiable for accountability purposes and that an entirely new accounting system would be required for any added programs, the commenter said it was questionable whether a grant about one-sixtieth (1/60) of the Title I amount would be worth the effort.

Response. The regulation has been changed so that, under section 5(e)(3), a description of a proposed project is required, rather than an application. If a project supplements an existing Title I project, only that part funded under section 5(e)(3) need be described. Accountability cannot be waived for these categorical funds.

Comment. A commenter asserted that there was no requirement under Pub. L. 81-874, as amended by Pub. L. 93-380, for the State to monitor programs of aid to federally affected areas and demanded that this requirement and all others relevant to it be dropped. The commenter said that the law required only assurances; anything in addition was not authorized. The commenter added that if Congress had wanted to give additional authority to the Office of Education or the Commissioner, it would have done so as it did in section 3(d)(2)(C)(iii) of Pub. L. 81-874, as amended by Pub. L. 93-380.

Another commenter favored the use of the regular State Title I monitoring components rather than the use of special services contracts between the Office of Education and the State agencies to implement the injunction that the State agency notify the Commissioner if a local educational agency has failed to comply with the terms of its application. The commenter expressed the view that, in most instances, local educational agencies would replace former ESEA Title I programs with others under section 5(e)(3), that the cost of monitoring the section 5(e)(3) programs might be considered part of a State's expenses in administering the Title I program, and that funds allocated to programs under section 5(e)(3) should not be diverted to fund special service contracts.

Response. The regulation has been rewritten to specify that the State educational agency should monitor the expenditures of section 5(e) funds by applicants. The Conference Report, Senate Rept. No. 93-1026, states on page 162, "The State education agency should monitor the expenditures of these funds for public housing since that agency has responsibility for monitoring the expenditure of Title I, ESEA."

NOTE.—The Office of Education has determined that this document does not contain a proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107.

(Catalog of Federal Domestic Assistance Program No. 13.478, School Assistance in Federally Affected Areas—Maintenance and Operation.)

Dated: January 18, 1978.

ERNEST L. BOYER,
U.S. Commissioner of Education.

Approved: April 26, 1978.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health, Education, and Welfare.

Part 115 is amended by adding Subpart H and Subpart I to read as follows:

Subpart H—Handicapped Children and Children With Specific Learning Disabilities

Sec.
115.70 General.
115.71 Eligibility requirements.
115.72 Application procedures.
115.73 Assurances and certifications.
115.74 Use of section 3(d)(2)(C) funds.
115.75 Per pupil expenditure requirement.
115.76 Relation to section 5(d)(2) of the Act.
115.77 Children in private schools.
115.78 Individualized educational programs and parental involvement.
115.79 Applicability of other statutory and regulatory requirements.

AUTHORITY: (20 U.S.C. 238, 240, 242(b)).

Subpart H—Handicapped Children and Children With Specific Learning Disabilities

§ 115.70 General.

(a) *Scope.* The regulation in this Subpart governs the provision of financial assistance to local educational agencies which provide free public education to handicapped children who are claimed under section 3(d)(2)(C) of the Act. The regulation, however, is not alone in governing the relationship between the local educational agency and the handicapped child. Other statutes and regulations which may be pertinent in a particular instance are section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 706 and 45 CFR Part 84 ff.), the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975 (20 U.S.C. 1401 et seq. and 45 CFR Part 121 ff.), and section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-1 and 45 CFR Part 116).

(b) *Purpose.* The purpose of the regulation in this Subpart is to set forth the requirements, interpretations, and guidance necessary to implement section 3(d)(2)(C) of the Act.

(c) *Definitions.* For the purposes of this Subpart, the following terms are defined as indicated:

(1) "Children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. These disorders include conditions such as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(2) "Education of the Handicapped Act" means Pub. L. 91-230, as amended (20 U.S.C. 1401 et seq.).

(3) "Free public education" means free appropriate public education as used in the Education of the Handicapped Act and as defined in 45 CFR 121a.4. In particular, this means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge,

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under 45 CFR 121a.340-121a.389.

(4) "Handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, deaf-blind, multi-handicapped children, or as having specific learning disabilities, who because of those impairments need special education and related services.

(5) "Preschool program" means an educational or related program encompassing the educational level from a child's birth to the time at which elementary education is provided as determined under State law, provided that this program is recognized as free public education under State law.

(6) "Related needs" means those needs related to a handicap or specific learning disability for which related services, in addition to direct instructional services, are deemed necessary so that the child may effectively participate in the instructional program of the local educational agency.

(7) "Related services" means transportation and other developmental,

corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that these medical services shall be for diagnostic and evaluation purposes only) required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(20 U.S.C. 238(d)(2)(C).)

§ 115.71 Eligibility requirements.

(a) In order that a handicapped child may be counted for the purpose of an increased entitlement under section 3(d)(2)(C) of the Pub. L. 81-874, the Act requires that a child must—

(1) Have a parent on active duty in the uniformed services, as defined by section 101 of Title 37 United States Code, or

(2) Reside on Indian lands, as described in section 403(1)(A) of the Act;

(3) Be receiving services suited to the child's special educational and related needs; and

(4) Be enrolled in a program (including a preschool program if appropriate) which is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the child's special educational and related needs provided as part of free public education in the local educational agency.

(b) The applicant agency must meet the regular eligibility requirements of Pub. L. 81-874 under section 3(c) to receive the increase in entitlement under section 3(d)(2)(C). However, there is no minimum number of handicapped children who must be served for the agency to receive the increase in entitlement.

(c) The program provided the handicapped children claimed under section 3(d)(2)(C) of the Act must conform to State standards for programs for handicapped children and must encompass the specific educational and related needs of the children claimed.

(20 U.S.C. 238(a)(b)(d)(2)(C); 240(f); Sen. Rept. No. 93-1026, p. 159 (1974); *Chinle Common School District v. Mathews*, Civil No. 76-1273 (D. D.C., 1976).)

§ 115.72 Application procedures.

(a) The applicant agency must state the number of handicapped children it claims under section 3(d)(2)(C) of the Act in the application filed in accordance with procedures set forth in Subpart B of this regulation published separately.

(b) The applicant agency must provide the assurances and certifications required under § 115.73 of this Subpart as part of the application mentioned in paragraph (a).

(c) The Commissioner may require information in addition to that contained in the application in order to substantiate compliance with assurances provided with the application.

(20 U.S.C. 238(d)(2)(C), 242.)

§ 115.73 Assurances and certifications.

(a) *Size, scope, and quality of the programs.* (1) For each applicant for assistance under the Act which is based in any part upon children who are counted under section 3(d)(2)(C) of the Act, the applicant agency must provide an assurance that these children are receiving services in programs (including preschool programs) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational and related needs of these children. The Commissioner will consider any special education program serving the special educational needs of these children which conforms to the requirements for special education programs under Part B of the Education of the Handicapped Act as satisfying the assurance.

(2) For each application containing the assurance required by paragraph (a)(1) of this section, the applicant agency must also provide a certification from its State educational agency that the particular program(s) provided by the applicant conform(s) to State standards for programs for these types of children.

(b) *Education of the Handicapped Act requirements.* (1) For each applicant for assistance under the Act which is based in any part upon a determination under section 3(d)(2)(C) of the Act, the applicant agency must provide an assurance that the programs designed to meet the special educational and related needs of children determined under that section conform to the policies and procedures required in fulfillment of requirement under sections 612 and 613 of the Education of the Handicapped Act.

(2) For each application containing the assurance required by paragraph (b)(1) of this section, the applicant agency must provide a certification from the State educational agency that the program provided by the applicant conforms to the requirements of sections 612 and 613 of the Education of the Handicapped Act.

(3) In undertaking any further determination whether these State standards and programs conform to the policies and procedures required under sections 612 and 613 of the Education of the Handicapped Act, the Commissioner shall consult with persons in charge of special education programs for handicapped children and children with specific learning disabilities in the State education agency.

(20 U.S.C. 238(3)(2)(C); H.R. Rept. No. 93-805, pp. 43-46 (1974); Sen. Rept. No. 93-1026, p. 45 (1974); Cong. Record, daily ed., H7396, July 31, 1974)

§ 115.74 Use of section 3(d)(2)(C) funds.

(a) *General.* Section 5(f) of the Act requires that the amount of a payment to an applicant which is attributable to a determination under section 3(d)(2)(C) of the Act must be used for special programs and projects designed to meet the special educational needs of the children counted under that provision. Only payments related to the increase in entitlement affected by section 3(d)(2)(C) must be used in this manner. Payments related to the basic entitlement provided under section 3(c) for those children do not have to be used in this manner.

(20 U.S.C. 240(f))

(b) *Duration of availability of funds.* An applicant may obligate and expend funds received for section 3(d)(2)(C) until the end of the fiscal year succeeding the fiscal year for which they were appropriated. The recipient agency must return those funds to the U.S. Office of Education that it has not obligated by the end of that period.

(20 U.S.C. 1225(b))

(c) *Methods of obligation and expenditure of funds.* Obligations and expenditures may be incurred for the uses authorized under section 5(f) of the Act and paragraph (a) of this section in either of two ways:

(1) The applicant agency may reimburse itself for obligations or expenditures from local funds already made during the fiscal year for which the funds were appropriated or during the following fiscal year. These obligations or expenditures must have been for appropriate programs or projects serving the children from whom the funds under section 3(d)(2)(C) were paid; or

(2) The applicant agency may obligate or spend these funds on a current basis during the fiscal year for which the funds were appropriated or during the following fiscal year. The obligations or expenditures must be for programs or projects serving the children for whom the funds under section 3(d)(2)(C) were paid.

(20 U.S.C. 233(d)(2)(C), 240(f), 243)

(d) *Allowable expenditures.* An agency receiving funds under section 3(d)(2)(C) of the Act shall use those funds for the following types of expenditures:

(1) Expenditures which are reasonably related to the conduct of programs or projects for the education of handicapped children which meet the requirements of this section. These expenditures may include planning, evaluating and disseminating of the results of those programs or projects but may not include the construction of school facilities;

(2) Expenditures for equipment to meet the special educational needs of

the handicapped children counted under section 3(d)(2)(C). If funds received under section 3(d)(2)(C) of the Act are used for the acquisition of equipment and any financial advantage is realized through bargains, rebates, discounts, bonuses, free pieces of equipment (not used in the program or project covered by this paragraph) or other circumstances, the fair market value of that financial advantage is not an allowable expenditure and shall not be credited as an expenditure of those funds.

In no case may funds provided by section 3(d)(2)(C) be used to acquire equipment when the title to that equipment would be in a private school and not in the applicant agency.

(c) *No supplanting of State funds.* The use of funds provided under section 3(d)(2)(C) of the Act shall not supplant any State funds which were or would have been available to the applicant agency for the free public education of children counted under section 3(d)(2)(C).

(1) The applicant agency must spend at least the same amount, per pupil, of State general aid funds and State handicapped education funds on children counted under section 3(d)(2)(C) as it does for other similarly handicapped children enrolled in the schools of the agency.

(2) A reduction in the amount, per pupil, of State aid spent on children counted under section 3(d)(2)(C) of the Act from that spent in a previous year raises a presumption that supplanting has occurred. This presumption may be rebutted by the applicant agency demonstrating that an equivalent reduction was made in the amount, per pupil, spent on other handicapped children enrolled in the schools of the agency.

(20 U.S.C. 235, 238, 240 and 242(b).)

§ 115.75 Per pupil expenditure requirement.

(a) *Expenditures for children eligible under section 3(d)(2)(C).* Expenditures per pupil by an applicant agency from State, local, and section 3(d)(2)(C) funds for handicapped children enrolled in programs serving children counted under section 3(d)(2)(C) must be greater than the expenditure per pupil for all children, other than handicapped children, receiving free public education in the schools of that agency.

(b) *Computation.* In determining whether an agency fulfills the requirement stated in paragraph (a) of this section, the following computations must be made:

(1) Divide the total current expenditures from State, local, and section 3(d)(2)(C) funds for special educational programs by the total number of children who are being served in the special educational programs of the agency.

(2) Divide the total current expenditures from State and local funds for children receiving a free public education from the agency who are not handicapped children by the total number of those children who are not handicapped.

(3) If the figure obtained under paragraph (b)(1) exceeds the figure obtained in paragraph (b)(2), the applicant agency has fulfilled the requirement of paragraph (a) of this section.

(c) *Records and information required of an applicant agency.* An applicant agency which receives funds under section 3(d)(2)(C) must keep records of the expenditures for children receiving a free public education in its schools in such a manner to permit the computation set forth in paragraph (b) of this section. Furthermore, when requested, that agency must furnish to the Commissioner whatever information or data the Commissioner considers necessary to substantial compliance with the requirements of this section

(20 U.S.C. 238(d)(2)(C), 240(f); H. Rept. No. 93-763, p. 45 (1974).)

§ 115.76 Relation to section 5(d)(2) of the Act.

(a) Section 5(d)(2) of the Act provides that States having a State aid program designed to divide expenditures for children equally among local educational agencies in the State, which conform to Subpart B, may consider payments received by an agency under Pub. L. 81-874 as local resources in determining the need for or the amount of State aid allocated to that agency. A regulation setting forth these standards appears in Subpart B of this part.

(b) Whether or not a State has a program of State aid that meets the requirements of section 5(d)(2) of the Act, payments provided under section 3(d)(2)(C) may not be considered by a State in determining the need for or the amount of State aid which will be allocated to a local educational agency receiving those payments.

(20 U.S.C. 233(d)(2)(C), 240(d), (f), 242(b).)

§ 115.77 Children in private schools.

(a) An applicant may place a handicapped child in, or refer a handicapped child to a private school or facility, so long as it follows the policies and procedures for doing so established under section 613 of the Education of the Handicapped Act. Regulations implementing those policies and procedures are set forth in 45 CFR § 121a. The applicant must have placed the handicapped child in, or have referred the children to, the private school or facility that he or she is attending in order for the child to be counted under section 3(d)(2)(C) of Pub. L. 81-874.

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

(c) Children who have been placed in private schools by the parents may participate in public school programs which use section 3(d)(2)(C) funds.

(20 U.S.C. 238, 240(f), 242(b), H. Rept. 93-763, p. 45 (1974).)

§ 115.78 Individualized educational programs and parental involvement.

(a) Each applicant must have in effect a written individualized educational program for a child counted under 3(d)(2)(C) of the Act. This program must:

(1) Be in effect before special education and related services are provided to the child; and

(2) Be implemented as soon as possible after meetings held for the purpose of developing, reviewing or revising the child's program.

(b) Each applicant must provide for the participation of and consultation with parents or guardians of handicapped children counted under section 3(d)(2)(C) of the Act in the children's educational development.

(c) Each applicant must take steps to insure the involvement of a handicapped child's parents or guardian in meetings held for the purpose of developing, reviewing or revising that child's educational program.

(d) Each applicant shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(e) The notice under paragraph (d)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(f) If neither parent can attend, the applicant shall use other methods to insure parent participation, including individual or conference telephone calls.

(g) A meeting may be conducted without a parent in attendance if the applicant is unable to convince the parents that they should attend.

(h) The applicant shall take whatever action is necessary to insure that the parent understands the proceed-

ings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The applicant shall give the parent, on request, a copy of the child's educational program.

(j) An applicant which satisfies, for children counted under section 3(d)(2)(C), the requirements of Part B of the Education of the Handicapped Act regarding the involvement of parents of handicapped children will have satisfied the requirements of this section.

(20 U.S.C. 238(d)(2)(C), 240(f), 242(b), 1231(d).)

§ 115.79 Applicability of other statutory and regulatory requirements.

(a) *Applicability of General Provisions Regulations.* Relevant provisions contained in parts 100a and 100c of this Chapter are applicable to programs conducted under section 3(d)(2)(C), with the following exceptions:

Sec.
100a.15 Applications for grants or contracts.
100a.23 Review of applications.
100a.27 Disposition of applications.
100a.31 Preapplications.

Subpart C—Application Forms for State and Local Governments

100a.54 Duration of projects.
100a.62 Payment methods for nonconstruction projects.
100a.71 Checks-paid basis letter of credit.

Subpart F—Financial Reporting Requirements

100a.403 Request for advance or reimbursement.

Subpart G—Monitoring and Reporting of Program Performance

100a.432 Performance reports for nonconstruction projects.

(20 U.S.C. 1221c(b)(1); 20 U.S.C. 242(b); OMB Cir. A-102.)

(b) *Applicability of civil rights and related requirements.* Payments provided under section 3(d)(2)(C) are subject to the requirements of the following laws and regulations: Title VI of the Civil Rights Act of 1964 (45 CFR Part 80); Title IX of the Educational Amendments of 1972 (45 CFR Part 86); and section 504 of the Vocational Rehabilitation Act of 1973 (45 CFR Part 84).

(42 U.S.C. 200d; 20 U.S.C. 1681, 29 U.S.C. 794)

Subpart I—Entitlements Related to Low-Rent Public Housing

Sec.
115.80 General.
115.81 Use of section 5(e) funds.
115.82 Application procedures.
115.83 Monitoring.
115.84 Needs assessment.
115.85 Project description, size, scope, and quality.
115.86 Measurement of educational achievement and evaluation of programs.
115.87 Parent advisory councils.
115.88 Participation of private school children.
115.89 Applicability of other statutory and regulatory requirements.

AUTHORITY: 20 U.S.C. 238-240, 242(b), 244.

Subpart I—Entitlements Related To Low-Rent Public Housing

§ 115.80 General.

(a) *Scope.* The regulation in this Subpart concerns entitlements calculated under section 3 of the Act with respect to children who reside on low-rent public housing or who reside with a parent who is employed on low-rent public housing.

(b) *Purpose.* The purpose of the regulation in this Subpart is to implement the requirement stated in section 5(e)(3) of the Act that funds paid to local educational agencies with respect to the children described in paragraph (a) of this section must be used for special programs and projects designed to meet the special educational needs of educationally deprived children. This regulation establishes particular procedural and substantive requirements regarding the application for and use of these funds.

(c) *Definitions.* For the purposes of this subpart, the following terms are defined as indicated:

(1) "Educationally deprived children" means (1) children who have need for special educational assistance in order that their level of achievement can be raised to that appropriate for children of their age; and (2) children who are handicapped, as defined in 45 CFR 115.70(c).

(20 U.S.C. 240(e), 242(b), 1401(1).)

(2) "Low-rent public housing" means any low-rent public housing, whether or not owned by the United States, which is part of a low-rent housing project assisted under the United States Housing Act of 1937, section 516 of the Housing Act of 1949, or part B of title III of the Economic Opportunity Act of 1964.

(20 U.S.C. 240(e), 244(1)(c).)

(3) "Section 5(e)" means section 5(e) of Pub. L. 81-874.

(20 U.S.C. 240(e).)

(4) "Title I" means title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241a et seq.).

(20 U.S.C. 240(e).)

§ 115.81 Use of section 5(e) funds.

(a) *General.* Section 5(e)(3) of the Act requires that an applicant which receives a payment based on a determination under section 5(e)(1) of the Act (payments attributable to children residing on, or residing with a parent employed on, low-rent public housing) use the funds from that payment only for special programs and projects designed to meet the special educational needs of educationally deprived children.

(b) *Use priorities.* An applicant receiving funds under section 5(e) must use those funds in the order stated below.

An applicant agency first has a choice of using the section 5(e) funds for either priority (1) or priority (2), or both, if applicable. However, it must fulfill the requirements of priority (2), if applicable, before proceeding to priority (3). It must then fulfill the requirements of priority (3) before proceeding to priority (4). The priorities are:

(1) *Agencies with reduced title I allocations.* If the local educational agency has:

(i) Received reduced allocations of title I funds because of the revision of the title I distribution formula in section 103 of Pub. L. 93-380 (Education Amendments of 1974); or

(ii) Received funds under subpart C of title I (as in effect before repeal by Pub. L. 93-380) during the period of July 1, 1973 to June 30, 1975, then it may use section 5(e) funds to continue or supplement existing title I programs in title I eligible school attendance areas already receiving title I assistance.

(2) *Unserved title I eligible areas.* If the local educational agency has school attendance areas which are eligible for title I assistance but which are not served by a title I program, the local educational agency may use the section 5(e) funds to provide programs for educationally deprived children in those areas.

(3) *Other title I programs.* If all eligible title I school attendance areas which did not receive title I funds are served by a section 5(e) program, the local educational agency may use any balance of these funds to supplement existing title I programs in other title I eligible areas.

(4) *Other school attendance areas.* If title I or section 5(e) programs are provided for all title I eligible school attendance areas, the local educational agency may use these funds to carry out the same type of programs for educationally deprived children in other school attendance areas.

(20 U.S.C. 240(e), 242(b); S. Rept. No. 93-1026, p. 162 (1974).)

(c) *Section 5(e) funds supplementary to State and local funds.* An applicant agency must use section 5(e) funds in a manner which supplement and do not supplant State and local funds which are or would have been expend-

ed for the free public education of the children to be served by the use of the section 5(e) funds. As part of this requirement, applicant agencies must adhere to the following practices:

(1) The use of section 5(e) funds must not result in a decrease in the use of State or local funds for the educationally deprived children to be served which, in the absence of funds provided under section 5(e), would be made available for the education of those children. This includes State and local funds for general education purposes as well as for special education purposes.

(2) The use of section 5(e) funds must not result in a penalization, with respect to the use of State or local funds for their education, of the educationally deprived children to be served, as compared to other children whose education is provided by the applicant agency.

(3) The applicant agency may use section 5(e) funds to provide services not provided by funds from other sources. However, there may be State or local funds available to the applicant agency which are designated for the same services included in the section 5(e) program or project. If there are any of those funds available to that agency at the time it submits its section 5(e) proposal, then it must apply those funds in conjunction with the section 5(e) program or project.

(4) The applicant agency may not use the section 5(e) funds to provide services which the applicant agency is required to provide under State law or under a formal determination under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, or section 504 of the Vocational Rehabilitation Act of 1973, as amended, or under a final court order.

(20 U.S.C. 240(d), (e), 242(b); S. Rept. 93-103, p. 162 (1974).)

(d) *Relation to section 5(d)(2) of the Act.* (1) Section 5(d)(2) of the Act provides that States having State aid programs designed to divide expenditures for children equally among local educational agencies in the State, which conform to subpart B, may consider payments received by an agency under Pub. L. 81-874 as local resources in determining the need for or the amount of State aid allocated to that agency. The regulation setting forth those standards appears in subpart G of this part.

(2) Whether or not a State has a program of State aid that meets the requirements of section 5(d)(2) of the Act, payments provided under section 5(e) may not be considered by a State in determining the need or amount of State aid which will be allocated to a local educational agency receiving those payments.

(20 U.S.C. 240(d)(2), (e), 242(b); S. Rept. 93-1026, pp. 152-153 (1974); S. Rept. No. 93-763, pp. 55-56 (1974); H. Rept. No. 93-805, pp. 42-43 (1974).)

(e) *Use of section 5(e) funds with other funds.* An applicant may not consolidate section 5(e) funds with funds from other sources, including other Federal funds. An applicant must keep records necessary to identify, for accounting and audit purposes, expenditures from section 5(e) funds for programs and projects specified in paragraph (b). However, section 5(e) funds may be used concurrently with funds from other sources in those programs and projects.

(20 U.S.C. 240(e), 20 U.S.C. 1231(c)(1)(C).)

(f) *Allowable expenditures.* An applicant agency which receives funds under section 5(e) must use those funds for expenditures which are directly related to the conduct of section 5(e) programs or projects, including expenditures for appropriate staff or instructional materials and supplies. These expenditures may also include:

(1) Expenditures for the construction of school facilities to meet the special educational needs of the educationally deprived children served with section 5(e) funds, but only if:

(i) The construction is essential to assure the success of the program or project serving those children, and

(ii) The construction project complies with the requirements of 45 CFR Part 100a, subpart K (Construction Requirements);

(2) Expenditures for equipment, exclusive of instructional materials and supplies, to meet the specific educational needs of the educationally deprived children in the program or project but only if:

(i) The equipment is essential to meet the needs of those children; and

(ii) The recipient agency has a staff trained in the use of the equipment to be acquired or has made provision for adequate staff training in the use of that equipment.

If section 5(e) funds are used for the acquisition of equipment and any financial advantage is realized through bargains, rebates, discounts, bonuses, free pieces of equipment (not used in the program or project contemplated by this paragraph) or other circumstances, the fair value of that financial advantage is not an allowable expenditure and shall not be credited as an expenditure of those funds.

(20 U.S.C. 235, 238, 240(e), 242(b).)

(g) *Use of property acquired with section 5(e) funds.* The applicant shall maintain title to and administrative control over property acquired with section 5(e) funds. The applicant shall use this property for the purposes provided in this section and shall not permit the property to be used to benefit any private school. The incidental use of the property for other purposes is permitted only for related educational purposes on public premises and only so long as the use does not interfere with the carrying out of a project under section 5(e).

(20 U.S.C. 240(e), 242(b).)

§ 115.82 Application procedures.

(a) *Claims for low-rent public housing children.* In accordance with the procedures set forth in subpart B of this part, an applicant agency must file in its regular application, initial claims for children who reside on or reside with a parent employed on low-rent public housing property. The Commissioner, however, will not make any payments based on those claims until the applicant agency has completed the steps set forth in paragraph (b) of this section.

(b) *Supplemental submissions.* The applicant agency must complete the following steps before it may receive any payments based on claims for low-rent public housing children.

(1) The applicant agency must submit to its State educational agency, as a supplement to its application filed under subpart B of this subpart, a document describing the proposed use of the section 5(e) funds. The document must establish that the applicant agency has complied with the requirements of §§ 115.81, 115.84, 115.85, 115.86, 115.87, and 115.88 of this Subpart. The State educational agency should retain this document, unless the Commissioner specifically requests the agency to forward it.

(2) The applicant agency must obtain a certification from the State educational agency, stating:

(i) The particular priority use(s) selected by the applicant agency in accordance with § 115.81 of this Subpart, and that the use(s) selected is appropriate;

(ii) That the proposed use(s) conforms to the requirements of this subpart; and

(iii) The amount of section 5(e) funds that the applicant agency will apply to the approved program or project.

This State certification must be based on a review of the document submitted by the applicant agency in accordance with paragraph (1) of this section. The State certification must be submitted to the Commissioner, either directly by the applicant agency or on behalf of the applicant agency by the State agency, before section 5(e) funds can be released.

(20 U.S.C. 240(e), 242(b); Sen. Rept. No. 93-1026, p. 162 (1974).)

(c) *Assurances.* An applicant agency which submits a claim based on children who live in low-rent public housing must provide the following assurances with its application filed under subpart B (Applications):

(1) An assurance that the section 5(e) funds will be used only for the purposes for which they were granted and in accordance with the requirements of that section of the Act and this regulation; and

(2) An assurance that the section 5(e) funds will be used in a manner which supplements and does not supplant State and local funds which are or which would be expended for the free public education of the children to be served by the use of the section 5(e) funds.

(20 U.S.C. 240-242(b).)

§ 115.83 Monitoring.

(a) The State educational agency should monitor the expenditure of section 5(e) funds by applicants for programs and projects certified by that agency in accordance with § 115.82(b) of this subpart. Whenever a State educational agency audits a title I program or project in a local educational agency which is also conducting a section 5(e) program or project, the State agency should also audit the section 5(e) program or project.

(b) If a State educational agency finds at any time that an applicant is not using any of its section 5(e) funds for the purposes certified by the State or in some other way is not complying with the requirements of this subpart, it should immediately notify the Commissioner.

(c) If the Office of Education or the Department of Health, Education, and Welfare has already audited an applicant's section 5(e) program or project, it is not expected that the State educational agency would audit the same program or project.

(20 U.S.C. 2401(e); Sen. Rept. No. 93-1026, p. 162 (1974); Cong. Rec. daily ed., July 31, 1974, H7395.)

§ 115.84 Needs assessment.

An applicant agency which submits a claim based on children who live in low-rent public housing must provide, as part of the document required to be submitted to the State educational agency under § 115.82(b) of this subpart, sufficient information to enable the State educational agency to determine that the applicant has made a needs assessment of the children to be served in its school. The steps required for this needs assessment are:

(a) *Review of existing data.* The local educational agency must review existing data on the performance of children in the agency's basic programs of instruction in all attendance areas. The purpose of the review is to determine the incidence and severity of educational deprivation among all children receiving free public education in all attendance areas.

(1) The data reviewed must include past evaluations, if any, of programs or projects that used section 5(e) funds in that agency.

(2) The agency must review data on children enrolled in private schools if the program or project for which section 5(e) funds will be used is designed to serve any of those children.

(3) If the agency has already reviewed data in connection with a needs assessment under title I for the fiscal year for which the section 5(e) funds are to be used, except for a review of past evaluations of projects funded solely with section 5(e) funds, the agency does not have to conduct another review under this paragraph.

(b) *Selection of project areas, target groups, and the needs to be served.* The local educational agency, on the basis of its findings from the review conducted under paragraph (a) must select:

(i) The project areas (in accordance with § 115.80(c)(2));

(ii) The age or grade levels at which it will operate the section 5(e) project(s); and

(iii) The types of educational needs to be addressed by the project(s).

(c) *Identification of target group children.* The applicant agency, using the data reviewed under paragraph (a), must identify all of the educationally deprived children in the areas to be served who are in the age or grade levels and have the type of educational needs identified under paragraph (b).

(d) *Identification of children most in need.* The local educational agency must secure any additional objective data which, in combination with the existing data specified in paragraph (a), will enable it to identify which of the educationally deprived children identified in paragraph (c) are most in need of special assistance.

(e) *Selection criteria.* The local educational agency must set forth specific criteria by which the educationally deprived children in the project areas will be chosen to receive section 5(e) services. An educationally deprived child may be included in a project even though he or she is not from a low-income family.

(f) *Diagnostic procedures.* The local educational agency must use adequate diagnostic procedures to determine the special educational needs of the children chosen to be served in a section 5(e) project.

(g) *Consultation.* In meeting the requirements under this section, the local educational agency must, to the extent feasible, consult with teachers, parents, and persons knowledgeable of the needs of private and public school children.

(20 U.S.C. 240(e), 242(b); S. Rept. No. 93-1026, p. 162 (1974); Cong. Rec. daily ed., July 31, 1974, H7396.)

§ 115.85 Project description, size, scope, and quality.

(a) *Project description.* As part of the document required to be submitted to the State educational agency under § 115.82(b), the applicant agency must provide a description of the section 5(e) project(s) which includes, for each project:

(1) The educational objectives of the project and the relationship of these objectives to the special educational needs identified by the diagnostic procedures required under § 115.84(f);

(2) The resources (including the type of staff and materials) to be used in the implementation of the projects and plans for their use;

(3) The time periods and instructional settings for the project services;

(4) The number of the children to be served and a general description of their special educational needs;

(5) The methods that will be used to evaluate the success of the project in attaining its objectives;

(6) A budget detailing the expenditures required for the implementation of the projects;

(7) The special educational needs and number of children, if any, who reside outside the project area and who will participate, as well as the manner of their participation; and

(8) Specific provisions for informing and consulting with parents concerning the services to be provided for their children under section 5(e), the performance of their children, and the ways in which those parents can assist their children in realizing the benefits those services are intended to provide.

(b) *Size, scope, and quality.* As part of the document required to be submitted to the State educational agency under § 115.82(b), the applicant agency must provide sufficient information for the State agency to determine that the section 5(e) program(s) or project(s) is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children to be served. In particular, the applicant agency must demonstrate that:

(1) The educational objectives of the project relate to one or more of the special educational needs of the participating children, as identified in § 115.34;

(2) The resources to be used in the project and the plans for their use are consistent with, and show reasonable promise of, meeting the objectives of the project;

(3) The evaluation plans comply with § 115.86 and are adequate for measuring the attainment of the objectives described in paragraph (b)(1) of this section;

(4) The expenditures for the project (as set forth in the budget) are not wasteful and are proposed for use

solely to meet the special educational needs of educationally deprived children identified in accordance with § 115.84;

(5) The project concentrates on a sufficiently limited number of services for a sufficiently limited number of educationally deprived children, identified in accordance with § 115.84, to show reasonable promise of meeting the educational objectives identified in paragraph (a) of this section;

(6) The project has not been designed to meet, nor will it have the effect of meeting, the general needs of schools or of the student body at large in a school or of a specified grade in a school;

(7) Any services or resources provided under section 5(e) will be offered only to those children who have been selected to participate in the project in accordance with § 115.84, except as approved under paragraph (b)(9) of this section;

(8) If services are provided in the regular classroom or in other settings in which children other than those properly selected to participate in the project will be present, these services will be directed to the selected children and the effectiveness of the project will not be impaired by the presence of children other than those selected to participate;

(9) If educationally deprived children residing outside the project area will participate, these requirements must be considered:

(i) Children are selected under the same criteria as the children from the project area;

(ii) Their participation will not result in the exclusion of children from the project area who meet these criteria;

(iii) The project will have been designed solely for the selected children from the project area; and

(iv) Participation of children from outside the project area will not impair the effectiveness of the project and will not result in any extra cost; and

(10) Services are equitably provided to all children with State aid and local funds without regard to the availability of section 5(e) funds in the applicant's schools for the educationally deprived children.

(c) *Relation to existing Title I programs or projects.* If the applicant agency proposes to use the section 5(e) funds to supplement, under § 115.81 (b)(1) or (b)(3), an existing Title I program or project it is conducting in a particular school attendance area, the agency must indicate this in the document provided the State educational agency under § 115.82. In that case, the applicant agency is not required to describe, in the detail required by paragraph (a) of this section, the basic program or project that will be supplemented. It must describe only how the section 5(e) will supplement that program or project.

(20 U.S.C. 240(e), 242(b); S. Rept. No. 93-1026, p. 162 (1974).)

§ 115.86 Measurement of educational achievement and evaluation of programs.

As part of the document required to be submitted to the State educational agency under § 115.82(b), the applicant agency must describe the procedures and techniques that it will use to evaluate, at least annually, the effectiveness of section 5(e) projects in meeting the special educational needs of participating children. The description must include appropriate performance criteria and the instruments and methods to be used to objectively measure changes in the educational achievement of those children.

(a) The applicant agency must use objective standards or norms in measuring the effectiveness of section 5(e) projects for improving the educational achievement of the participating educationally deprived children.

(b) The applicant agency must evaluate the effectiveness of programs and projects for children enrolled in private schools who participated in them.

(20 U.S.C. 240(e), 242(b); S. Rept. No. 93-1026, p. 162 (1974).)

§ 115.87 Parent advisory councils.

(a) *Scope.* Section 141(a)(14) of Title I and § 116a.25 of the Title I regulation (45 CFR Part 116a.25) require the establishment of district advisory councils and school advisory councils by local educational agencies receiving assistance under Title I. This section of this subpart sets forth the rules for establishing and operating of district and school advisory councils for projects assisted under section 5(e).

(b) *Section 5(e) projects and existing Title I district council.* If a local educational agency which receives funds under section 5(e) has established a district advisory council under section 141(a)(14) of Title I and § 116a.25 of the Title I regulation, that agency may designate that council to serve as the district advisory council for projects supported in whole or in part with funds under section 5(e), if it takes steps to insure that:

(1) The functions and duties of the council are extended to these projects; and

(2) The district advisory council includes at least one member who is selected by parents in a project area (if any) having a project served with funds under section 5(e) but not with funds under Title I. See § 115.81 (b)(1) and (b)(3).

(c) *Section 5(e) projects in agencies without Title I district councils.* If an applicant agency which receives section 5(e) funds does not have an existing Title I district advisory council, it must establish a district advisory council for section 5(e) projects in the same way that Title I district advisory councils are established under § 116a.25 of the Title I regulation.

(d) *Section 5(e) projects and existing Title I school advisory councils.* If an applicant agency which receives section 5(e) funds uses these funds for projects in a school attendance area which has an existing Title I school advisory council, the agency may designate that council to serve as the school advisory council for projects supported in whole or in part with funds under section 5(e), if the functions and duties of the council are extended to those projects. See § 115.81 (b)(1) and (b)(3).

(e) *Section 5(e) projects in school attendance areas without Title I school advisory councils.* If an applicant agency which receives section 5(e) funds proposes to use those funds in a school attendance area which does not have an existing Title I school advisory council, it must establish a school advisory council for that attendance area in the same way that Title I school advisory councils are established under § 116a.25 of the Title I regulation.

(f) *General rules for advisory councils.* The following rules apply to advisory councils designated or established by an applicant agency under this section:

(1) Parents of children who are participating (or will participate) in a project for which section 5(e) funds are used are eligible for membership on a district advisory council or school advisory council to the same extent that they would be under § 116a.25 of the Title I regulation if their children participated in projects supported with Title I funds.

(2) Parents in school attendance areas served by a project supported with section 5(e) funds are eligible to participate in the selection of members of the district and school advisory councils.

(3) The advisory functions of these councils and their rights to access to information under § 116a.25 of the Title I regulation extend to projects supported with section 5(e) funds.

(g) *Supplements to applications.* As part of the document required to be submitted to the State educational agency under § 115.82(b)(2), an applicant agency which receives section 5(e) funds must include a description of the steps which it has taken or is taking to meet the requirements of this section. The description must be sufficient to permit the State educational agency making the certification under § 115.82(b)(2) to determine that the steps described by the applicant

agency are adequate to meet the requirements of this section.

(20 U.S.C. 240(e); 242(b); S. Rept. No. 93-1026, p. 162 (1974).)

§ 115.88 Participation of private school children.

(a) *Participation permitted.* Applicants receiving section 5(e) funds may provide services with those funds to educationally deprived children attending private schools with those funds.

(b) *Rules for participation.* If an applicant includes children attending private schools in a section 5(e) program or project, the use of section 5(e) funds for those children is subject to the following conditions:

(1) Educationally deprived children attending private schools must be selected for the section 5(e) program or project on the same basis as children attending public schools. The supplement to the application submitted under § 115.82(b) must state:

(i) The number of private school children who were found to be educationally deprived according to specific criteria used under § 115.84;

(ii) The number of those children who are expected to be included in the section 5(e) program or project: and

(iii) The degree and manner of their expected participation.

(2) The programs or projects in which those children are included must meet the children's special educational needs rather than the general needs of the private schools which they attend, the student body of those schools, or children within a specific grade in those schools. Provisions for serving educationally deprived children attending private schools may not include the financing of the existing level of instruction in the private schools.

(3) Any project involving the participation at the same site of children attending private schools and children attending public schools must avoid, as much as possible, classes which are separated by school attendance or religious affiliation of the children.

(4) Public school personnel may be made available in other than public school facilities, but only when necessary to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, and guidance and counseling services) for those educationally deprived children for whom those services were designed, and only when those services are not normally provided by the private schools.

(5) Provisions for special educational services for educationally deprived children attending private schools may not include paying salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control.

(6) An applicant agency which conducts a project including educationally deprived children attending private schools must maintain continuing administrative direction and control over those services and over the use of equipment required to provide those services.

(20 U.S.C. 240(e), 242(b); S. Rept. No. 93-1026, p. 162 (1974).)

§ 115.89 Applicability of other statutory and regulatory requirements.

(a) *Applicability of general provisions regulations.* Relevant provisions contained in parts 100a and 100c of this chapter are applicable to programs conducted under section 5(e), with the following exceptions:

Sec.
100a.15 Applications for grants or contracts.
100a.26 Review of applications.
100a.27 Disposition of applications.
100a.31 Preapplications.

Subpart C—Application Forms for State and Local Governments

100a.54 Duration of projects.
100a.62 Payment methods for nonconstruction projects.
100a.71 Checks-paid basis letter of credit.

Subpart P—Financial Reporting Requirements

100a.405 Request for advance or reimbursement.

Subpart Q—Monitoring and Reporting of Program Performance

100a.432 Performance reports for nonconstruction projects.

(20 U.S.C. 1221c(b)(1); 20 U.S.C. 242(b); OMB Cir. A102.)

(b) *Applicability of civil rights and related requirements.* Payments provided under section 3(d)(2)(C) are subject to the published requirements of the following laws and regulations: Title VI of the Civil Rights Act of 1964 (45 CFR Part 80); Title IX of the Educational Amendments of 1972 (45 CFR Part 86); and section 504 of the Vocational Rehabilitation Act of 1973 (45 CFR Part 84).

(42 U.S.C. 2000d; 20 U.S.C. 1681, 29 U.S.C. 794.)

(FR Doc. 78-12601 Filed 5-5-78; 8:45 am)

HEW Policy Interpretations
Under §504 of the Rehabilitation Act:
Discrimination Prior to Effective Date
of Regulations and Statute of
Limitations for Such Discrimination

43 Fed. Reg. 18630 (May 1, 1978)

To Be Inserted After
Page 160, RECENT FEDERAL
DEVELOPMENTS IN SPECIAL
EDUCATION (May, 1978)

[4110-12]

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Office of the Secretary

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Policy Determinations

INTRODUCTION

The Office for Civil Rights will hereafter publish all major policy determinations in the FEDERAL REGISTER and systematically provide copies to organizations representing beneficiaries and recipients of Federal financial assistance.

Policy determinations will fall into one of three categories:

1. *Policy Interpretations* will clarify and explain regulatory provisions.

2. *Procedural Announcements* will outline the specific procedures recipients must follow to comply with regulatory provisions or the procedures this office will follow to obtain compliance.

3. *Decision Announcements* will illustrate how this office has applied regulatory provisions to specific fact patterns developed through investigations.

Following are the first five policy determinations issued in accordance with this procedure. Three relate to Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex; two relate to Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of handicap.

Dated: April 26, 1978.

DAVID S. TATEL,
Director,
Office for Civil Rights.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Coverage: The following two policy interpretations apply to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This coverage includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

POLICY INTERPRETATION NO. 1

Subject: Requests for applicants' "marital status."

Policy Interpretation: Recipients may not ask prospective students or employees for their marital status including their maiden or former married name. However, applicants may be asked to state any names by which they may have been identified in relevant academic or employment records.

Discussion: the Title IX regulation prohibits discrimination on the basis of marital status and expressly prohibits inquiry into the marital status of prospective students and employees, including whether they are "Miss" or "Mrs." Recipients have asked whether requests for an applicant's "former married name" or "maiden name" would violate the regulation. The Department finds such requests indistinguishable from a request that an applicant state whether she is "Miss" or "Mrs."

The Department acknowledges that relevant employment or academic information may be filed under an applicant's former names. For the purpose of locating such relevant information all applicants, regardless of sex, may be asked to state other names under which such information can be found; but if the question is asked of persons of one sex it must be asked of persons of both sexes. This policy effectively reconciles the legitimate need to locate information about an applicant with the Title IX regulation's prohibition against discrimination on the basis of marital status.

Application forms must accommodate this policy. For example, the application form may include the following request: "If information necessary to process this application is located under a different name, please include such name(s) in the space provided."

Current supplies of forms which ask for maiden name or former married names may be exhausted if questions which would directly or indirectly reveal marital status are deleted or modified to conform to this policy interpretation.

Authority: Regulation issued under Title IX of the Education Amendments of 1972, 45 CFR 86.21(c)(4) and 86.60(a).

Section 86.21(c)(4): (c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." * * *

Section 86.60(a): (a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

POLICY INTERPRETATION NO. 2

Subject: Religious objections to participation in coeducational classes.

Policy Interpretation: Students who demonstrate that their religion prohibits certain coeducational courses may be excused from such courses or offered them on a sex segregated basis.

Discussion: The Title IX regulation's requirement that recipients offer classes on a coeducational basis is subject to several exceptions. For example, students may be grouped by objective standards of ability within physical education classes, or separated by sex for those portions of physical education activities devoted to participation in contact sports, or for those portions of elementary and secondary school classes which deal exclusively with human sexuality. Students may also be separated on the basis of vocal range for participation in chorus.

Recipients have asked whether they may offer sex segregated classes for students who object to coeducational classes on religious grounds. Although the regulation does not expressly authorize such classes, recipients must accommodate religious beliefs protected by the First Amendment. Therefore, students who demonstrate that they belong to religions which prohibit certain activities on a coeducational basis (e.g. swimming) may, at the option of the recipient, either be excused from unitary classes or offered sex segregated classes.

Authority: First Amendment to the Constitution of the United States. Regulation issued under Title IX of the Education Amendments of 1972, 45 CFR 86.34.

Section 86.34: A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses * * *

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progess in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

DECISION ANNOUNCEMENT NO. 1

Subject: Facts constituting adequate proof of unlawful sex discrimination.

Discussion: The complainant was a female elementary school principal who alleged that her employment contract was limited to 1 year because of her sex.

The recipient, a public school district, employed twelve principals, eleven of whom were men with 2-year contracts. The length of a contract offered by the recipient was determined entirely by "performance evaluation," under which the complainant was superior to at least six of the men. (See Exhibit "A") The school district's only response to these disparities was an unsubstantiated general denial of sex discrimination.

Decision: Sex discrimination barred by Title IX, like other forms of unlawful discrimination, may be proved by unrebutted statistical analyses. The school district failed to offer an adequate explanation for the statistical disparities and a "letter of findings" in favor of the complainant was issued.

The school district was required to lengthen the complainant's contract to 2 years and assure future compliance with Title IX. There was no claim or proof of a lower salary resulting from the 1-year contract and, accordingly, no back pay was required.

EXHIBIT A.—*Evaluation of principals*

Sex	Name	Number of 11 individual traits rated scale 1-5			Job performance summary scale of 1-5	Leadership objectives evaluation scale 1-5	2 yr. contract	1 yr. contract
		Strong	Good	Satisfactory				
F	Complaint	6	5	0	5	4		X
M	Principal No. 2	5	6	0	5	4	X	
M	Principal No. 3	5	6	0	5	4	X	
M	Principal No. 4	7	4	0	5	4	X	
M	Principal No. 5	4	7	0	5	4	X	
M	Principal No. 6	11	0	0	5	4	X	
M	Principal No. 7	7	4	0	5	4	X	
M	Principal No. 8	5	6	0	5	4	X	
M	Principal No. 9	5	6	0	4-5	4-5	X	
M	Principal No. 10	3	7	1	4-5	3	X	
M	Principal No. 11	7	2	2	4-5	4	X	
M	Principal No. 12	(*)	(*)	(*)	(*)	5	X	

*Evaluation sheet noted that the job performance evaluation did not apply to the 1975-76 year.

SECTION 504 OF THE REHABILITATION ACT OF 1973

Coverage: The following two policy interpretations apply to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information see definition of "recipient" at 45 CFR 84.3(f).

POLICY INTERPRETATION NO. 1

Subject: Discrimination that occurred before the effective date of the regulation.

Policy interpretation: The Office for Civil Rights will investigate complaints of alleged discrimination that occurred after September 26, 1973, the date section 504 became law, and prior to June 3, 1977, the date the section 504 regulation became effective, if those complaints charge violations of the statute which do not require for their resolution the interpretative language of the regulation.

Discussion: Section 504 of the Rehabilitation Act of 1973 became law on September 26, 1973. The implementing regulation became effective on June 3, 1977. It would therefore be unreasonable for the Department to investigate the pending complaints alleging violations of section 504 occurring between September 26, 1973 and June 3, 1977 unless a clear violation of the statute is at issue.

The question, to be answered on a case-by-case basis is whether the language of the statute provides notice that the challenged policy or practice is unlawful. For example, the exclusion of qualified handicapped students from a college or university or the prohibition of tape recorders in classrooms by students whose handicap impairs their ability to take notes, will be considered violations of section 504. Discrimination against a qualified applicant for employment will be considered a violation of section 504 if adjustments would not have been needed to accommodate the applicant's handicap. However, failure to provide auxiliary aids in colleges and universities or to reasonably accommodate the needs of handicapped applicants for employment will not be considered unlawful unless it occurs after June 3, 1977.

This policy interpretation has no affect on obligations established by the Federal Architectural Barriers Act which predates Section 504.

Authority: Section 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794).

Section 504: No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

POLICY INTERPRETATION NO. 2

Subject: Application of the 180-day limitations period to discrimination occurring before the effective date of the regulation.

Policy interpretation: The 180-day limitations period for complaints of discrimination will not be applied to acts of discrimination occurring prior to the effective date of the regulation.

Discussion: The regulation requires that complaints of discrimination be filed within 180 days of the unlawful act. This requirement was not imposed until the effective date of the regulation (June 3, 1977), and it will therefore not apply to complaints alleging discrimination that occurred before the effective date of the regulation but after the effective date of the statute (September 26, 1973). For these complaints, the 180-day limitations period will begin to run from June 3, 1977. Such complaints, however, will

be investigated only if they allege clear violations of the statute. See Section 504 Policy Interpretation No. 1.

Authority: Regulation issued under Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964, 45 CFR 84.61 and 80.7(b).

Section 84.61: The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6-80.10 and Part 81 of this Title.

Section 80.7(b): (b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative filed with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

[FR Doc. 78-11742 Filed 4-28-78; 8:45 am]

HEW Policy Interpretations
Under §504 of the Rehabilitation Act:
Program Accessibility, Participation of
the Handicapped in Contact Sports, and
School Board Members as Hearing Officers

43 Fed. Reg. 36034 (August 14, 1978)

To Be Inserted After
Page 160, RECENT FEDERAL
DEVELOPMENTS IN SPECIAL
EDUCATION (May, 1978)

[4110-12]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Policy Interpretations

INTRODUCTION

The following four policy interpretations are issued by the Office for Civil Rights under the procedures announced in the FEDERAL REGISTER on May 1, 1978, 43 FR 18630. They interpret the Department's regulation issued under section 504 of the Rehabilitation Act of 1973.

DAVID S. TATEL,
Director,
Office for Civil Rights.

AUGUST 8, 1978.

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 3

Subject: "Program Accessibility" Requirements.

Policy Interpretation: A recipient is not required to make structural modifications to its existing facilities if its services can be made effectively available to mobility impaired persons by other methods. In selecting from among other methods, recipients must give priority to those that offer handicapped and nonhandicapped persons programs and activities in the same setting. Because of the administrative impossibility of continually determining, on an up-to-date basis, whether mobility impaired individuals will be entitled to services by a given recipient, and for other reasons set forth below, the absence of mobility impaired persons residing in an area cannot be used as the test of whether programs and activities must be made accessible.

Discussion: The Department has been asked by recipients conducting modest programs (e.g., libraries in rural areas, small welfare offices, day care centers and senior citizens centers): (1) Whether they must make structural changes to their buildings to accommodate persons who are mobility impaired; and (2) whether they must make their services accessible to mobility impaired persons even if no such persons are known to live in their service area.

The Section 504 regulation was carefully written to require "program accessibility" not "building accessibility," thus allowing recipients flexibility in selecting the means of compliance. For example, they may arrange for the delivery of their services at alternative sites that are accessible or use aides or deliver services to persons at their homes. The regulation does *not* require that all existing facilities or every part of an existing facility be made accessible; structural changes are *not* necessary if other methods are effective in making the recipient's services available to mobility impaired persons. For example, a library building in a rural area with one room and an entrance with several steps can make its services accessible in several ways. It may construct a simple wooden ramp quickly and at relatively low cost. Mobility impaired persons may be provided access to the library's services through a bookmobile or by special messenger service or clerical aid or any other method that makes the resources of the library "readily accessible." However, recipients are required to give priority to methods that offer handicapped and nonhandicapped persons programs and activities in the same setting.

There is an additional option for recipients that have fewer than 15 employees and that provide health, welfare, or other social services. If such a recipient finds, after consulting with a handicapped person seeking services, that only a significant alteration to its existing facilities will make its program accessible, the recipient may refer the handicapped person to another provider of the same services that is accessible. The referring recipient has the obligation to determine that the other provider is accessible and is willing to provide the services.

The section 504 regulation does not condition the requirement of "program accessibility" upon handicapped persons residing in the recipient's service area. Such a condition would be administratively unworkable. It would require the establishment of arbitrary geographic boundaries for each recipient's service area, the identification of all handicapped persons in that area and periodic surveys to determine whether handicapped persons have moved into or out of the service area. It would also ignore the needs of those persons who temporarily become mobility impaired or those mobility impaired persons who visit a service area. Moreover, mobility impaired persons may decide not to settle in a community because its services are not accessible.

The Department concludes, as it did when the section 504 regulation was adopted, that because the "standard (for program accessibility) is flexible" the regulation "does not allow for waivers" (See "Authority" section below).

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR section 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.22 and appendix A.

Section 84.22:

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

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than 15 employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

Appendix A—Section-by-Section Analysis, Subpart C—Program Accessibility.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. *The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers.* The Department is ready at all times to provide technical assist-

ance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirements * * *. (Emphasis added.)

Further, it is the Department's belief, after consultation with experts in the field, *that outside ramps to buildings can be constructed quickly and at a relatively low cost.* Therefore, it will be expected that such structural additions will be made promptly * * *. (Emphasis added.)

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 4

Subject: Carrying Handicapped Persons to Achieve Program Accessibility.

Policy Interpretation: Carrying is an unacceptable method for achieving program accessibility for mobility impaired persons except in two cases. First, when program accessibility can be achieved only through structural changes, carrying may serve as an expedient until construction is completed. Second, carrying will be permitted in manifestly exceptional cases if carriers are formally instructed on the safest and least humiliating means of carrying and the service is provided in a reliable manner.

Discussion: The section 504 regulation requires that federally assisted programs and activities be "readily accessible" to handicapped persons. A program or activity will be judged "readily accessible" only if it is conducted in a building and room that mobility impaired persons can enter and leave without assistance from others. Carrying requires such assistance and is therefore unacceptable.

Carrying may also be undependable (e.g., when college students or employees are expected to volunteer) and often hazardous (e.g., when carriers are untrained or when the carrying is to occur on poorly illuminated or narrow stairs). It may humiliate the handicapped person by dramatizing his or her dependency and creating a spectacle. Its use is therefore inconsistent with section 504's critical objective of encouraging handicapped persons to participate in programs and activities.

The Department recognizes that carrying may be necessary in the following cases:

(1) The section 504 regulation requires "program accessibility" for handicapped persons and suggests a variety of methods for attaining compliance that can be implemented within 60 days. However, if "program accessibility" can be achieved only through "alterations of existing facilities (or) construction of new facilities," the construction must be completed "as expeditiously as possible," but in no event, later than June 3, 1980. Although recipients are not required to provide "program accessibility" during the period of construction, the Department encourages recipients to develop an interim expedient that may be carrying.

(2) Carrying is also acceptable in manifestly exceptional cases. For example, a university has properly maintained that the structural changes and devices necessary to adapt its oceanographic vessel for use by mobility impaired persons are prohibitively expensive or unavailable. Carrying, under this exception, must be provided in a manner that attempts to overcome its shortcomings. For example, carriers must be formally instructed on the safest and least humiliating means of carrying and the service must be provided in a reliable manner.

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR § 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR §§ 84.22 (a), (b) and (d).

Section 84.22:

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

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within 3 years of the effective date of this part, but in any event as expeditiously as possible.

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATON NO. 5

Subject: Participation of Handicapped Students in Contact Sports.

Policy Interpretation: Students who have lost an organ, limb, or appendage but who are otherwise qualified, may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition. If the school system provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.

Discussion: The Department has received several complaints that students have been denied an opportunity to participate in contact sports solely because they have lost an organ, limb, or appendage. The regulation's requirement that handicapped students be provided an equal opportunity to participate in physical education and athletics programs extends to contact sports. The exclusion from contact sports of students who have lost an organ, limb, or an appendage (e.g. a kidney, leg, or finger) but who are otherwise qualified is a denial of equal opportunity. It denies participation not on the basis of ability but because of a handicap.

A recipient cannot assume that such a child is too great a risk for physical injury or illness if permitted to participate in contact sports. However, a child may be required to obtain parental consent and approval for participation from the doctor most familiar with his or her condition.

If the recipient provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information see definition of "recipient" at 45 CFR § 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.37(c)(1).

Section 84.37(c)(1):

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

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 6

SUBJECT: School board members as hearing officers.

POLICY INTERPRETATION: School board members may not serve as hearing officers in proceedings conducted to resolve disputes between parents of handicapped children and officials of their school system.

DISCUSSION: The section 504 regulation requires school districts to establish a "system of procedural safeguards" to protect against errors in the educational programs developed for handicapped students. One requirement of that system is an "impartial hearing * * * and a review procedure" through which a parent may contest the evaluation and placement of his or her child.

Recipients have asked whether school board members may serve as the hearing or reviewing authority in their own school district. The Department has concluded that this practice is inconsistent with the regulation's requirement of "impartial" proceedings. School board members have a clear interest in the outcome of the hearing. For example, determinations adverse to the parents will often avoid additional expenditures by the board. Also, the school board has hired, and therefore expressed confidence in, the judgment of the professionals challenged in the hearing. Moreover, since the Department will generally not review individual placement and other educational decisions of a school district if the "system of procedural safeguards" is in place, every precaution must be taken to ensure that those procedures operate fairly.

This interpretation is also supported by our commitment to coordinate section 504 procedural safeguards with those established by the Office of Education under the Education of the Handicapped Act. The regulations issued under that statute, as interpreted by the Office of Education, bar school board members from serving as hearing officers in their school system.

COVERAGE: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR 84.3(f).

AUTHORITY: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR 84.36 and Appendix A thereto.

Section 84.36: A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Appendix A, Subpart D (Fifth Paragraph): It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures) * * *.

Regulations Issued Under the Education of the Handicapped Act, 45 CFR 121a.507 and Appendix A Therto

Section 121a.507: (a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which could conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer . . . .

Appendix A, Subpart E ("Response" to "Comment" on Section 121a.507): [A] parent of the child in question and school board officials are disqualified under § 121a.507.

[FR Doc. 78-22612 Filed 8-11-78; 8:45 am]

Typical Questions From Teachers About the Law

Q. I have a handicapped child assigned to my regular classroom, but his problem is so severe I do not think he belongs there. The principal tells me to go ahead and teach him. What recourse do I have under the law?

A. In one sense, the teacher does not have any recourse, because, as one federal official explained in a letter to the National Education Association, "PL 94-142 does not address the separate rights or general responsibilities of teachers." (Cited in *A Teacher's Reference Guide to PL 94-142.*)

The "Education for All Handicapped Children Act," however, has such detailed regulations that those who look for assistance are likely to find what they are seeking. Attorney and author Reed Martin, in an interview with the *Journal of Learning Disabilities,* says that "by guaranteeing rights for children" the law also guarantees them for teachers. He then goes on to list no less than ten of them.

If the teacher feels a child does not belong in his or her class — a problem heard of frequently as schools move to mainstream the handicapped — she can begin by citing section 121a.534 and asking for a new Individualized Education Plan meeting.

Says that paragraph, "Each state and local agency shall insure . . . that an evaluation of the child . . . is conducted . . . if the child's parent or teacher requests an evaluation." Perhaps intended as a right to protect the child, the requirement is nevertheless statutory and gives a powerful tool to the teacher as well.

Since Section 121a.344 guarantees the teacher the right to be present at the I.E.P. meeting, in requesting the meeting the teacher wins the right to be heard as well. Should such clear legal requirements be neglected in the school district, then, as a last resort, the teacher can file a formal complaint with the State under 121a.344, which says, "Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part."

The teacher, too, might approach the problem from a different angle. If the mountain does not come to Mohammed, Mohammed goes to the mountain. She can insist that the school pay for her to be *trained* to teach the child with that particular disability (under 121a.380, "Comprehensive System of Personnel Development"). And the instructor might request, under 121a.13, "such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education" — a tape recorder, a hearing aid, a wheelchair, glasses, perhaps even a teacher's aid.

A teacher, then, in reality has great deal of recourse under the law . . . whatever first impression one might have to the contrary.

Q. In our state we have had a comprehensive special needs law for three years. Administrators are now citing the "mainstreaming" requirements of PL 94-142 to cut back in servicing to certain handicapped, particularly the learning disabled. Is there anything to prevent this kind of "backlash?"

A. Yes. There is PL 94-142 itself. To back up the front line of defense, there is Section 504 of PL 93-112.

The Education for All Handicapped Children Act, in Section 121a.550, requires that "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped."

"Appropriate" is a word that appears elsewhere in the regulations, most notably in the phrase "Free Appropriate Public Education," and under the law the word means "special education and related services to meet their [the handicapped] unique needs." Since "special education" (121a.14) and "related services" (121a.13) also have statutory meaning such as "specially designed instruction," it is clear that the least restrictive environment that is "appropriate" may well call for a good deal of servicing indeed.

The second line of defense — Section 504 — is at least equally compelling. "In implementing the unequivocal Congressional statute," wrote H.E.W. Secretary Joseph Califano in 1977, "this regulation opens a new era of civil rights in America." "Unequivocal" is probably the most telling word in the phrase. Section 504 is an unequivocal civil rights law for the handicapped, and it insists that "a recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the reicpient's jurisdiction, regardless of the nature or severity of the person's handicap."

The law calls for free appropriate education before it says anything about funding or mainstreaming or quotas or any other technicality of the law, and that requirement takes precedence over all the rest, pure and simple. If the administration can provide education that is as good or better than before and yet offer it within the

classroom, then it is indeed implementing the law, but the school would be wrong to compromise quality to satisfy the "mainstreaming" requirement.

PL 94-142 is quite explicit, too, in stating that any funding it does provide is for "excess costs" beyond those the school was already incurring to educate the handicapped. The law is not intended to replace state and local programs or local funding . . . only to raise them up to a certain standard. If a school district already exceeds federal requirements by offering programs that reach, say 20% or more of the school population, there is nothing in the laws that would require the schools to cut back their programs . . . and much that would seem to require them to keep them in force.

Q. Does the law say anything about controlling class size?

A. No. (But how large a class could one have and still implement individualized education plans for each handicapped child in the class? Teachers ought to ask the question during I.E.P. meetings.)

Q. Does the law say anything about financial compensation to teachers for the additional time spent in I.E.P. meetings?

A. No. (Though teachers are saying a good deal about it themselves.)

Q. Since the I.E.P. does require "annual goals" and "short term instructional objectives," what will happen if the schools do not meet the objectives?

A. The law does say, "The Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives." That provision may not sidestep the accountability issue as much as it appears at first, however.

Schools, for one thing, likely would be accountable if the school did not implement the "specific special education and related services" called for in the plan. They would be accountable, too, if they did not evaluate "on at least an annual basis, whether the short term instructional objectives are being achieved."

Since the services themselves will be designed to reach the objectives of the plan, and since the school will be called upon to refine those services so that they might better and better reach the goals, then the law is in fact requiring a good deal of accountability already. If you plant an apple seed, you know what you will get if the other conditions are right — an apple tree. The law requires that the schools plant the appropriate seed and create the right conditions. For that they are accountable. The results should be right. If not the first year, they should be the second.

Schools may not be fully accountable, but perhaps they are as accountable as they might reasonably be expected to be.

Q. I am a special needs teacher, and I have a great deal of confidence in the structured reading program I use to teach learning disabled students. I see good results. But, when the students return to the regular classroom the teacher there follows a reading approach that works at cross purposes with mine.

How can I get the teacher to cooperate with what I am doing?

A. If you are right that your program is as effective as you say, then there are steps you can take. "Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration," says section 121a.385. If your program has proven effective, then the school should cooperate with you in seeing that it is fully effective.

There may seem to be no machinery for carrying out the delicate diplomatic negotiations between regular teacher and resource teacher, but, again, the law opens some possibilities. The act brings the two together formally during the initial evaluation, in the I.E.P. meeting, and at the regular meetings during the year to assess the I.E.P. Those occasions will give much opportunity to share "educational practices and materials proven effective."

Some teachers maintain that such meetings are hardly adequate, and many therefore try to make the most of

informal meetings at lunch, in the teachers' lounge, or in the parking lot on the way home after school. But one expert on the law points to another mechanism for change. Reed Martin speaks of "the right to be involved as a participant in the overall process of planning." Says Section 121a.234 in speaking of the school applications for funding, "Each applicant must: (1) Provide for making the application and all documents related to the application available to parents and the general public."

During the planning process, Martin suggests, teachers who know of effective procedures can insist that other teachers be made aware of them. "You can't just go into work every day and face the impossible job that's given to you and realize that you're not going to be able to satisfactorily discharge that job because somebody else isn't coming through for you," he says in the *Journal of Learning Disabilities*. "So, I think these annual reviews are a very proper forum; it's not adversarial or hostile, and hopefully it won't get anybody fired to say, 'Look, we're professionals, we've assessed how things are going, and here's some needs that have to be addressed.' "

Hopefully it won't get anybody fired. Hopefully teachers who have programs that work will take that risk.

Q. I have a classroom of 29 children, and I now have three handicapped pupils among them. Should I not be able to conduct my classes as I always have and expect the handicapped to be able to keep up? If they cannot learn when I teach as I would teach others, then perhaps they do not belong in the regular classroom.

A. Though perhaps few teachers would put the question so bluntly, many must have the thought, "If this child needs special help, then he should not be here but in a special class." The teacher may be right to question a child's Individualized Educational Program, as explained in question one.

However, when the child is appropriately placed in the classroom, the law does put a certain responsibility on the teacher to learn new techniques to help him. Section 121a.14, for instance, lists "classroom instruction" among the categories of "special education" that must be made available to children with special needs. Moreover, it lists "classroom instruction" first.

Teachers must learn new methods. Some are insisting that they be taught new techniques *before* they take on the challenge of educating handicapped students, and the requirement for a "comprehensive system of personnel development" seems to give validity to such a position.

Nevertheless, the law requires that "to the maximum extent appropriate" special needs children be "educated with children who are not handicapped." Therefore, while teachers may be right to put some of the onus on the administration when faced with difficult teaching problems, they must still continue to bear some of it themselves.

It is clearly illegal, on the other hand, for the teachers or the administration to allow a child to remain in the classroom and, as one Vermont parent put it, "drown in the mainstream." The school must meet the child's "unique needs," and more than one court case has been quite specific on what that means.

In the Pennsylvania case of Fialkowski v. Sharp, for instance, the plaintiffs said that they were "given access to buildings, rooms and play-school, but they have been denied access to education." The court ruled in favor of the parents, and so it is likely to do in similar cases elsewhere.

The only apparent solution, when the teachers are not already equipped to teach handicapped children assigned them, is for them to be trained appropriately.

Questions on Dyslexia from Parents, Teachers, and Dyslexics

As a result of recent magazine articles, parents and educators have presented thousands of questions to the agencies that offer help to dyslexics (**The Orton Society, The Association for Children with Learning Disabilities,** and similar organizations). The most typical questions are answered here by Margaret Rawson, a national authority on dyslexia.

What is dyslexia?

Q. What is dyslexia? My son has trouble with reading, and I think he may have it.

A. "I can think. But what's wrong [dys] is my words [lexia]. I forget them, and I can't manage them," a ten-year-old dyslexic boy once said. It is perhaps as good a definition as any for a problem medical people and educators have been treating with a good deal of success for over forty years.

Dyslexia is a learning difference that occurs in perfectly intelligent people. It shows up as poor spelling, a tendency to reverse letters and symbols, and general difficulty in reading. It tends to run in families. A federal Department of Health, Education and Welfare study estimates that dyslexia of severe enough degree to be troublesome occurs in one person in seven.

Here is a statement from an imaginary dyslexic boy — Alfred — telling of his problem in his own words:

> I can think. But what's wrong is my words. I forget them, and I can't manage them. Sometimes I can just work my head to the bone trying to figure out what I want to say so people will know what I mean. Yesterday I was talking about the boo bam I saw growing in the park, and people would just say, *"The what?"* or look at me funny. One person said, "Oh, 'bamboo.' " Isn't that what I said? Finally I just sat down on the pavewalk and cried.
>
> At first people thought maybe I was deaf, cause I didn't talk until I was three. But they saw that I could hear the doorbell ring, and I always looked up when Beethoven (our German Shepherd) barked.
>
> But, I don't know, the worst part is that I forget the words I want to read. Something like " 'h-a-s' spells 'has' " is easy. Right? Not for me. I must have seen it 200 times and still did not know it when I saw it again. One teacher (Miss Featherstone) told me she was just wasting her mind with me and gave up.
>
> She said something like that. It is so frustrating. You should see me when I have to write or spell. Do you know what "ysez" spells when I write it? Neither do I if I look at it two hours after I wrote it. "Ysez" spells "easy." "Splushla" spells "special." That is what they call me. Some of the kids call me something else that I spell "s-t-u-p-i-t."
>
> I mix up "u" and "r" all the time. Why do they have to look so much alike? I sometimes put "tac" for "cat" and do not know the difference. "Was" and "saw" are the same word as far as I am concerned.
>
> I feel sorry for anybody who tries to read my writing, even me. My hand gets all stiff and sore when I hold the pencil. I wrote "I love you" on the bottom of a card to my mother. She thought it said "thank you."
>
> It doesn't really help any either that my two sisters both have masters degrees and one is a writer. My big brother used to have a lot of trouble, but he can read now. He still can't spell, I guess. How can I tell? Other people say he can't. Maybe he's just a ragged individualist, you know? I mean, if we are all cremated equal, how come everybody laughs at you if you come up with your own ways to spell a few words?
>
> My Dad says to cheer up, though. He says he was worse than I am, and Grandma agrees. Now he is a nuclear physician . . . nucleous physicist, nucleonic . . . Well, he makes a lot of money. When my teacher learned what my father's job was, you could have knocked her over with a fender.
>
> I have a special tutor now, so maybe I'll be all right some day. Right now I think I'll go eat worms.

Not every dyslexic has all the symptoms Alfred describes — reversals, poor spelling, poor handwriting, family history of the problem. But one can be said to be dyslexic a) if one of the difficulties is severe or b) if enough of

the traits occur together to cause serious difficulty. . .

For one in seven of us one or both does happen.

How soon can you tell?

Q. My husband and his father both have dyslexia to some extent. One of his sisters has it. My husband went through high school without being able to read even simple three- and four-letter words. We have a ten-month-old daughter and were wondering what her chances were of having dyslexia. How early can it be detected?

A. A formal diagnosis of dyslexia should come from a qualified expert, but there are signs you as a parent can watch for in your child. If her speech is late in developing, her motor control is poor, and she tends to mix up ideas like today and tomorrow, up and down, left and right, she may be heading for difficulty in learning to read and write.

Here is a timetable of what you might watch for:

By 15 months Should be saying single words ("Mommy," "Daddy," "no," "ball").

Note: Often the child will naturally overcome early delays in speaking, but it is good to keep your eye on the situation when she has been slower than the others you know in developing useful speech.

By age two Should be speaking in two-word sentences — "Go home." "Got rocks." "All gone."
By age three Speaking rather fluently
By age four Speaking fluently

Putting it a bit differently, signs of normal progress in language development that you might watch for include the following:

— The child speaks well and fluently.
— She is interested in books and likes to pretend to read along with you.
— She has good motor coordination (walking, running, climbing, coloring).

If you detect the problem early you can avoid many later problems. It can be good, for instance, to keep the young six-year-old in kindergarten an extra year, giving him or her a chance to develop spoken language. It is very difficult for the child to learn to read if she does not have good spoken language.

But do not just wait for maturity to take care of it. Watch to see what the child may need, then provide help. She may have no trouble at all, so while you are being alert don't hover anxiously. Let her have a natural, happy childhood with lots of experiences and lots of talk about them.

Will she outgrow it?

Q. Our daughter, who is eight, has all the classic symptoms of dyslexia. When she was tested at school, the principal said, "She is doing it for attention. Just ignore it. In time it will disappear if you do."

So we did, but it did not seem to go away. Will it if we wait long enough?

A. No. Seldom, if ever, has it been true that dyslexia has gone away by itself. We have seen many, many adults who had the problem as children. As adults *they still have it!*

If you decide to wait, it can be like putting off that visit to the repair shop for a new tire and continuing to drive. The situation does not just stay the same. . . . It gets worse. You may find yourself jacking up your car by the side of the road when you are supposed to be meeting with the president of the firm.

If you delay in getting help for the dyslexic, as time goes by he or she falls further and further behind his classmates and becomes more and more discouraged about himself. Because he cannot read as well as he should, he misses a great deal of education he should be getting. The emotional problems coming from failure in school are likely to be quite serious and to complicate his later learning. After a while one pressure may become too great, and we know what happens to a tire in that situation. In the case of children, frustration from school failure can lead to behavior "blowouts" in some cases.

There are adult dyslexics doing quite well in business, government, education, and elsewhere, of course. But they have not outgrown their dyslexia . . . just found ways to get around it. Usually the method is nothing

imaginative, just working extra, extra hard. Perhaps they might discover ways to teach themselves other than the unsuccessful methods used with them in school, but that is unlikely. Dyslexics need to be *taught* by methods that are successful, and the earlier the better. This will save them time, frustration, and danger of failure.

Need Help, No Money

Q. My ten-year-old son has been to a psychologist and a very good medical doctor. His intelligence has been rated superior, but when he was tested he could not write one word or read five words. We do not have money to get him the help he needs. I tried to talk to the people in his school, but this is a small town. There has not been much headway. What more can we do?

A. **The Education of All Handicapped Children Act,** a new federal law, guarantees "that all handicapped children have available to them a free appropriate public education." In the past the parent who could not make much headway with the schools had very little alternative unless he or she had private financial resources.

Now, however, the law requires that the school provide a suitable education at public expense. If the school is unresponsive, ask it to inform you of your rights under PL94-142. Write to your Congressman for a copy of the law. Get in touch with the Orton Society, your state's Association for Children With Learning Disabilities, or other parent groups to find out how to proceed.

The school, however, is legally obligated not only to provide free appropriate public education but also to inform you of the procedures you can follow to win such education under the law. Asking for free appropriate public education does not guarantee you will get it. But ask. Now that legislation has been passed schools may find that the consequences of not responding are more costly than doing whatever it takes to meet the needs of handicapped children.

We can afford the help if we knew where to get it. Where should we take our child?

Q. I would like information that would help me work with my fourteen-year-old son. His school diagnosed him as a slow learner who did not know whether he was right- or left-handed and worked with him to make him right-handed. But it has not worked on his reading. We can afford help for him if we only knew where to get it. Do you have any suggestions?

A. Since you can afford additional help beyond that offered by the school, you have special options open to you.

The advice, in one sentence, is: Get a good diagnosis, and follow the recommendation of the diagnostician. There are hospital and university clinics specializing in diagnosis and treatment of children with this kind of language difficulty. Often the county school system has a diagnostic service available. If it does not, perhaps it can tell you where to find one.

There is no ironclad guarantee against your going to the wrong facility. In a 1974 book, author Louise Clarke wrote, "Down through the years, our search for an answer to this mystery [her son's dyslexia] seemed like a blind man groping his way through a maze. In our search, we brushed against dozens of clues that we did not recognize as clues until the malevolent genie was identified: not until [our son] was seventeen years old."

We recommend that you hold out for a facility that can do what in this case your school may have tried to do but apparently did not know how to do — help the child with his reading. Helping decide which hand to use, trying to build up self-image, working on physical coordination, and offering eye exercises and other therapies may or may not be good for dyslexia. Proper instruction in language will definitely be good for it. Look for people who are going to teach the child what he needs to know about his language — how to read, write, and spell.

The dyslexic child has special learning needs. Until those needs are specifically and systematically addressed they are not likely to be met.

Should our daughter be kept back?

Q. Our daughter is eight years old and receives A's and B's in her other subjects but failing grades in reading. She is going into the fourth grade, and her teachers say she reads at a first-grade level. She is being tutored but has not really made much progress. I am afraid her school is going to keep her back. Do you think that will be good for her?

A. In general, if a child's intelligence is equal to that of her age mates, she will probably learn more by staying

with her class than by remaining behind to go over ideas she already knows. If you know the continents in order of size but cannot spell them, it does not do as much good to learn the continents in order of size for a tenth time as to begin to learn what Nicaragua exports (if that comes in the next grade) *while getting special help with your spelling.*

We must emphasize, though, that if she does go on with her class she must also have special help in catching up with language. It can be harmful for the intelligent child to be kept back, because it can hurt her self image. However, it can be just as harmful for the child to go ahead if she does not get help. Failing in grade after grade is not good for the self image either.

While the child is catching up in reading, parents or someone should read her assignments aloud to her so that she will be kept well informed. It is not that parents should do her homework for her, but they can provide the reading skills the child needs to keep up while the child does all the same thinking as the others in her class. A child with a broken leg may need to be given a ride to school. A dyslexic may need to have his social studies assignment read to him. Both middlemen — the driver and the reader — can be eliminated as soon as they are no longer needed.

Won't it make my child dependent if I read to him?

Q. **Won't it make my child dependent if I read to him? He is eight years old, and maybe by now he should always read to himself.**

A. Probably not . . . if he is getting special tutoring in reading as well. Reading to him will just keep him well informed and up with his classmates. As soon as he can read to himself, he will prefer to do so. In the first place, he will prefer to be independent. In the second, as he learns to read, he will begin to read faster to himself than you can read aloud to him. Therefore, he will prefer it.

What can a teacher tell parents about special classes for dyslexics?

Q. **I am a counselor in an elementary school in which there are seven learning disabilities classes. I find it very difficult sometimes to explain to the parents of dyslexic children why their intelligent child was recommended for special classes. How can I help them understand?**

A. There are two possibilities — that the parents are right to complain, or that you are right. If the dyslexic child has been put in a special class with other typically special-class children, then the parents are right. A dyslexic fourth grader who reads at a second-grade level, for instance, should not be placed with the slow learner, the disruptive child, and the child with hearing loss. He needs to be taught by a method that is appropriate for dyslexics, not just by the method that is appropriate for second-grade readers.

However, if the class is special only in that it meets his special needs, then you are right and should explain to the parents that the child is not in a class for slow children. It is a special class only in that the teacher in the regular class has too many other children drawing her in too many directions and does not have the time or perhaps the expertise that the teacher in the dyslexic class has.

In Czechoslovakia, for instance, there are whole classes and whole schools for dyslexics. At first the parents objected, but as soon as they found out how well their children were getting along they did not want their children to graduate from those classes. They wanted them to stay there.

Will balance beams help a dyslexic?

Q. **The counselor at my son's school has recommended a program of walking on balance beams and playing on trampolines. He said that improving his coordination and self-confidence would help him with learning to read. Will these methods help him?**

A. They may help him, but not with his reading. "There is no stick of wood yet that has ever taught a child to read, not even the paddle," goes one old saying. Walking on balance beams may be a good thing to do, as bouncing on trampolines can be. But neither will teach a child to read.

Every child needs to have good control of his body and feel good about himself, and anything that helps with

that is all to the good. Walking the beam may make the child more in control of his muscles and more at peace with himself. In that sense he may become more free to learn. But he still has to be taught how to handle the English language.

There is one danger to such physical therapies. They may be used *instead of* teaching the child to read. The child may spend time balancing on a long stick that he might better spend learning and practicing language skills.

Will a special diet help?

Q. My dyslexic son has been placed on a sugar-free diet, with no enriched flours, no pork, and no eggs and milk. I am concerned that the treatment is of no value to him. Am I right to be concerned?

A. The child's diet is a question for his pediatrician to use his judgment on. Whatever the physician feels is good, then go with that.

However, as far as teaching the child to read is concerned, it has been our experience that the direct method of teaching reading is the best. He should be taught the skills of language. If some physical activity or nutritional improvement helps make him more receptive to teaching, that is fine. But it is not good for diet or something else to be thought of as a *substitute* for systematic instruction in the "a, b, c's" and how to use them.

What is the connection between cerebral palsy and dyslexia?

Q. I have a nursery school and kindergarten, and one of my children has cerebral palsy as well as a language problem. Could you explain the possible connection between cerebral palsy and dyslexia?

A. There is no connection. Cerebral palsy is caused by brain damage, dyslexia is not. The latter condition is a *specific* learning disability that is more a difference than necessarily a handicap; it is like tone deafness or a poor sense of direction, which you can compensate for if you know how.

Dyslexia and cerebral palsy may complicate each other, but they do not cause each other. It is perfectly possible to have chicken pox and a broken leg at the same time. The rash makes it extremely uncomfortable to wear the cast, but the chicken pox certainly does not cause the broken leg.

Likewise for dyslexia and cerebral palsy. Each complicates the other. Neither causes the other.

Am I dyslexic? I have a knack for mirror writing.

Q. Could I be dyslexic? I've never had a problem in reading, spelling, writing, or reversing letters. But since I've been six years old I've had a knack for mirror writing whenever I wish. I do not do it accidentally, but, if I try, I can write as much as I wish in mirror writing almost as fast as "regular writing" . . . in cursive or manuscript.

A. You and Leonardo Da Vinci. The 16th century painter was able to draw with one hand and, simultaneously, write with the other one in mirror writing.

If you have such a knack, make use of it whenever it suits you. Enjoy it. Do not call it "dyslexia."

Should dyslexics be taught phonetically?

Q. We have a boy 12 years old who has dyslexia. I suggested to his teachers that they teach him phonetically, but they dismissed my idea. Should I continue to fight for a phonetic reading program for him.

A. We recommend that you continue to seek a phonetic program, a systematic one, although you may as well know that you have inadvertently entered the bull arena at high noon. The "whole word method" that has dominated the teaching of reading for forty years is the bull. Phonics is the red flag. Dr. Jeanne Chall of Harvard studied both methods for two years and, in a book titled *Learning to Read: The Great Debate* did finally recommend a phonetic approach. Since her book appeared in 1973, schools have begun to add some phonics to the curriculum. Most schools now offer a combination of both, but the one that still clearly predominates is the bull — the whole word method — and the phonics are often haphazard bits and pieces.

Either may work well enough for most children, but phonics, we feel, is the right method for dyslexics and in

some cases the *only* approach that will work. "Teach the language as it is to the child as he is," we recommend, and phonics makes use of the structure of the language as it is.

Language can be broken up into smaller units as follows: Language is built up with words. Words are made up of sounds. Sounds are written with letters in the same order in which sounds are spoken.

Teach the child the 26 letters and the sounds they represent. Teach him how to combine the letters into words (or to decode words when he sees them), and he will be able to generate all the words in the unabridged dictionary and have plenty of room left over for "turboencabulators," "hypoventriculators," and other coined words that sound real but are not.

Memorizing the letters and a few procedures for putting them together makes it possible to do a great deal with a very small memory load. On the other hand, if you are memorizing whole words, you have to memorize at least 1,000 of them before you can be said to be able to read at all. By contrast to the 26 letters, there are hundreds of thousands of words in the language.

Since children with dyslexia have difficulty with language memory and often cannot remember whole words, the phonetic approach has usually been found to be better for them. Even non-dyslexics, who may learn to read easily enough by the whole word method, often have difficulty when trying to recall a word and write it down. Unless they know the structure of the language . . . that is, how the English language is put together, and what its common patterns or rules are, they have difficulty with spelling (which sometimes now seems close to a lost art in our schools).

We recommend a phonetic approach, because it reduces the child's memory load to its lowest necessity. We must caution, however, that phonics is taught in many ways . . . sometimes well, sometimes not so well. Look for the kind of teaching that makes use of the structure of the English language as described above. The approach should be structured, systematic, sequential, cumulative, thorough, and multisensory. That's a summary which takes volumes to explain and years to learn how to use. Experts are needed, but just understanding the essentials can make a big difference.

Can a 52-year-old get help with his spelling?

Q. I am 52 years old, but I need help. I have suffered a lifetime of shame because I cannot spell, not even words that I should be able to. Can I get help at this age?

A. "It's never too late to begin, and it's always too early to give up, as long as the will is there," we always counsel those who decide to do something about their dyslexia.

You certainly can get help at your age. To begin with, you need three things: 1) a good teacher 2) a good phonetic spelling book, and 3) the simple understanding of the nature of the English language that follows.

English spelling has suffered from a kind of schoolboy's revenge. Most people, that is, tend to think that English spelling is irregular and therefore nearly impossible to manage. Other languages — Spanish, Basque, Swahili — are probably "easy," but English is "hard."

George Bernard Shaw draws a standing ovation from the schoolboy in all of us for ridiculing English spelling and saying "gh-o-ti spells fish."

But our beloved George is in this case the misinformed schoolyard name-caller saying, "We don't have to learn all that spelling anyway. The teacher is wrong, not us." Now, "gh" does sometimes spell the "f" sound, but only at the ends of certain words (like "rough"), never at the beginning where Mr. Shaw puts it. "O" sounds like "i" in only one word — "women." "Ti" sounds like "sh" only when introducing the final syllable in words like "attention" and never in English stands by itself at the end of a word. Though delightful as rhetoric, George Bernard Shaw's example should not be considered the last word.

There are, in other words, perfectly sound rules for English spelling as for Swahili, Basque, or Spanish. Most of us eventually gave in to school and admitted that the multiplication tables were not arbitrary after all. Geography had to be learned as it was because, after all, Africa is below Europe and not below North America. Spelling, too, does have solid inner logic, but for some reason we have held out longer before surrendering to it.

One principle can give anyone, 5 years old or 54, a meaningful foundation for learning to spell. "Letters stand for sounds." To spell a word properly, first ask, "What are the sounds of this word?" Then ask, "What letters represent those sounds?" "Fat" is spelled "f-a-t" and not "o-r-g" for good reason. "F" stands for the "f" sound "a" for the "a" sound and "t" for the "t" sound. "F-a-t" spells "fat" because those three letters stand for the sounds in the word as we say it. (We do not spell it "phat," because the "ph" occurs only in words of

Greek origin. Even here the choice of "f" or "ph" is logical and not arbitrary.)

We have found, together with other authorities like Elsie Smelt from Australia, that many people have never realized that when you are spelling you are writing letters to stand for sounds. We have seen college students who did not know that words are spelled as they are for that simple reason.

A computerized study has found that about 50% of the words in the language can be spelled exactly as they sound. Another 35% can be spelled according to sound with a little bit of thought about spelling patterns that are common in English, such as when to use "tch" or "ch" at the end of a word. For the other 15% you can make educated guesses that will sometimes be right and will usually represent the word so that others will know what you mean. You can concentrate memory-spelling on the 15%, the "red-flag" words.

As a beginning, then, we offer you this assurance. — English spelling is mostly logical. It is not often arbitrary. It is based on a simple principle. Words are made up of sounds. Letters stand for sounds.

Apply that understanding, and it should begin to help you. If you would like to go further, we can help you find a good teacher and good spelling book. Do begin. It's never too late. Do not give up. It is always too early for that (as long as the will is there).

How can I help my dyslexic child with his homework? (Part I)

Q. How can I help my dyslexic child with his homework?

A. "I can think," the dyslexic child says. That is important. He can do the calculations in arithmetic or understand the concepts in social studies as well or better than the other students. "But what's wrong is my words."

If the child says, "What's wrong is my eyes. Everything is blurry," then we provide the mechanical device he needs to help him — glasses. If he cannot think as quickly as most others, we help him by going more slowly.

But the dyslexic child — with good or corrected eyesight and good, even above average intelligence — has special needs of a different sort. Sometimes the parent can be to him what glasses are to the sight-impaired or the slower pace is to the mentally retarded. It is only fair for him to have such help. It is well, though, for parents who give such help to have a clear understanding with the teacher, if possible. This helps avoid confusion all around and keeps everyone moving ahead together.

Writing Papers

Take, for instance, writing papers. The dyslexic should think out his paper just the same as the nondyslexic. A parent, though, can help him through the verbal confusion caused by dyslexia, so that the paper he writes is as good as he is capable of writing.

If the child has a paper to write, knows what he wants to say, but cannot get it down on paper, he can begin by *dictating his ideas to his mother (or father or, maybe, a tape recorder).* She can write them down, and then he can copy them.

Or, the mother can write down the ideas, and then read them back to him and have him write them down. But the mother or father has to be very careful not to help him with the thinking process. (Glasses do not help the child think. They help with a specific problem. Likewise should it be with the parent "dictaphone" for the dyslexic.)

Social Studies, Arithmetic

For some subjects — like social studies — the reading the student has to do is simply the means to another end (like learning how far Paul Revere rode or why we lost the battle of Lexington). In such cases, the parent can help by reading aloud to the student and answering any questions he has about words or expressions.

For arithmetic, too, calculations are primary and the reading is just a necessary posing of the problem. Often the dyslexic is quite good at arithmetic reasoning, but he may not realize it because he often may misunderstand directions, forget the steps he is to follow, or forget the figures in what he is doing as he works.

"If four apples cost 20¢," the problem asks, "but Johnny wants to buy only three apples, how much will they cost altogether?"

The answer, of course, is "15¢." The dyslexic may forget the last step and write "5¢." His reading, not his arithmetic, is at fault. Or he may think "15¢" and write "13¢" just because the two numerals look similar.

His mother or father can make sure that his arithmetic homework is truly an arithmetic exercise by reading the word problems to him. If he can read them to himself, make sure he reads them several times to be sure that he knows the sequences of questions and steps to take. Have him read aloud to help him keep those sequences

in mind. (One of the major problems with a dyslexic is keeping a sequence of steps in his mind long enough to process it.)

If you read the problem to your child, or have him read the problem several times to himself while possibly jotting down the steps, you will help him to compete fairly with the other children (who wear glasses if they need glasses or have hearing aids if they need them).

Q. How can I help my dyslexic child with his homework? (Part II)

A. *Foreign Languages*

The dyslexic has enough trouble learning to read and spell the sentence "I would like to have this watch repaired" without having to try to learn "Je voudrais faire reparer cette montre." Even at the college level the dyslexic can often win an exemption from the foreign language requirement.

If disaster should strike, however, and the dyslexic should be required to study French, Spanish, or another foreign language; you *may* be able to help him survive.

Let him choose Spanish if possible, for its phonetic system will be easier for him.

Encourage him to do his work out loud, so that he can hear what he is doing as well as see it. And if he will write as he is hearing and seeing, the writing will reinforce his learning further.

The only way to get information from the world out there into your head is through the senses — seeing, hearing, moving the muscles. The more senses you can have reinforcing each other, the more likely you will be to understand and remember the information passing into your head from the world out there. Sending a rocket to the moon, scientists had back up systems for their back up systems. The machine reached its destination.

Spelling

In learning a foreign language it is good, when possible, to have all the senses reinforcing one another. The same is true of spelling. It can be as difficult for a dyslexic child to remember a list of spelling words as for any of us to memorize a list of telephone numbers.

Have him write each word on the list, spelling it aloud as he writes it. If he is to spell "s-t-u-m-p," for instance, have him first say the word aloud and think about the sounds. "How will I spell them?" he should ask himself, or, at first, you may ask him how he would spell each one, in order.

— As he writes, have him say each letter's name as he writes: "s" "t" "u" "m" "p."

— Then, have him proofread what he has written to be sure he has put down what he intended.

— If he has written something like "s-t-u-p," ask, "Is that what you intended?" and "What did you leave out? Sound it through to check yourself."

Q. How can I help my dyslexic child with his homework? (Part III)

A. *Helping High School Students*

Many of the above techniques can be used even with high school students. In addition, often such students can easily understand the ideas in their textbooks but do not have the vocabulary to understand the words themselves. They know what a "battle" is but are confused by "military engagement." Parents can help by finding textbooks covering the same material but in more elementary vocabulary. With such readings language disabled high school students can learn the material even if they do not at first see it in the words of their regular textbooks.

A Time-Honored Teaching Technique: The Field Trip

Whenever students can see, or best of all get into, the action as well as the words, they are more likely to know they are experiencing something real. Take them to the aquarium to see the sharks and stingrays and piranha. Take them to the natural history museum to see the dinosaur bones. Let them look at early American artifacts like flintlock rifles, calico dresses, pewter spoons. Take them to the farm to see the cows milked and to the dairy to watch the liquid put into bottles and loaded onto trucks. Take them apple picking, maple sugaring, horseback riding.

One New England director of a special school took his class to Greece and Troy in Asia Minor after they had studied *The Iliad.* Are any of those children likely to think that Homer's story was just "pretend" and had no meaning for him?

Where can I get materials so I can teach my child myself?

Q. My school has refused to teach my child phonetically. Where can I obtain phonics cards and other aids so I can teach him myself?

A. Physicians sometimes say that the doctor who treats himself has a fool for a patient. While it may not be true that the parent who teaches her own child has made a poor choice of tutor, it probably is. The child, at least, is likely to think so, and without his cooperation there may be a lot of "teaching" going on but not much "learning."

It is very difficult for the parent to teach his or her own child. First of all, parents do not usually feel secure in the subject they are teaching. Being able to read, after all, is not the same as being able to *teach* reading. Can you be sure you remember about "consonants," "syllables," "suffixes," and "prefixes". Do you know what a "phoneme" is? A "grapheme?" The teacher in school may know them all. Even if you once knew as much as that teacher may know, she probably has years of experience you do not.

But an even greater obstacle is the problem already mentioned. It has been found, in generations of experience all over the globe, that it is very difficult to teach your own child anything. It is possible, just as it is possible for a husband to teach his wife to drive a car. But in that latter case the children in the back seat should wear crash helmets *and* ear muffs (and start thinking about which parent they would rather see on weekends, which during the week).

If there is no other way, though . . . any port in a storm, even if the port is Havana during hurricane season. Go ahead, with caution. If you possibly can, find a neighbor who has a similar problem. Couldn't you both learn how to teach, then trade children at lesson time?

There are certain materials designed for the parent to use on her own. It is best to get some instruction before trying to use them, and they do not always work even then. One such set of materials is the *Language Tool Kit* by Paula Rome and Jean Osman. It is best if you learn to use them with the help and guidance of a trained teacher. Such kits are not easy to use, but you can do it if you have had an introduction to the materials. There are some others, too, but the *Language Tool Kit* is theoretically sound and use-tested.

If you decide to take on such a challenge, go ahead with humility. Remember where you are likely to fit in to the old adage, "Fools rush in where angels fear to tread." Some of those fools, once in, probably make out just fine, even grow wings in time!

How can a 25-year-old improve his handwriting?

Q. We had no idea until we saw a recent magazine story that poor reading, miserable spelling, and illegible handwriting could be helped. Our son is 25 and married, with two children. He has a good job as an office machine repairman, but his supervisor tells him that the customers cannot read the bills he makes out. He must learn to write better or lose his job. Is there some course of self-help for him? The cost of a tutor would be more than a young family budget could handle.

A. Tell him to print, in capitals and lower case letters. Inaccurate printing is at least easier to read than inaccurate longhand.

There are special programs your son might take, like the Johnson Handwriting Program, but we know of no quick and easy answer other than the suggestion we have just given.

Your son should know, too, of his protection against job discrimination under the **Vocational Rehabilitation Act** of 1973. As explained by the Office of Civil Rights of the Department of Health, Education, and Welfare, "Employers may not refuse to hire or promote handicapped persons solely because of their disability. Reasonable accomodation may also have to be made to the person's handicap, where needed."

If your son has been diagnosed as having a handicap, then his employer cannot simply fire him because of his poor handwriting. The firm, instead, should make reasonable accommodation . . . like providing him with a typewriter. (That should be easy, for an employer specializing in office machines.)

If your son feels he has been discriminated against because of what may be dyslexia, then he should write to his H.E.W. Regional Office for Civil Rights.

For California, where you reside, the address is:

Office for Civil Rights
14th Floor
100 Van Ness Avenue
San Francisco, California 94102
415-556-8586

For addresses in other regions, please see pp. 177-178.

Can I get reading help for my son in prison?

Q. I have a 21-year-old son who was recently sent to a correctional institution in Oregon. In my opinion he is a borderline illiterate. I do not feel a correctional institution is the answer to my son's inability to cope with day-to-day living. But, since he will be there for a while, maybe he will be able to improve his reading and perhaps start a domino reaction. How can I get him started on a language program in prison?

A. You are right to suspect that a correctional institution *may* help . . . if it decides to help correct your son's language problems. Contact your local prison authority and ask for a volunteer to work with your boy. Many penal institutions are willing to cooperate in such projects, and with surprisingly good results.

In Gatesville, Texas, for instance, in one dramatic illustration of the success of a prison reading program, a young boy was learning to read from a skilled tutor when his sentence ran out. Back on the streets and facing no better reading instruction than he had enjoyed before reform school, he made a deliberate choice. He went downtown, broke a plate glass window, and went back to the one place he had found where someone could teach him to read.

Statistics indicate that this young man's survival instincts may have been right. Nobody likes being locked up, but if incarceration was the price for learning to read, he was willing to pay it. Learn to read, and life offers its opportunities to you. Be unable to fill out a job application, write out a bill to a customer, read the instructions on a label; and you will walk a lot of streets, turn a lot of doorknobs, and hear "Sorry" so many times that you will not even want to know how to spell *that* word.

"It is possible that reading failure is the single most significant factor in those forms of delinquency which can be described as anti-socially aggressive," suggests Dr. Dennis L. Hogenson in a study of "Reading Failure and Juvenile Delinquency."

Try to find a delinquent who reads up to grade level. Hogenson reports the following statistics, for instance: "In New Jersey three state training schools report an average reading grade level of 4.6. In Texas, children between the ages of 10 and 16 and in penal institutions are reading at an average grade level of 3.2. In Missouri, the average reading level for all incarcerated adolescents is mid-fourth grade."

One theory is that delinquents are lazy, hostile, or ignorant by nature. They do not learn to read for the same reason that they commit crimes. — They are the bad guys. But the young man in Gatesville was not lazy. He just needed to be given a chance. One experienced language tutor reports, "I have never met the child yet who did not want to learn to read." And she has met thousands of children over the years.

Another explanation for at least some delinquency is the very one you suggest. — Illiteracy may cause anti-social behavior. Humiliation, frustration, and failure come to those who cannot read. Humiliation, too, can eventually break out in crime.

Many dyslexics, of course, grow up to become outstanding citizens. Nelson Rockefeller, Woodrow Wilson, and Albert Einstein all had early difficulties with language. But so did Lee Harvey Oswald, though that wasn't all that was wrong with his life. What would have become of that latter man, and of our nation's recent history, if he had been offered early, effective instruction in reading? He might not have become an Einstein, but there is statistical evidence to suggest he would not have turned out as he did.

Are there any speed reading courses that will help dyslexics?

Q. I was an above average student in high school, but to improve my reading I started to take speed reading courses. Reading was always hard for me, and when I started college I began to have a lot of trouble because of it. So I dropped out.

In my speed reading course I would put on a record provided with the materials, and I was to run my fingers over the pages along with the record. I could not see any improvement and stopped going to the course.

I would like to go back to college, but I can't see wasting money to receive D's in courses again. Are there any speed reading courses you have found successful for adults with dyslexia?

A. We have found successful *reading* courses but, if a student is dyslexic, it is probably a mistake for him or her to take a *speed* reading course. If you begin learning to ride horseback by attempting to ride bareback standing up, you may not learn to ride at all.

We recommend the other sequence. Get proper instructions first and master the basics. Then you can gradually learn to read faster and faster (or to ride bareback or standing up in the case of horseback riding).

If you want to do something to speed up your reading, try practicing with a light fictional book where accuracy is not important (Harold Robbins or Alex Haley or some such author). Then just make yourself read fast.

But if you are reading something where accuracy is required, then you may just have to accept the fact that you may be slower than some others at getting the material. But go ahead and get it. If you attempt to read such material fast, you are likely to find, as a dyslexic, that your haste not only makes waste. It makes D's in school.

My son eats and writes right-handed but has to throw a ball or shoot a gun left-handed. Do you think he is dyslexic?

Q. **My son is 12 years old and already a grade behind. He had math in summer school, but he still cannot remember his times tables. He eats and writes right-handed, but he has to throw a ball or shoot a gun left-handed. His writing is very sloppy. I asked him one day if he could write with his left hand, and with no hesitation he wrote perfectly *backwards* with his left hand. If you held the paper up to a mirror, the writing was neater than when he wrote with his right hand.**

Do you think he is dyslexic?

A. We cannot be sure whether he has dyslexia or not, but he may have some of the symptoms that often go with dyslexia. If he has enough of the symptoms to cause trouble, then he can be called "dyslexic." A good diagnosis by a neurologist can tell you for sure whether he is or not.

From what you have said, though, it does seem that there may be help for his handwriting. Eating and writing are both learned skills. If he does these two activities with his right hand but many others with his left, it may very well be that he needs to write with his left hand. (Or perhaps he may be ambidextrous.)

Perhaps he can learn to write left-handed but frontwards by practicing *with the copy in front of him.*

We know of one case of an older man, however, who had a similar problem but did not feel he had time to retrain himself. So he wrote his very clear mirror writing and put a reverse carbon under the page as he wrote. When he turned his paper over, there was clear conventional writing. He was fine as long as he had carbon paper, which he carried with him the way most of us carry just our ball point pen.

We recommend that one retrain himself if possible, of course. You can almost always borrow a pen if need be. But carbon paper can be hard to find when you need it, so that method is a last resort.

My daughter sometimes works addition problems diagonally and sometimes horizontally. Do you think she is dyslexic?

Q. **I have a child who prints only the letter "c" in her name backwards. On a page of addition with 8 problems, she does two correctly, adds two diagonally (e.g.**

$$\begin{array}{r} 23 \\ \wedge \\ 15 \\ \hline 47) \end{array}$$

two horizontally

$$\begin{array}{r} (2 \rightarrow 3 \\ 1 \rightarrow 5 \\ \hline 56) \end{array}$$

and the other two perhaps a mixture of both. Do you think she is dyslexic?

A. One reversed letter is not an indication of dyslexia. It may point toward it, but it may not. In this case your

daughter's arithmetic performance does not indicate dyslexia but a lack of understanding of what is going on in addition.

Dyslexia, on the other hand, does not show up as lack of understanding. In arithmetic it may show up as trouble in remembering the times tables or number combinations. The dyslexic may understand addition perfectly well but get wrong answers because he reads incorrectly and forgets steps. His $\begin{array}{r}23\\+15\\\hline\end{array}$ might come out 30 — because

(a) he looks at the "3" and sees a "5," and (b) he forgets to carry the "1."

It may take little more to help your daughter than a simple explanation of addition. Tell her that the first column on the right is for units, and you must add units to units. If you have too many of them (more than ten), then you change to tens. And you must add tens to tens. Better still, have her act it out with pennies (units) and dimes (tens), exchanging pennies for dimes when she has more than she can write (carrying) or a dime to pennies when she needs them (borrowing). And don't expect one explanation or demonstration to be enough. She must have both understanding and practice.

When your daughter is adding she is doing so by magic — like buying a lottery ticket and hoping for the best. She is not really adding but playing games with numbers. Explain the number system to her and the chances are her "dyslexia" will go away. If it does not, then it is possible she will need special tutoring, or a more practiced math teacher!

What is the connection between brain damage and dyslexia?

Q. **Our daughter shows many of the symptoms of dyslexia except that she is a good speller. I want to ask you about possible brain damage. Her birth was long (3 days), and the cord was wrapped around her neck. I have had the feeling for years that she should have been right-handed, but that one side of her brain suffered some damage and the other side had to take over. Is that possible?**

A. Yes, it is *possible*, but the only one who could answer that one for sure would be a neurologist. Though it is not difficult to identify someone who has the general kind of problem we are talking about, a pinpoint diagnosis of causes, symptoms, and treatments is for an expert.

We can give a special caution, too, for those who suspect brain damage. Dyslexia as a learning difference is not caused by brain damage, but injury can cause many kinds of symptoms . . . including reversals, forgetting words and numbers, and others usually associated with dyslexia.

Where the symptoms are similar, the treatment may also be similar — often structured, systematic, multisensory tutoring in language. However, if the cause of the difficulty is brain damage, not constitution, then the chances of the child making rapid progress may be less.

A brain-damaged child may be able to make a great deal of progress. The neurologist will be able to determine that. But where there is damage, ways must be found to compensate for what has been injured. When the problem is dyslexia, however, then one faces learning "differences" but not damage. Then, one need not so much compensate as make use of different pathways or learning styles than those used by nondyslexics.

For you to know which category your child belongs in — brain damaged or dyslexic — you must get a first-class evaluation by a neurologist. Every child is different from every other. Then, whichever is the diagnosis, you will need a first-class teacher.

Is it right to correct a dyslexic child?

Q. **I want to ask about my husband's dyslexic son (my stepson). Is it all right for a parent to correct a dyslexic child when he speaks improperly? He repeatedly asks, "I can have a cookie?" for instance, instead of "Can I have a cookie?" I have been correcting him, and it seems to work when he is in our company. But when he comes back to visit after several weeks at his other home, he has usually slipped back into talking backwards.**

Does the correcting help him? Will it effect him emotionally later on? Is it wrong to tell him he cannot have what he asks for unless he asks properly?

A. Common sense and being humane is the answer. Let him have the cookie (unless it is just before dinner or he

has already had ten or for some reason you would not have given it to him anyway). Do not deny him what he wants because of his speech error.

But it is good to correct him and say, "Ordinarily people say, 'Can I have a cookie?' " (We should say "*May* I have a cookie?" but one grammar lesson at a time is enough.) Tell him, though, that you did understand what he said.

He will want to talk as other people talk. He probably thinks he is doing just that. Therefore, you do him a service by pointing out what the problem is. If you call to his attention that "people usually say it this way" instead of just correcting him for no apparent reason, he will be more likely to understand you and pay attention to what you are saying.

It is good for the child to understand that the problem with saying things incorrectly, or saying things in a way that is not the same as others say them, is that you call attention to how you are speaking instead of to what you are saying. Communication breaks down. Incorrect spelling has the same effect. If you write, "I kneed a lofe of bred," to the errand boy, he may laugh so hard at the image that this presents to him, he may forget to make the delivery.

The primary reason for speaking conventionally and spelling conventionally, then, is, very simply, so people will understand you. Explain that to your stepson when you correct him, and he is likely to appreciate you for it . . . especially if you give him the cookie, too.

Is it harmful for a child to be labelled dyslexic in school?

Q. I want to ask you about labelling. Do you think it can be harmful for a child to be identified as "dyslexic" in the early grades and then be known as that for all the rest of his school years?

A. We believe you should label conditions, not children. You can not even talk without using labels. A label is a name for an idea. Every word is a label.

What can be unfortunate for a child, though, is if we label him and then pigeonhole him so that we then think of him primarily in terms of his blue-eyedness or his dyslexia or his inability to carry a tune.

It makes about as much sense, that is, to say something like, "Oh, he could never be a good baseball player; he has dyslexia," as to say, "He can not be much of an athlete; he is tone deaf."

The dyslexic has many characteristics, only one of which is his dyslexia. Perhaps in the past the general public did not understand that dyslexia is simply a characteristic, and therefore it might have tended to label children and not conditions. However, awareness of dyslexia and all kinds of individual differences, (some of which are "handicapping conditions") is growing, assisted by Section 504 of the **Rehabilitation Act** of 1973, which states, "Section 504 . . . reflects a national commitment to end discrimination on the basis of handicap."

Children, it is often found, do tend to be very tolerant of other children anyway when they understand what's what. If they dislike someone, as they sometimes do, often this is not because a child has been labelled one thing or another but, as one school principal describes it, "because he is a particularly nasty kid."

On balance, say most of those who have worked long in the field of dyslexia, putting a valid name to the condition is useful in understanding the child's learning difference and responding to it effectively. Often it is the adult who is upset, because he has heard the statement, "It is bad to label," and makes him afraid he is in the wrong. It does not cause nearly the problems for the child that it does for him to have an unnamed, possibly untreated "mysterious disability."

Should the dyslexic be mainstreamed or placed in special classes?

Q. Is it better for a dyslexic child to be "in the mainstream" or to be in special classes with other children who have his same problem, so he can get specialized help?

A. He does well to be in the mainstream as long as he can swim, on shore or buoyed by a life raft when he cannot.

It is the popular misconception that the new **Education of All Handicapped Children Act (PL94-142)** requires that, "no matter what," a child with a disability should spend all his time in the classroom with everybody else, just as a black student or a member of any other minority should under other civil rights acts. In many areas the law is being unwisely applied in just that way.

Actually, the law does not say "no matter what." It says "to the maximum extent appropriate." The word

"maintreaming" does not appear in the law at all, and someone, sometime might do well to trace the aquatic term back to its source and set its usage straight. Under the heading *"least restrictive environment"* the law does state, "Each public agency shall insure that to the maximum extent appropriate handicapped children . . . are educated with children who are not handicapped."

The regular classroom is appropriate if the child progresses there. If he looks at the other children and sees himself as the last of the procession — disabled, unable, inadequate, seeming stupid — then being in the general classroom can be very "restrictive" for him emotionally. Here and there, already a cry has gone up from parents that "my child is drowning in the mainstream."

Our preference in respect to "least restrictive environment" is that children should be with their peers but taught as they need to be taught. A dyslexic child, for instance, may be with the rest of the class for social studies, science, possibly even arithmetic. But when the time comes for the subject he has difficulty with — spelling or reading perhaps — then at that time let him go to a resource room or tutor where he can be taught as he needs to be taught. Then he can enjoy the best of both worlds.

Thirty years ago there were no special classes, and every child who went to school was "mainstreamed." Then the schools set up special classes that were quite effective for some of the children. Now there is a tendency to go back to the other extreme again and put everybody in the same class with his peers all the time.

It seems there ought to be a compromise in which the child can be with his age mates and social peers wherever he can function well and be in a separate setting where he can perform well for other things. Such a compromise seems clearly the intent of the law.

The "least restrictive environment" that is "appropriate" might be the regular class, or perhaps the regular class with special provisions like resource rooms or tutors. Perhaps, though, the least restrictive environment that is appropriate for a certain child will be a special class, or even, at the extreme, a residential school out of state.

Whichever option is best, the school must pay for it. As Section 504 of the **Vocational Rehabilitation Act** of 1973 phrases it, "the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian."

What can colleges do for dyslexic students?

Q. I am a college professor and read recently of dyslexia. I believe I have identified the problem in one student advisee. The disability, I have learned, is often unidentified in public school students, and therefore those students who are able to do well enough on College Board examinations by substituting wit for skills are admitted to college, where the instructors again fail to identify the problem.

The end result is frustration for a student whose edited work — a book review or term paper — stands in marked contrast to work done in class (examinations, quizzes, essays).

What can I do to help the particular student I have found and to expand the general awareness of the educational community?

A. Now that Section 504 of the **Vocational Rehabilitation Act** has been passed, you can begin to expand the awareness of your college administration by showing them the law. One subpart of the act applies to secondary education, and it prohibits "discriminating, on the basis of handicap, against a qualified handicapped applicant or student" either in admissions or academic requirements.

Though colleges often prove to be most receptive to learning about dyslexia, the experience quite as often is, as you point out, that they know little about it initially. There is still a widespread belief at the college level that "if a person has a learning disability, he or she does not belong in college."

It may help to point out that, by that reasoning, Albert Einstein, Woodrow Wilson, (who became president first of Princeton University and then of the United States), and former Harvard President A. Lawrence Lowell did not belong in college.

Best of all now, though, is to point to the law. It requires, for instance, that handicapped students may not be prohibited the use of tape recorders (which can be as indispensible to a college dyslexic as is a seeing eye dog, or indeed a tape recorder, to a blind person).

The law suggests making "modifications" in academic requirements if necessary to prevent discrimination and says, "Modifications may include changes in the length of time permitted for the completion of degree

requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."

The lower ranks in management and the work forces abound with could-be executives who stumbled over the foreign language requirement or the freshman composition requirement and dropped out of college. If the student is a demonstrated dyslexic, however, the college may have to modify such requirements . . . to the likely benefit of the higher levels of management and the society as a whole.

As for helping the particular student you know — it is possible to help a college-level dyslexic, but it takes time. And it takes a great deal of persistent effort on the student's part.

The therapy is the same as for other levels — systematic tutoring in reading and written work. There are many success stories among those fortunate to be discovered and helped. She graduated with a good average, won a graduate fellowship, and finished third out of 80 students in her masters degree class.

At the level of college entrance, the College Entrance Examination Board also now makes modifications for dysléxics, allowing such disabled readers to have extra time for the examinations, to take oral tests in certain cases, to have someone write for them, or in other ways to compensate for their difficulty.

The College Entrance Examination Board, that is, is trying to find out what the student knows, not just what he can show. Though the time has not arrived yet, thanks to new federal laws an era may be coming when colleges as a whole take the same enlightened approach to educating the learning disabled student once he has been admitted.

More power to you in helping speed that day!

National, Legal, Advocacy, and Service Organizations

Center for Law and Education
Gutman Library
6 Appian Way
Cambridge, MA 02138
(617) 495-4666

Primarily a research and information service for attorneys.

Children's Defense Fund
1520 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 483-1470

Not a service organization or a source of low cost legal service in most cases but will accept significant cases and conduct litigation. Carries out research, advocacy, and political lobbying. Will answer parent or lawyer questions.

List of publications available on request.

Mental Health Law Project
1220 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 467-5730

Mexican-American Legal Defense Fund
28 Geary Street
San Francisco, CA 94108
(415) 981-5800

As the name suggests — legal group for Mexican Americans. While PL 94-142 is not a specialization, will offer consultation on the law as it effects Mexican Americans.

National Center for Law and the Handicapped
1235 N. Eddy Street
South Bend, IN 46617
(219) 288-4751

Legal action and social science research. Primarily a service directly to lawyers seeking information at the local level but will answer questions for the general public. Publishes *Amicus*, a bimonthly magazine on law and the handicapped.

National Committee for Citizens in Education
Suite 410
Wild Lake Village Green
Columbia, MD 21044
(301) 997-9300
(800) NETWORK = 638-9675 (National Hotline)

Takes parent point of view. Nationwide program to mobilize citizens to improve quality in education. Referral. Handbooks. Training sessions. Advocacy (will go to court in cases with precedent-setting potential). More than 300 affiliates in fourteen states.

National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036

Teachers' organization. Publishes *A Teacher's Reference Guide to PL 94-142.*

Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Has education specialist. Information on P.L. 94-142 and Section 504 as they affect native Americans.

Reading Reform Foundation
7054 Indian School Road
Scottsdale, AZ 85251
(602) 946-3567

With branches in many states. Primarily concerned with bringing good phonics programs into the schools.

State and Local Information and Advocacy Groups

The handicapped have not been pursuing their rights as actively as they should concluded former Time Magazine reporter Roa Lynn in a Fall 1978 report on "Learning Disabilities: The State of the Field." Nevertheless, there are those in every state who have sought to enjoy the opportunities offered by the law. In some cases those experienced in moving through the system have established advocacy agencies, primarily to assist those who are not yet experienced.

The Association for Children With Learning Disabilities is one such parent-founded advocacy agency. Any parent who goes through the process of speaking out for his or her own children's rights is likely to want to share expertise as an advocate for others, and many do.

The federal government, through the Closer Look organization listed above, has designated a number of grassroots agencies as "Parent Information Centers." Such offices, designated here by the initials PIC, are information centers (not active advocates) in their role as formal Closer Look affiliates. But all began autonomously as parent groups, and most continue to supply more than information alone to those who ask for it.

Not leaving advocacy entirely up to parents, however, the federal government requires, under Public Law 94-101, that each state have a formally designated agency of "Protection and Advocacy for Developmental Disabilities." Washington provides funding. The protection and advocacy agency for each state appears with the following list with the accompanying note "Federally Mandated Protection and Advocacy Agency." For further information on the federally mandated program, contact:

Terrence Lynch
Bureau of Developmental Disabilities
Room 3070
HEW South
Washington, D.C. 20201
(202) 472-3014

State and Local Information and Advocacy Groups

ALABAMA

Alabama Council on Human Relations
P.O. Box 1632
Auburn, AL 36830
(205) 821-8336

***Alabama Developmental Disabilities Advocacy Project**
918 Fourth Ave.
Tuscaloosa, AL 36830
(205) 348-4928

ALASKA

***Protection and Advocacy for Developmental Disabilities, Inc.**
600 University Plaza West, Suite C
Fairbanks, AK 99701
(907) 479-6940

ARIZONA

Arizona ARC
5610 S. Central Avenue
Phoenix, AZ 85040
(602) 243-1787

***Arizona Center for Law in the Public Interest**
112 N. 5th Ave.
P.O. Box 2783
Phoenix, AZ 85002
(602) 252-4904
(800) 352-5335 (in state)

ARKANSAS

***Arkansas Developmental Disabilities Advocacy System**
Governor's Office
State Capital Building
Room 011
Little Rock, AR 72201
(501) 371-2171

CALIFORNIA

***California Protection and Advocacy Panel**
150 Grand Avenue
Oakland, CA 94612
(415) 451-4790

***Federally Mandated Protection and Advocacy Agency**

Center for Independent Living
2539 Telegraph Avenue
Berkeley, CA 94074
(415) 841-4776

Works with elderly and such handicapped as the blind and deaf. Job development, drug repair center, law resource center, advocacy, housing assistance, etc.

Legal Aid Foundation of Los Angeles
1550 West Eighth St.
Los Angeles, CA 90017
(415) 487-3320

Public Advocates, Inc.
1535 Mission St.
San Francisco, CA 94102
(415) 431-7430

Works with disadvantaged. Does not represent individual cases.

***Sonoma County Citizens Advocacy, Inc.**
P.O. Box 4449
Santa Rosa, CA 95402
(707) 546-4622

A protection and advocacy agency under P.L. 94-101.

Youth Law Center
693 Mission St.
Sixth Floor
San Francisco, CA 94105
(415) 543-3307

National legal services support center, primarily for attorneys. Does not represent individual cases.

COLORADO

***Legal Center for Handicapped Citizens**
1060 Bannock Street, Suite 316
Denver, CO 80204
(303) 573-0542

CONNECTICUT

Office of Handicapped Services
157 Church St.
New Haven, CT
(203) 436-2690

***Office of Protection and Advocacy for Handicapped**
61 Woodland St., Second Floor
Hartford, CT 06115
(203) 566-7616

R.E.S.P.O.N.D.
Resource to Encourage Services to Provide for the Ongoing Needs of the Disabled
956 Chapel St.
New Haven, CT 06510
(203) 865-1388

DELAWARE

***Community Legal Aid Society, Inc.**
913 Washington St.
Wilmington, DE 19801
(302) 575-0660

DISTRICT OF COLUMBIA

Information Center for Handicapped Individuals
1413 K St., N.W.
Washington, D.C. 20005
(212) 268-9161

Referral and advocacy. Has directory of agencies for District of Columbia area.

Neighborhood Legal Services Program
310 6th St., N.W.
Washington, D.C. 20001
(202) 628-9161

***One America Educational Services, Inc.**
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 628-2216

FLORIDA

***Governor's Commission on Advocacy for Persons With Developmental Disabilities/ Department of Administration**
530 Carlton Building
Tallahassee, FL 32304
(904) 488-9070

Publishes a county-by-county directory, "Can't Somebody Help: An Advocacy Directory for the Developmentally Disabled."

GEORGIA

American Friends Service Committee
Southeastern Public Education Program
P.O. Box 56JJ
Macon, GA 31208
(912) 742-3335

***Georgia Advocacy Office, Inc.**
1447 Peachtree Street, N.E.
Suite 811
Atlanta, GA 30309
(404) 885-1447
(800) 252-4538

*Federally Mandated Protection and Advocacy Agency

HAWAII

***Kahua Ho'omalu Kina, Inc.**
765 Amana St.
Suite 300
Honolulu, HI 96814
(808) 949-2922

IDAHO

***Idaho's Coalition of Advocates for the Disabled**
(CO-AD), Inc.
100 Scout Lane
Boise, ID 83702
(208) 336-5353

ILLINOIS

Coordinating Council for Handicapped Children (Also PIC)
407 South Dearborn, Room 680
Chicago, IL 60605
(312) 939-3513

Founded in 1969 as a parents' group and, though affiliated with Closer Look in 1976, continues its broader functions as well, such as to provide "step-by-step instruction in self advocacy."

Generally serves parents in the Midwest but also supplies information and help to any part of the country.

The Developmental Disabilities Law Project
343 S. Dearborn St.
Chicago, IL 60604
(312) 341-9026

***Illinois Developmental Disabilities Advocacy Authority**
1 West Old State Capital Plaza
Suite 917
Springfield, IL 62701
(217) 544-5750

INDIANA

***Indiana Protection and Advocacy Service**
Commission for Developmentally Disabled
445 N. Pennsylvania St.
Room 503
Indianapolis, IN 46204
(317) 633-7013

Task Force on Education for the Handicapped Children (Also PIC)
812 E. Jefferson Blvd.
South Bend, IN 46617
(219) 234-7101

Primarily Northern Indiana but will attempt to serve people in surrounding areas.

IOWA

***Iowa Protection and Advocacy System**
Iowa Civil Rights Commission
418 Sixth Street
Liberty Building
Suite 340
Des Moines, IA 50319
(515) 281-4121

KANSAS

***Kansas Advocacy and Protective Services for the Developmentally Disabled, Inc.**
513 Leavenworth, Suite 2
Manhattan, KS 66502
(913) 776-1541

KENTUCKY

***Office for Public Advocacy**
Division for Protection and Advocacy
State Office Bldg. Annex
Third Floor
Frankfort, KY 40601
(502) 564-2967

LOUISIANA

***Advocate for the Developmentally Disabled**
New Orleans Legal Aid Corporation
226 Carondelet Street, Suite 716
New Orleans, LA 70130
(504) 522-2337

Advocates for Juvenile Justice
344 Camp Street
Suite 1101
New Orleans, LA 70130
(504) 586-8835

MAINE

***The Advocates for the Developmentally Disabled**
Cleveland Hall
Winthrop Street
Hollowell, ME 04347
(207) 289-2395

*Federally Mandated Protection and Advocacy Agency

Human Resources Development Corporation
81 N. Street
Saco, ME 04072
(207) 283-3964

MARYLAND

***Maryland Advocacy Unit for the Developmentally Disabled**
2612 Maryland Ave.
Baltimore, MD 21218
(301) 383-3094

MASSACHUSETTS

Developmental Disabilities Law Center of Massachusetts
294 Washington St., Suite 840
Boston, MA 02108
(617) 426-7020

Federation for Children with Special Needs, Inc. (Also PIC)
120 Boylston St., Suite No. 338
Boston, MA 02116
(617) 482-2915

Information, training, and advocacy. Established primarily to serve Massachusetts, provides information and help to parents in surrounding states.

Massachusetts Advocacy Center
Two Park Square
Boston, MA 02111
(617) 357-8431

Massachusetts Association for Children With Learning Disabilities
11 River Street
Wellesley, MA 02181
(617) 235-9370

Office for Children
120 Boylston Street
Boston, MA 02116
(617) 727-8900

MICHIGAN

***Michigan Protection and Advocacy Service for Developmentally Disabled Citizens**
Michigan Association for Retarded Citizens
230 N. Washington Sq., Suite 200
Lansing, MI 48933
(517) 487-1755

Student Advocacy Center
202 E. Washington
Room 300
Ann Arbor, MI 48104

MINNESOTA

Developmental Disabilities Advocacy Project
222 Grain Exchange Bldg.
323 Fourth Ave. S.
Minneapolis, MN 55415
(612) 338-0968

Has directory of agencies within state.

***Developmental Disabilities Planning Office**
State Planning Agency
101 Capitol Square Building
550 Cedar St.
St. Paul, MN 55101
(612) 296-4018

MISSISSIPPI

Children's Defense Fund
Mississippi Project
Box 1684
Jackson, MS 39205
(601) 355-7495

Mississippi Mental Health Project
Box 951
Jackson, MS 39205
(601) 948-6752

***Mississippi System of Protection and Advocacy for Developmentally Disabled Individuals, Inc.**
235 Watkins Building
510 George Street
Jackson, MS 39201
(601) 944-0485

MISSOURI

Bootheel Legal Aid Society
225 Ward Avenue
Caruthersville, MO 63830
(314) 333-4076

***Missouri Developmental Disabilities Protection and Advocacy Services, Inc.**
420 A Brooks St.
Jefferson City, MO 65101
(314) 636-8113

National Center for Youth Law
St. Louis University School of Law
3701 Lindell Boulevard
St. Louis, MO 63108
(314) 533-8868

***Federally Mandated Protection and Advocacy Agency**

MONTANA

***Developmental Disabilities/ Montana Advocacy Program**
1218 East Sixth Street
Helena, MT 59601
(406) 449-3878

NEBRASKA

***Nebraska Advocacy Services for Developmentally Disabled Citizens, Inc.**
3940 Cornhuskers Highway, Suite 200
Lincoln, NE 68504
(402) 467-4616

Nebraska State Department of Health
Division of Developmental Disabilities
301 Centennial Mall South, Third Floor
P.O. Box 95007
Lincoln, NE 68507
(402) 471-2981

NEVADA

***Developmental Disabilities Advocate's Office**
Governor's Office of Planning Coordination
1050 East Williams, Suite 402
Carson City, NV 89710
(702) 885-4837

NEW HAMPSHIRE

New Hampshire Coalition for Handicapped Citizens, Inc. (Also PIC)
Box 1255
Concord, NH 03301
(603) 224-7005

Primarily New Hampshire.

***New Hampshire Protection and Advocacy Advocate**
110 North Main Street
Concord, NH 03301
(603) 224-7322

NEW JERSEY

Education Law Center
605 Broad Street, Eighth Floor
Newark, NJ 07102
(201) 624-1815

Public interest law firm.

Office of Advocacy for the Developmentally Disabled
Department of the Public Advocate
P.O. Box 141
Trenton, NJ 08625
(609) 292-9744

NEW MEXICO

Developmental Disabilities Protection and Advocacy System
New Mexico State Human Rights Commission
303 Bataan Building
Santa Fe, NM 87501
(505) 827-5681

New Mexico Advocates for the Developmentally Disabled
839 Paseo de Peralta
Suite N
Santa Fe, NM 87501

Paralyzed Veterans of America
2608 Monroe, N.E.
Albuquerque, NM 87110
(505) 265-7049

NEW YORK

Advocates for Children
29-28 41st Avenue
Room 508
Long Island City, NY 11101
(212) 786-9100

Center on Human Policy
216 Ostrom Avenue
Syracuse, NY 13210
(315) 423-3851

Has publications list. Free advocacy.

Mayor's Office for the Handicapped
250 Broadway
Room 1414A
New York, NY 10007
(212) 566-0972

New York Civil Liberties Union
84 Fifth Avenue
New York, NY 10011
(212) 924-7800

Deals with precedent-setting test case litigation where the constitution is concerned.

Office of Advocate for the Disabled
State of New York, Executive Chamber
Albany, NY 12224
Harold Unterberg, State Advocate
(Albany) (518) 474-7955
(New York City) (212) 938-0186

***Protection and Advocacy System for Developmental Disabilities, Inc.**
175 Fifth Avenue, Suite 500
New York, NY 10010
(212) 982-1140

***Federally Mandated Protection and Advocacy Agency**

Public Education Association
20 W. 40th Street
New York, NY 10018
(212) 354-6100

NORTH CAROLINA

***Advocacy Council for the Mentally Ill and Developmentally Disabled**
North Carolina Department of Administration
107 Howard Building
112 West Lane Street
Raleigh, NC 27611
(919) 733-3111

NORTH DAKOTA

***Protection and Advocacy Project for the Developmentally Disabled**
Governor's Council on Human Resources
State Capitol, 13th Floor
Bismarck, ND 58505
(701) 224-2972

OHIO

Ohio Association for Protection and Advocacy for Persons with Developmental Disabilities
8 East Long Street, Suite 320
Columbus, OH 43215
(614) 461-1318
(800) 282-9181 (in state)

Southwestern Ohio Coalition for Handicapped Children (Also PIC)
3024 Burnet Avenue
Cincinnati, OH 45219
(513) 861-2400

Information and help with advocacy. Primarily Southwestern Ohio but will attempt to serve people in surrounding areas.

OKLAHOMA

***Protection and Advocacy Agency for Developmental Disabilities**
9726 East 42nd
Osage Building, Room 121
Tulsa, OK 74145
(918) 664-5883

OREGON

***Oregon Developmental Disabilities Advocacy Center**
621 S.W. Morrison, Room 519
Portland, OR 97205
(503) 243-2081

PENNSYLVANIA

***Developmental Disabilities Advocacy Network, Inc.**
1607 City Towers
301 Chestnut Street
Harrisburg, PA 17101
(717) 238-0474

Education Law Center
2100 Lewis Tower Building
225 South 15th Street
Philadelphia, PA 19102
(215) 732-6655

A non-profit, public interest law firm specializing in reform and improvement of the public school system in New Jersey and Pennsylvania.

Public Interest Law Center of Philadelphia
1315 Walnut Street
Philadelphia, PA 19107
(215) 735-7200

PUERTO RICO

***Protection and Advocacy System of Consumers With Developmental Disabilities**
Minillas Gubernamental Center, North Bldg.
P.O. Box 41059
Santurce, PR 00908
(809) 727-8536

RHODE ISLAND

***Rhode Island Protection and Advocacy System, Inc.**
187 Warren Ave.
East Providence, RI 02914
(401) 438-9260

SOUTH CAROLINA

***Advocacy for Handicapped Citizens**
P.O. Box 1254
111 Church Street
Charleston, SC 29402
(803) 723-2518

SOUTH DAKOTA

South Dakota Advocacy Project, Inc.
111 West Capitol
Pierre, SD 57501
(605) 224-8294

*Federally Mandated Protection and Advocacy Agency

TENNESSEE

***Tennessee State Planning Office**
Division of Advocacy
660 Capitol Hill Building
301 Seventh Avenue North
Nashville, TN 37219
(615) 741-1676

TEXAS

***Advocacy, Inc.**
5555 N. Lamar Street, Suite K-109
Austin, TX 78751
(512) 475-5543

UTAH

***Legal Services for the Developmentally Disabled, Inc.**
455 East 400 South, Suite 202
Salt Lake City, UT 84111
(801) 363-1347

VERMONT

***Vermont Developmental Disabilities Advocacy Project**
P.O. Box 562
180 Church St.
Burlington, VT 05401
(802) 863-2871

VIRGINIA

American Civil Liberties Union of Virginia
1001 East Main Street
Suite 515
Richmond, VA 23219
(804) 644-8022

Takes on only test cases "likely to change the law."

***Virginia Developmental Disabilities Protection and Advocacy Office**
Ninth Street Office Building
First Floor
Richmond, VA 23219
(804) 786-4185

VIRGIN ISLANDS

Protection and Advocacy Committee
P.O. Box 734
Fredericksted, St. Croix
U.S.A. Virgin Islands 00840
(809) 772-1277

WASHINGTON

***Troubleshooters Office**
1600 West Armory Way
Seattle, WA 98119
(206) 284-1037

WEST VIRGINIA

***West Virginia Advocates for the Developmentally Disabled, Inc.**
1021 Quarrier Street, Room 411
Charleston, WV 25301
(304) 346-0847

WISCONSIN

***Wisconsin Coalition for Advocacy, Inc.**
2 West Mifflin, Suite 200
Madison, WI 53703
(608) 251-9600

WYOMING

***Developmental Disabilities Protection and Advocacy System, Inc.**
508 Hynds Building
Cheyenne, WY 82001
(307) 632-3496
(800) 442-4744 (in state)

***Federally Mandated Protection and Advocacy Agency**

National Organizations for the Handicapped

(Adapted and expanded from an original list compiled by Closer Look and published by Children's Defense Fund.)

ALL DISABILITIES

American Association for the Education of the Severely/Profoundly Handicapped
P.O. Box 15287
Seattle, WA 98115
(206) 283-5055

Provides literature and information.

American Coalition of Citizens With Disabilities
1346 Connecticut Avenue, N.W.
Suite 817
Washington, D.C. 20036
(202) 785-4265

A private, nonprofit organization interested in helping disabled people secure basic human and civil rights, particularly through education, rehabilitation, and employment. Seventy-five national, state, and local chapters.

The Council for Exceptional Children
1920 Association Drive
Reston, VA 22091
(703) 620-3660

An organization of teachers, professionals, parents, students. Information center/ERIC clearinghouse for handicapped and gifted children.

AUTISM

National Society for Autistic Children
169 Tampa Avenue
Albany, NY 12208

or

National Society for Autistic Children
Suite 1017
Mass. House
1234 Mass. Ave., N.W.
Washington, D.C. 20005
(202) 783-0125

Parent organization, similar to the Association for Children With Learning Disabilities and the National Association for Retarded Citizens though for a smaller incidence disorder. Has network of local chapters.

BLIND

American Council of the Blind
1211 Connecticut Avenue, N.W.
Suite 506
Washington, D.C. 20006
(202) 833-1251

Non-profit national organization with over 12,000 members. Forty-two state affiliate organizations.

American Foundation for the Blind
15 West 16th Street
New York, NY 10011
(212) 924-6420

Publishes books. Sells instruments and toys for the blind.

National Federation of the Blind
1346 Connecticut Avenue, N.W.
Suite 212, Dupont Circle Building
Washington, D.C. 20036
(202) 785-2974

Seeks to promote better opportunities for blind people through legislation and by educating the public.

CEREBRAL PALSY

United Cerebral Palsy Association
122 East 23rd Street
New York, NY
(212) 785-2974

DEAF

Alexander Graham Bell Association for the Deaf
3417 Volta Place, N.W.
Washington, D.C. 20007
(202) 337-5220

Information. Advocacy. Conferences. Publications.

Mental Health Association, National Headquarters
1800 North Kent Street
Arlington, VA 22209
(703) 528-6405

Organization "to promote citizen interest and activity on behalf of the mentally ill and for the cause of mental health." 850 local affiliates. List of publications available. Order materials from local chapters.

National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910
(301)587-1788

Consumer organization to serve the needs of the deaf. Sponsors International Association of Parents of the Deaf Legal Defense Fund.

EPILEPSY

Epilepsy Foundation of America
1828 L Street, N.W., Suite 406
Washington, D.C. 20036
(202) 293-2930

Advocacy, referrals, information. Monitors legislative activity. Sponsors self-help groups. There are 228 local chapters.

LEARNING DISABILITIES

See section, **Association for Children With Learning Disabilities** and list of local chapters, pp. 179-184.

Also, see **The Orton Society**, p. 184.

MENTAL RETARDATION

American Association of Mental Deficiency
5101 Wisconsin Ave.
Room 405
Washington, D.C. 20016
(202) 686-5400
(800) 424-3688

Primarily a professional group — physicians, lawyers, social workers, paraprofessionals — though parents may join. Has structure of state and local chairpersons. List of publications available on request.

National Association for Retarded Citizens (NARC)
2709 Avenue E East
Arlington, TX 76011
(817) 261-4961

also:

National Association for Retarded Citizens, (NARC)
1522 K. Street, N.W.
Suite 516
Washington, D.C. 20005
(202) 785-3388

Research, advocacy, lobbying. Over 2,000 local chapters. For retarded of all ages. Services to the mentally retarded comparable to those of ACLD to the learning disabled.

PHYSICALLY HANDICAPPED

The National Easter Seal Society for Crippled Children and Adults
2023 W. Ogden Ave.
Chicago, IL 60612

Two thousand state and local affiliates. Voluntary agency providing information, referrals, professional staff training, consulting, public education, and other direct rehabilitation services to handicapped children and adults.

National Paraplegia Foundation
369 Elliot Street
Newton Upper Falls, MA 02164
(617) 964-0521

Publishes *1978 Resource Directory:* (A guide to services for spinal cord injured persons and others with severe physical disabilities). List of publications available.

Spina Bifida Association of America
343 South Dearborn Street, Suite 319
Chicago, IL 60604
(312) 663-1562

SPEECH IMPAIRED

American Speech and Hearing Association
10801 Rockville Pike
Rockville, MD 20852
(301) 897-5700

The national scientific and professional association for speech-language pathologists, audiologists, and speech and hearing scientists. Forty-seven state affiliates. List of publications available.

State Departments of Education

State departments of education are an even greater resource under P.L. 94-142 than their name alone might imply. Though the Education For All Handicapped Children Act is a federal law, the Washington agency implementing it does not have regional offices. Instead The Bureau of Education for the Handicapped funds the states to answer questions and meet local needs of parents and schools as they seek free appropriate public education for the handicapped.

States often can provide referrals to such services as low cost legal assistance, outside evaluations, advocacy, and other support. They can interpret the law in everyday language, give history and background, explain particular state laws that affect local interpretation of national law. Call the state department of education directly, or, if you are not certain which person within the department to contact, write or call the following federal office, which oversees all the state programs for the handicapped: William D. Tyrrell or Jerry Vlasak, Compliance Officers, U.S. Office of Education/DHEW, 400 Maryland Ave., S.W., Washington, D.C. 20202, (202) 472-3740.

State Special Education Departments

ALABAMA

Exceptional Children and Youth
State Department of Education
868 State Office Building
Montgomery, AL 36130
(205) 832-3316

ALASKA

State of Alaska
Department of Education
Office for Exceptional Children
Special Education Programs
Pouch F 0500
Juneau, AK 99811
(907) 465-2970

ARIZONA

Division of Special Education
Arizona Department of Education
1535 W. Jefferson
Phoenix, AZ 85007
(602) 271-3183

ARKANSAS

Special Education Section
Department of Education
Arch Ford Building
Capitol Mall
Little Rock, AR 72201
(501) 371-2161

CALIFORNIA

California State Department of Education
Office of Special Education
721 Capitol Mall
Rm. 614
Sacramento, CA 95814
(916) 445-4036

COLORADO

Colorado Department of Education
State Office Building
201 East Colfax
Denver, CO 80203
(303) 839-2727
ATTN: Special Education

CONNECTICUT

Bureau of Pupil Personnel and Special Educational Services
State Department of Education
P.O. Box 2219
Hartford, CT 06115
(203) 566-3561

DELAWARE

Exceptional Children/ Special Programs Division
State Department of Public Instruction
John G. Townsend Building
P.O. Box 1402
Dover, DE 19901
(302) 678-4667

DISTRICT OF COLUMBIA

Special Education
Division of Special Educational Programs
Presidential Building
Room 602
415 12th Street, N.W.
Washington, D.C. 20004
(202) 724-4018

FLORIDA

Bureau of Education for Exceptional Students
Florida Department of Education
204 Knott Building
Tallahassee, FL 32304
(904) 488-1570

GEORGIA

Program for Exceptional Children
Georgia Department of Education
State Office Building
Atlanta, GA 30334
(404) 656-2425

HAWAII

State Department of Education
Special Education Department
45-955 Kam Highway
Kaneohe, HI 96744
(808) 235-2443

IDAHO

Department of Education
Special Education Division
650 West State Street
Boise, ID 83720
(208) 384-2203

ILLINOIS

Department of Specialized Educational Services
Illinois Office of Education
100 North First Street
Springfield, IL 62777
(217) 782-6601

INDIANA

Division of Special Education
Department of Public Instruction
229 State House
Indianapolis, IN 46204
(317) 927-0216

IOWA

State of Iowa
Department of Public Instruction
Special Education Division
Grimes State Office Building
Des Moines, IA 50319
(515) 281-3176

KANSAS

Special Education Administration Section
Kansas State Department of Education
120 E. Tenth
Topeka, KS 66612
(913) 296-3866

KENTUCKY

Bureau for Education of Exceptional Children
Capital Plaza Tower
8th Floor
Frankfort, KY 40601
(502) 564-4970

LOUISIANA

Division of Special Educational Services
State Department of Education
Capital Station
P.O. Box 44064
Baton Route, LA 70804
(504) 342-3631

MAINE

Division of Special Education
State Department of Educational &
Cultural Services
State House
Augusta, ME 04333
(207) 289-3451

MARYLAND

Division of Special Education
State Department of Education
P.O. Box 8717
Balt-Wash International Airport
Baltimore, MD 21240
(301) 796-8300 Ext. 245

MASSACHUSETTS

Division of Special Education
State Department of Education
Park Square Building
31 St. James Avenue
Boston, MA 02116
(617) 727-5700

MICHIGAN

Special Education Services
State Department of Education
P.O. Box 30008
Lansing, MI 48909
(517) 373-0923

MINNESOTA

Special Education Section
State Department of Education
Capitol Square Bldg.
550 Cedar Avenue
St. Paul, MN 55101
(612) 296-4163

MISSISSIPPI

Special Education Section
State Department of Education
P.O. Box 771
Jackson, MS 39205
(601) 354-6950

MISSOURI

Director of Special Education
Dept. of Elementary and Secondary Education
P.O. Box 480
Jefferson City, MO 65101
(314) 751-3502

MONTANA

Special Education Unit
Office of Public Instruction
State Capitol
Room 106
Helena, MT 59601
(406) 449-5660

NEBRASKA

State Department of Education
Special Education Branch
301 Centennial Mall South
Lincoln, NE 68509
(402) 471-2295

NEVADA

Nevada Department of Education
Special Education Division
Capital Complex
400 West King Street
Carson City, NV 89710
(702) 885-5700 Ext. 214

NEW HAMPSHIRE

New Hampshire Department of Education
Division of Vocational Rehabilitation
Special Education Section
105 Loudon Rd.
Concord, NH 03301
(603) 271-3741

NEW JERSEY

Division of Special Education
New Jersey Department of Education
Division of School Programs
Branch of Special Operations and
Pupil Personnel Services
Room 232
225 West State Street
Trenton, NJ 08625
(609) 292-4692

NEW MEXICO

Division of Special Education
State Department of Education
Education Building
300 Don Gaspar Avenue
Santa Fe, NM 87503
(505) 827-2793

NEW YORK

Office for the Education of Children with Handicapping Conditions
State Education Department
55 Elk Street
Albany, NY 12234
(518) 474-5548

NORTH CAROLINA

Division for Exceptional Children
State Department of Public Instruction
Room 352, Educational Building
Raleigh, NC 27611
(919) 733-4258

NORTH DAKOTA

Division of Special Education
Department of Public Instruction
State Capitol
Bismarck, ND 58505
(701) 224-2277

OHIO

Division of Special Education
State Department of Education
933 High Street
Worthington, OH 43085
(614) 466-2650

OKLAHOMA

State Department of Education
Special Education Section
2500 N. Lincoln Blvd.
Room 263
Oliver Hodge Building
Oklahoma City, OK 73105
(405) 521-3351

OREGON

Special Education
Oregon Department of Education
942 Lancaster Drive, N.E.
Salem, OR 97310
(503) 378-3598

PENNSYLVANIA

Pennsylvania Department of Education
Bureau of Special and Compensatory Education
P.O. Box 911
Harrisburg, PA 17126
(717) 783-1264

RHODE ISLAND

Rhode Island Department of Education
Special Education Unit
235 Promenade Street
Providence, RI 02908
(401) 277-3505

SOUTH CAROLINA

Office of Programs for the Handicapped
State Department of Education
Room 309, Rutledge Building
1429 Senate Street
Columbia, SC 29201
(803) 758-7432

SOUTH DAKOTA

Section for Special Education
Richard F. Kneipe Bldg.
Pierre, SD 57501
(605) 773-3678

TENNESSEE

Division for the Education of the Handicapped
State Department of Education
103 Cordell Hull Building
Nashville, TN 37219
(615) 741-2851

TEXAS

Department of Special Education
Texas Education Agency
201 East 11th Street
Austin, TX 78701
(512) 475-3501

UTAH

Division of Staff Development
Utah State Board of Education
250 East Fifth South
Salt Lake City, UT 84111
(801) 533-5982

VERMONT

Special Educational and Pupil Personnel Services
State Department of Education
Montpelier, VT 05602
(802) 828-3141

VIRGINIA

Division of Special Education
State Department of Education
1322-28 E. Grace
P.O. Box 6Q
Richmond, VA 23216
(804) 786-2673

WASHINGTON

Division of Special Services
Mail Stop FG 11
Old Capitol Bldg.
Olympia, WA 98504
(206) 753-6733

WEST VIRGINIA

Division of Special Education and Student Support Systems
West Virginia Department of Education
Capitol Complex, Room B-315
Charleston, WV 25305
(304) 348-8830

WISCONSIN

State Department of Public Instruction
Bureau for Crippled Children
126 Langdon Street
Madison, WI 53702
(608) 266-3726

WYOMING

Office of Exceptional Children
State Department of Education
Hathaway Bldg.
Cheyenne, WY 82002
(307) 777-7411

Office for Civil Rights

National:

Office for Civil Rights
Department of Health, Education, and Welfare
HEW North Bldg.
Washington, D.C. 20202
Attn: 504 inquiry

To file a complaint of discrimination, contact regional offices listed below.

Regional:

HEW Regional Offices for Civil Rights represent the main enforcement arm of the federal government for implementing the laws for the handicapped. Here is the Office for Civil Rights' description of how to file a complaint of discrimination followed by the addresses of the ten regional offices.

HOW TO FILE A COMPLAINT OF DISCRIMINATION

Any person who has a complaint that discrimination on the basis of physical or mental handicap exists in any program funded by HEW may notify the Office for Civil Rights. A complaint should be filed by letter to the regional office that serves the state in which the discrimination occurred. (See list with addresses).

Letters of complaint should explain who was discriminated against; in what way; by whom or what institution; when the discrimination took place; who was harmed; who can be contacted for further information; the name, address, and telephone number of the complainant; and as much background information as possible. These are suggestions, not requirements. However, the Office for Civil Rights can respond more efficiently if it is well informed. Citizens may also ask the regional offices for help in writing a complaint.

HEW Regional Offices for Civil Rights

Region I

(Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont):
14th Floor
140 Federal Street
Boston, Massachusetts 02110
(617) 223-6397

Region II

(New Jersey, New York, Puerto Rico, Virgin Islands):
26 Federal Plaza
New York, New York 10007
(212) 264-4633

Region III

(Delaware, D.C., Maryland, Pennsylvania, Virginia, West Virginia):
Gateway Building
3535 Market Street
Post Office Box 13716
Philadelphia, Pennsylvania 19101
(215) 596-6772

Region IV

(Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee):
101 Marietta Street
10th Floor
Atlanta, Georgia 30303
(404) 221-5934

Region V

(Illinois, Indiana, Minnesota, Michigan, Ohio, Wisconsin):
300 South Wacker Drive
Chicago, Illinois 60606
(312) 353-2521

Region VI

(Arkansas, Louisiana, New Mexico, Oklahoma, Texas):
1200 Main Tower Building
Dallas, Texas 75202
(214) 655-3951

Region VII

(Iowa, Kansas, Missouri, Nebraska):
Twelve Grand Building
1150 Grand Avenue
Kansas City, Missouri 64106
(816) 374-2474

Region VIII

(Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming):
Federal Building
1961 Stout Street
Denver, Colorado 80294
(303) 837-2025

Region IX

(Arizona, California, Hawaii, Nevada):
14th Floor
100 Van Ness Avenue
San Francisco, California 94102
(415) 556-8586

Region X

(Alaska, Idaho, Oregon, Washington):
Arcade Plaza Building MS 508
1321 Second Avenue
Seattle, Washington 98101
(206) 442-0473

Bureau of Education for the Handicapped

National:

Office of Education
Bureau of Education for the Handicapped
400 Maryland Ave., S.W.
Washington, D.C. 20202

Directly responsible for administering PL 94-142, as is the Office of Civil Rights for section 504 of PL 93-112.

Closer Look
Parents' Campaign for Handicapped Children
Box 1492
Washington, D.C. 20013

An information center, **Closer Look** is not an advocacy agency itself. Replies may take up to two months.

The Association for Children With Learning Disabilities

The Association for Children With Learning Disabilities, formed in 1964, was established to create an "empathetic society for the learning disabled." It is devoted to defining and finding solutions for the broad spectrum of learning problems. The ACLD has 50 state affiliates with over 700 local chapters and more than 30,000 members which include parents, professionals and concerned citizens.

The ACLD promotes an inter-disciplinary approach to effective correction of learning disabilities. Therefore its major goals and objectives are: 1) to encourage research; 2) to stimulate development of early detection programs and educational techniques; 3) to create a climate of public awareness and acceptance; 4) to disseminate information and; 5) to provide advocacy for the learning disabled.

The Association encourages improved certification standards in the school systems and therefore is concerned with the Individualized Educational Programs that are developed for Specific Learning Disabilities children. It is involved in the planning and implementation of programs in school systems in order to identify, diagnose and evaluate problem areas in classroom performance. The ACLD is also a center for retrieving educational resources, information and referrals so that parents may acquire political leverage in the community by initiating the formation of local chapters.

The following is a list of national and state ACLD offices.

Association for Children With Learning Disabilities

National Office

Association for Children With Learning Disabilities (ACLD)
4156 Library Road
Pittsburgh, Pa. 15234
412-341-1515

An association of parents and professionals concerned with all types of learning disabilities.

Association for Children With Learning Disabilities — State Affiliates

ALABAMA (Alabama ACLD)
President:
Mrs. Ronnie Carr
3313 G Fountain Lane
Montgomery, AL 36116
Phone: (205) 272-6096

State Office:
P.O. Box 11588
Montgomery, AL 36111

ALASKA (Alaska ACLD)
President:
Gloria D. Oakes
7420 Old Harbor Ave.
Anchorage, AK 99504
Phone: (907) 333-6372

ARIZONA (Arizona ACLD)
President:
Margaretta Wellman
4171 N. 81st St.
Scottsdale, AZ 85251
Phone: (602) 949-5975

Arizona State Office:
P.O. Box 15525
Phoenix, AZ 85060
Phone: (602) 248-7373

ARKANSAS (Arkansas ACLD)
President:
Mrs. Dolly D. Garrison
Rt. No. 7, Box 138
Pine Bluff, AR 71603
Phone: (501) 879-0057

Arkansas State Office:
P.O. Box 7316
5018 Club Rd.
Little Rock, AR 72217

CALIFORNIA (CANHC)
President:
Mary Lu Kost
2215 Tallac St.
Sacramento, CA 95821
Phone: (916) 925-6541

California State Office:
P.O. Box 4088
Los Angeles, CA 90051
Phone: (213) 831-8644

COLORADO (Colorado ACLD)
President:
Russell DeWitt
2072 S. Williams
Denver, CO 80210
Phone: (303) 733-1036

State Office:
P.O. Box 55
Loretto Sta.
Denver, CO 80236
Phone: (303) 934-6956

CONNECTICUT (CACPLD, INC.)
President:
Mr. Albert Chamberlin
14 Plainfield Rd.
West Hartford, CT 06107
Phone: (203) 236-5349

State Office:
20 Raymond Rd.
W. Hartford, CT 06107
Phone: (203) 236-3953

DELAWARE (Diamond State ACLD)
President:
Mrs. Mary Lou Walsh
R.D. No. 3
Bridleshire Farms
Newark, DE 19711
Phone: (302) 239-5225

State Office:
2400 W. 17th St.
Wilmington, DE 19806
Phone: (302) 571-0230

DISTRICT OF COLUMBIA (Dist. of Col. ACLD)
President:
Suzan Wynne
3915 Livingston St.
Washington, D.C. 20015
Phone: (202) 244-6861

FLORIDA (Florida ACLD)
President:
Dr. Ronald Cantwell
8330 S.W. 16th St.
Miami, FL 33155
Phone: (305) 264-5738

Florida State Office:
11125 S.W. 74th Ave.
Miami, FL 33156

GEORGIA (Georgia ACLD)
Co-Presidents:
Dr. Elliott McElroy
2294 Lanier Place
Morrow, GA 30260
Phone: (404) 961-0330 and

Mrs. Mary Steigerwald
1055 Pine Mountain Dr.
Forest Park, GA 30050
Phone: (404) 961-5300

State Office:
P.O. Box 29492
Atlanta, GA 30329
Phone: (404) 633-1236

HAWAII (Hawaii ACLD)
President:
Mrs. Phyllis Rice
2877 Kalakaua 107
Honolulu, HI 96815

State Office:
Mrs. Ivalee Sinclair, Exec. Dir.
(Home Phone) (808) 988-4962
P.O. Box 4203
Honolulu, HI 96813
(Office Phone) (808) 949-4941

IDAHO (Idaho ACLD)
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Mrs. Barbara Balding
5217 Wylie Ln.
Boise, Idaho 83703
Phone: (208) 343-8620
State Office:
Same address

ILLINOIS (Illinois ACLD)
President:
Mary Cotter
6513 N. St. Louis
Lincolnwood, IL 60645
Phone: (312) 674-7878

State Office:
407 S. Dearborn,
Rm. 680
Chicago, IL 60605
Phone: (312) 939-3513

INDIANA (Indiana ACLD)
President:
Mrs. Ellie Thurston
6417 Dean Rd.
Indianapolis, IN 46220
Phone: (317) 251-9813
State Office:
Same address

IOWA (Iowa ACLD)
President:
Lynne Cannon
920 Highwood St.
Iowa City, IA 52240
Phone: (319) 337-5731
State Office:
Same Address

KANSAS (Kansas ACLD)
President:
Joe D. Swalwell
5507 W. 15th St.
Topeka, Kansas 66604
Phone: (913) 272-0033
State Office:
P.O. Box 4424
Topeka, Kansas 66604

KENTUCKY (Kentucky ACLD)
President:
Mr. Oscar M. Marvin
225 Bramton Road
Louisville, Kentucky 40207
Phone: (502) 459-6246
State Office:
334 E. Broadway,
Suite 323
Louisville, KY 40202
Phone: (502) 584-6289

LOUISIANA (Louisiana ACLD)
President:
Charles Nolan
7100 St. Charles Ave.
New Orleans, LA 70118
Phone: (504) 861-9503
State Office:
Same address

MAINE (Maine ACLD)
President:
Mrs. Harriet Blaisdell
23 Park St.
Kennebunk, ME 04043
Phone: (207) 985-3171
State Office:
Same address

MARYLAND (Maryland ACLD)
President:
Matt Kamins
13719 Woodlark Dr.
Rockville, MD 20853
Phone: (301) 933-8546
State Office:
320 Maryland Nat'l Bank Building
Baltimore, MD 21202

MASSACHUSETTS (MA. Child)
Catherine S. McLeod
P.O. Box 261
Chestnut Hill, MA 02167
Phone: (617) 734-4508
Blue Hills ACLD:
Mrs. George Norris
154 West St.
Randolph, MA 02368
Phone: (617) 963-5407
Hingham ACLD:
Mrs. Virginia Kelly
88 Smith Rd.
Hingham, MA 02043
Phone: (617) 749-2697

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Jackie Sipple
2800 Bradway Blvd.
Birmingham, MI 48010
Phone: (313) 642-1283
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Helene Gruber,
Executive Secretary
2338 N. Woodward
Royal Oak, MI 48073
Phone: (313) 548-4455

MINNESOTA (Minnesota ACLD)
President:
James E. Stoddart
1860 Shadywood Rd.
Wayzata, MN 55191
Phone: (612) 471-8313
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1821 University Ave.
St. Paul, MN 55104
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752 E. Railroad Ave.
Long Beach, MS 39560
Phone: (601) 864-1146

Mississippi State Office:
P.O. Box 12083
Jackson, MS 39211
Phone: (601) 982-2812

MISSOURI (Missouri ACLD)
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Mrs. Juanita Blevins
1809 E. 125th St.
Kansas City, MO 64146
Phone: (816) 942-6139

State Office:
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Springfield, MO 65804

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Same address

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Passaic, NJ 07055
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State Office:
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Convent Sta., NJ 07961
Phone: (201) 539-4644

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1606 Hermosa N.E.
Albuquerque, NM 87110
Phone: (505) 265-2217

Judy Zanotti
7021 Prospect PL., N.E.
Albuquerque, NM 87110
Phone: (505) 883-1787

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President:
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340 E. 18th St.
Brooklyn, NY 11226
Phone: (212) 282-8854

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Executive Director
Richardson Hall
Room 272
SUNY-Albany, Albany, NY 12222
Phone: (518) 472-7110

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Las Vegas, NV 89121
Phone: (702) 458-1445
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Wilmington, NC 28403
Phone: (919) 762-3451

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Mrs. Jody Podoll
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Bismarck, ND 58501
Phone: (701) 258-8293

State Office:
Same address

OHIO (Ohio ACLD)
President:
Charles Ambuske
8110 E. New Carlisle Rd.
New CArlisle, OH 45344
Phone: (513) 845-1693

Ohio State Office:
Mrs. Dorothy Doria,
Executive Secretary
333 W. National Rd.
Englewood, OH 45322
Phone: (513) 836-0415

OKLAHOMA (Oklahoma ACLD)
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Mrs. Brenda Finnegan
2609 Whippoorwill
Enid, OK 73701
Phone: (405) 237-5557

State Office:
3701 N.W. 62nd St.
Oklahoma City, OK 73112
Phone: (405) 943-9434
Janet Hatchett, Secretary

OREGON (Oregon ACLD)
President:
Aubrey Trimble
200 N. Monroe
Eugene, OR 97402
Phone: (503) 343-7175

State Office:
Geneva Winkel,
Executive Director,
Special Ed. Dept.
Portland State University
P.O. Box 751
Portland, OR 97207
Phone: (503) 229-4439

PENNSYLVANIA (Pennsylvania ACLD)
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Mr. Joesph Hart
609 Kennard Rd.
State College, PA 16801
Phone: (814) 466-7235

State Office:
Mrs. Renee Sourber,
Secretary
1383 Arcadia Rd.
Lancaster, PA 17601
Phone: (717) 393-8284

RHODE ISLAND (Rhode Island ACLD)
President:
Mrs. Betty Gallipeau
76 Lincoln Avenue
Barrington, Rhode Island 02806
Phone: (401) 246-1439

State Office:
P.O. Box 6685
Providence, Rhode Island 02904

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President:
Dr. George L. Bass
860 Glendalyn Ave.
Spartanburg, SC 29301

State Office:
Same address
Phone: (803) 583-7824

SOUTH DAKOTA (South Dakota ACLD)
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Mrs. Jan Van Veen
1605 So. 10th Ave.
Sioux Falls, SD 57105
Phone: (605) 339-9640

State Office:
Same address

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Mrs. Muriel Savage
Box 774
Gatlinburg, TN 37738
Phone: (615) 436-9785

State Office:
Same address

TEXAS (Texas ACLD)
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209 Hermosa
El Paso, TX 79922
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State Office:
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Austin, TX 78705
Phone: (512) 458-8234

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344 East 3100 N.
North Ogden, UT 84404
Phone: (801) 782-9563

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Waterbury Center, VT 05677
Phone: (802) 244-8089

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9 Heaton St.
Montpelier, VT 05602

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3851 No. Upland St.
Arlington, VA 22207
Phone: (703) 532-6497

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June Gray,
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P.O. Box 13410
Richmond, VA 23225
Phone: (804) 320-5166

WASHINGTON (Washington ACLD)

President:
Mrs. Barbara Pattison
9319 42nd N.E.
Seattle, WA 98115
Phone: (206) 242-9400

State Office:
Mozelle Sims,
Director
444 N.E. Ravenna Blvd.
Room 206
Seattle, WA 98115
Phone: (206) 523-9768

WEST VIRGINIA (West Virginia ACLD)

President:
Mrs. Kay Crum
P.O. Box 117
Charlton Hgts., WV 25040
Phone: (304) 779-9558

State Office:
Same address

WISCONSIN (Wisconsin ACLD)

President:
John Westerlund
Rt. 1, Box 112
Washburn, WI 54891
Phone: (715) 373-2536

State Office:
Same address

The Orton Society

National Office

The Orton Society, Inc.
8415 Bellona Lane
Suite 113
Towson, Maryland 21204
(301) 296-0232

A non-profit scientific and educational organization for the study and treatment of children with specific language disability (dyslexia).

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- San Diego
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Branches in:
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UPPER MIDWEST
(responsible for Minnesota, Nebraska, North and South Dakota, Wisconsin, Iowa)

VIRGINIA

WASHINGTON

Books and Directories for Parents and Teachers

Between Parent and Child
by Dr. Haim G. Ginott
Avon Books
959 Eighth Avenue
New York, NY 10019
$2.25 © 1973 252 pages

A Bibliography on the Nature, Recognition and Treatment of Language Difficulties
by Margaret B. Rawson
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$5.00 postpaid © 1974 160 pages

*****Can't Read, Can't Write, Can't Talk Too Good Either***
by Louise Clarke
Hard cover:
Walker & Company
720 5th Ave.
New York, NY 10019
$9.95 postpaid © 1973 308 pages
Paperback:
Penguin Books
625 Madison Ave.
New York, NY 10022
$2.95 postpaid © 1973 286 pages

Classroom Strategies to Aid the Disabled Learner
by Jean Abbott
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$4.80 postpaid © 1978 96 pages

Closer Look
Newsletter, published quarterly. Free
Parents' Campaign for Handicapped Children and Youth
Box 1492
Washington, D.C. 20013

The College Guide for Students With Disabilities: A Detailed Directory of Higher Education Services, Programs, and Facilities Accessible to Handicapped Students in the United States
by Elinor Gollay and Alwina Bennet
Abt Publications
55 Wheeler Street
Cambridge, MA 02138
Hardcover: $22.50 plus $1.50 postage and handling
Paperback: $18.50 plus $1.50 postage and handling
© 1976 546 pages

Developing Oral Language With Young Children
(Six books plus parent-teacher inventory)
by John Murphy and Charles O'Donnell
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$11.50 © 1974 226 pages total

*****Developmental Dyslexia***
Edited by Drake D. Duane, M.D. and Paula D. Rome
Insight Publishing Co., Inc.
501 Madison Avenue
New York, NY 10022
$4.00 postpaid © 1974 56 pages
Collection of essays by leading researchers and clinicians. Also available from the Orton Society and Educators Publishing Service.

Developmental Language Disability
Adult Accomplishments of Dyslexic Boys
by Margaret B. Rawson
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$6.00 postpaid © 1968 & 1978 148 pages

Excel: Experience for Children in Learning
by Polly Behrmann and Joan Millman
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$3.40 postpaid © 1969 64 pages

Excel II: Experience for Children in Learning
by Polly Behrmann and Joan Millman
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$3.40 postpaid © 1976 58 pages

Failing to Learn — Learning to Fail:
A Handbook for Parents and Teachers
by Betty S. Levinson, Ph.D. and Ruth B. Spodak, Ph.D.
Tri-Services Center
1055 Rockville Pike
Rockville, MD 20852

*****Helping Children Overcome Learning Difficulties***
by Jerome Rosner
Walker & Company
720 5th Avenue
New York, NY 10019
$12.50 postpaid © 1975 340 pages

* Also available from Educators Publishing Service, 75 Moulton Street, Cambridge, Massachusetts 02138.

Home Is A Learning Place
by Helen and Martin Weiss
Little, Brown and Company
34 Beacon Street
Boston, MA 02106
$6.75 postpaid © 1976 258 pages

How to Organize an Effective Parent Group and Move Bureaucracies
by Charlotte DesJardins
Coordinating Council for Handicapped Children
407 South Dearborn, Room 680
Chicago, IL 60605
$1.50 plus .20 postage and handling
© 1971 92 pages
Advice from experience by one parent to others.

Human Development and Reading Instruction
Edited by S. Donald Marani
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$7.75 postpaid © 1977 248 pages
A collection of articles written by distinguished educators and reprinted from educational journals.

Listening, Language, and Learning Disabilities:
A Guide for Parents and Teachers
by John Murphy
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$3.00 postpaid © 1970 32 pages

Parents and Teachers Guide to Learning Disabilities
by Helen and Martin Weiss
Treehouse Associates
Box 568
Great Barrington, MA 01230
$4.50 postpaid © 1977 44 pages

Psychiatrists and the Legal Process:
Diagnosis and Debate
Edited with commentary by Richard J. Bonnie
Book Sales Department
Insight Communications, Inc.
501 Madison Avenue
New York, NY 10022
$5.00 postpaid © 1977 350 pages
A collection of articles published in *Psychiatric Annals* from 1973 to 1977.

Reading, Perception and Language:
Papers from the World Congress on Dyslexia — 1974.
Edited by Drake D. Duane, M.D. and Margaret B. Rawson
The Orton Society
8415 Bellona Lane
Suite 113
Towson, MD 21204
$7.95 plus $.50 postage and handling
©1975 272 pages

Recent Federal Developments in Special Education
by Diana Pullin
Center for Law and Education
6 Appian Way
Gutman Library
Third Floor
Cambridge, MA 02138
$6.00 postpaid © 1978 208 pages
Up-to-date photoduplicates of federal special needs legislation. Scholarly and thorough.

A Survival Manual
Case Studies and Suggestions for the Learning Disabled Teenager
by Helen Ginandes Weiss and Martin S. Weiss
Treehouse Associates
Box 568
Great Barrington, MA 02130
$6.95 postpaid © 1976 154 pages

Why Wait for a Criterion of Failure?
by Beth H. Slingerland
Educators Publishing Service
75 Moulton Street
Cambridge, MA 02138
$3.00 postpaid © 1974 48 pages
Describes how school systems can identify specific language disability children through early screening and provide instruction tailored to their needs within normal classroom settings.

In addition, many pamphlets and books of interest to parents are available from the Association for Children With Learning Disabilities Office, 4156 Library Road, Pittsburgh, Pa. 15234. A list of materials is available upon request.

Monographs and reprints relating to Specific Language Disability (dyslexia) are available from The Orton Society, 8415 Bellona Lane, Towson, Maryland 21204. See inside back cover for partial listing of reprints.

* Also available from Educators Publishing Service, 75 Moulton Street, Cambridge, Massachusetts 02138.

The Orton Society, Inc. is a non-profit, scientific, and educational organization for the study and treatment of children with Specific Language Disability (dyslexia).

Among its other services the society makes available to parents and educators publications and reprints of articles relating to dyslexia. Many of the following should be of interest to readers of this guide.

BOOKS

READING, WRITING AND SPEECH PROBLEMS IN CHILDREN
Samuel T. Orton, M.D. $3.50.

READING, PERCEPTION AND LANGUAGE — Papers from the World Congress on Dyslexia
Edited by Drake D. Duane, M.D. and Margaret Byrd Rawson $7.95.

WHY WAIT FOR A CRITERION OF FAILURE?
Beth H. Slingerland $2.00.

DEVELOPMENTAL DYSLEXIA *by Drake D. Duane, M.D. and Paula Dozier Rome,* A "Psychiatric Annals" reprint. $4.00.

MONOGRAPHS

Volume I — DYSLEXIA IN SPECIAL EDUCATION $2.50

Volume II — "WORD BLINDNESS" IN SCHOOL CHILDREN AND OTHER PAPERS ON STREPHOSYMBOLIA (Specific Language Disability — Dyslexia), *Samuel T. Orton, compiled by June Lyday Orton* $3.50.

Volume III — EDUCATION AND SPECIFIC LANGUAGE DISABILITY, The papers of Anna Gillingham, M.A. $3.50.

BIBLIOGRAPHY — A BIBLIOGRAPHY ON THE NATURE, RECOGNITION AND TREATMENT OF LANGUAGE DIFFICULTIES, *by Margaret B. Rawson* $4.00.

REPRINTS

1. **Specific Reading Disability. A Problem in Integration and Adaptation** by Edwin M. Cole *50c*
4. **Pedagogical Implications of Specific Language Disability** by Anna Gillingham *50c*
5. **Specific Language Disability (Dyslexia)** by J. Roswell Gallagher, M.D. *50c*
9. **Obscure Causes of School Failure — A Pediatric Viewpoint** by Raymond Clemmens, M.D. *50c*
11. **The Orton-Gillingham Approach** by June Lyday Orton *75c*
12. **Reading and Speech Problems as Expression of a Specific Language Disability** by Edwin M. Cole, M.D. and Louise Walker, B.A., LSC *50c*
17. **Dyslexia: Its Phenomenology** by Roger E. Saunders *50c*
18. **Brain Mechanisms Underlying the Language Function** by Richard L. Masland, M.D. *75c*
25. **Maturational Readiness for School Tasks** by Alice Ansara *50c*
26. **Specific Reading Disability Information for Parents and Teachers** by R.S. Eustis, M.D. *50c*
27. **Language Disability in Men of Eminence** by L.J. Thompson, M.D. *50c*
29. **Toward a New Understanding of Youngsters with Reading Problems** by Paula D. Rome *25c*
31. **Inheritance of Dyslexia** by Brenda K. Sladen *50c*
33. **The Adolescent with Scholastic Failure** by George Bright, M.D. *50c*
34. **The Study of Factors Involved in Early Identification of Specific Language Disability** by Genevieve Oliphant, Ph.D. *50c*
38. **The Psychiatric Aspects of Dyslexia** by Howard P. Rome, M.D. *50c*
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41. **Anatomical Evolution and the Human Brain** by Norman Geschwind, M.D. *50c*
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48. **Language Therapy to Salvage the College Potential of Dyslexic Adolescents** by Alice Ansara *50c*
49. **Teaching Adults with Specific Language Disability** by Harold S. Danenhower *50c*
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59. **Severe Reading Disabilities: The Family's Dilemmas** by Carl L. Kline, M.D. and Carolyn Lacey Kline *50c*
61. **A Neurologic Overview of Specific Language Disability for the Non-Neurologist** by Drake D. Duane, M.D. *75c*
63. **Reading Failure and Juvenile Delinquency** by Dennis L. Hogenson, Ph.D. *50c*
66. **Tutorial and Group Instruction in a Hospital Language Research Unit** by Aylett Royall Cox *75c*
67. **Cluttering and Stuttering** by Katrina de Hirsch, F.C.S.T. *50c*

Send your check or money order for any of the above listed books or reprints to **The Orton Society, 8415 Bellona Lane, Towson, Maryland 21204.** Add 50¢ per order for postage and handling.

For information about The Orton Society or for a full list of materials available, write to The Orton Society at the above address.

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