

INSTRUCTIONS

PART I

Items 1-11 — Enter on Lines 1-11 in Column (c) the total amounts needed for the project. If this is an application for new grants, leave Columns (a) and (b) blank. If this is an application for amendments, changes or supplements, show the current approved budget in Column (a); enter in Column (b) on the appropriate line(s) the amount of the change, amendment or supplement; add each line entry in Column (a) to the line entries in Column (b) and enter the total for each line in Column (c). The amounts shown in Column (c) represent the amount of the new or revised grant budget.

Item 12 — Enter the Federal share of the amount on Line 11.

Item 13 — Enter the non-Federal share of the amount on Line 11.

Item 14 — Enter the amount of estimated income, if any, to be generated by the project. Do not add or subtract this amount from

the total project amount. The estimated amount of project income may be considered by the Federal grantor agency in determining the total amount of the grant award.

Item 15 — Enter the type of indirect cost rate (provisional, predetermined, final or fixed), the rate that will be in effect during the funding period, and the amount of the base to which the rate is applied.

PART II

The Project Narrative statement should show the need, objectives, approach, the geographical location of the project and the benefits expected to be obtained from the assistance. Attach any data that may be needed to establish the applicant's eligibility for receiving assistance under the Federal program. Refer to the Annual Program Announcement for more details.

PART III — ASSURANCES

The applicant hereby assures and certifies that it will comply with the regulations, policies, guidelines, and requirements including the applicable OMB Circulars Nos. (A-21, A-110, A-122, A-87, A-102, and A-128) as they relate to the application, acceptance and use of Federal funds for this Federally assisted project. The Applicant also assures and certifies with respect to the grant that:

1. It possesses legal authority to apply for the grant; that a resolution, motion or similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.
2. It will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and in accordance with Title VI of that Act, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any project or activity for which the applicant receives Federal financial assistance and will immediately take any measures necessary to effectuate this agreement.
3. It will comply with Title VI of the Civil Rights Act of 1964 (42 USC 2000d) prohibiting employment discrimination where (1) the primary purpose of a grant is to provide employment or (2) discriminatory employment practices will result in unequal treatment of persons who are or should be benefiting from the grant-aided activity.
4. It will comply with the provisions of the Hatch Act which limit the political activity of employees.
5. It will comply with the minimum wage and maximum hours provisions of the Federal Fair Labor Standards Act, as they apply to educational institution employees of State and local governments.
6. It will establish safeguards to prohibit employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties.
7. It will give the grantor agency or the Comptroller General through any authorized representative the access to and the right to examine all records, books, papers, or documents related to the grant.
8. It will comply with all requirements imposed by the Federal grantor agency concerning special requirements of law, program requirements, and other administrative requirements approved in accordance with applicable Office of Management and Budget Circulars.
9. It will insure that the facilities under its ownership, lease or supervision which shall be utilized in the accomplishment of the project are not listed on the Environmental Protection Agency's (EPA) list of Violating Facilities and that it will notify the Federal grantor agency of the receipt of any communication from the Director of the EPA Office of Federal Activities indicating that a facility to be used in the project is under consideration for listing by the EPA.
10. It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973, Public Law 93-234, 42 USC 4012a. Section 102(a) requires the purchase of flood insurance as a condition for the receipt of any Federal financial assistance for machinery, equipment, fixtures, and furnishings to be used in any area that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards.
11. It will assist the Federal grantor agency in its compliance with Section 106 of the National Historic Preservation Act of 1966 as amended (16 U.S.C. 470), Executive Order 11593, and the Archeological and Historic Preservation Act of 1966 (16 U.S.C. 469a-1 et seq.) by (a) consulting with the State Historic Preservation Officer on the conduct of investigations, as necessary, to identify properties listed in or eligible for inclusion in the National Register of Historic Places that are subject to adverse effects (see 36 CFR Part 800.0) by the activity, and notifying the Federal grantor agency of the existence of any such properties, and by (b) complying with all requirements established by the Federal grantor agency to avoid or mitigate adverse effects upon such properties.

INSTRUCTIONS

1. The first part of the report should be a summary of the work done during the period covered by the report. This should include a statement of the objects of the work, a description of the methods used, and a statement of the results obtained. The summary should be written in a clear and concise manner, and should be able to stand alone as a brief account of the work.

2. The second part of the report should be a detailed account of the work done. This should include a description of the methods used, a statement of the results obtained, and a discussion of the significance of the results. The detailed account should be written in a clear and concise manner, and should be able to stand alone as a full account of the work.

3. The third part of the report should be a conclusion. This should be a brief statement of the main results of the work, and a statement of the significance of the results. The conclusion should be written in a clear and concise manner, and should be able to stand alone as a brief account of the work.

REPORT

The first part of the report should be a summary of the work done during the period covered by the report. This should include a statement of the objects of the work, a description of the methods used, and a statement of the results obtained. The summary should be written in a clear and concise manner, and should be able to stand alone as a brief account of the work.

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The third part of the report should be a conclusion. This should be a brief statement of the main results of the work, and a statement of the significance of the results. The conclusion should be written in a clear and concise manner, and should be able to stand alone as a brief account of the work.

Register

Friday
August 14, 1987

Part IX

Environmental Protection Agency

40 CFR Part 12

Enforcement of Nondiscrimination on the Basis of Handicap in the Environmental Protection Agency's Programs; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 12

[FRL-3057-3]

Enforcement of Nondiscrimination on the Basis of Handicap in the Environmental Protection Agency's Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation provides for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the Environmental Protection Agency (EPA).

EFFECTIVE DATE: September 14, 1987.

FOR FURTHER INFORMATION CONTACT:

Ms. Nereid Maxey, Office of Civil Rights (A-105), Environmental Protection Agency, Room 211 West Tower, 401 M Street, SW., Washington, DC 20460, (202) 382-4567, TDD (202) 382-4565.

Copies of this regulation are available on tape for those with impaired vision. The tape may be listened to at or ordered from the Office of Civil Rights, EPA, at the above address. For information, please call 202/382-4575 or TDD # 202/382-4565.

SUPPLEMENTARY INFORMATION: On May 6, 1985, EPA published a Notice of Proposed Rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap as it applies to programs and activities conducted by EPA 50 FR 19136.

By the close of the comment period, July 5, 1985, EPA had received five written comments and several telephone calls requesting information about the regulation. Three of the written comments were submitted by organizations representing the interests of individuals with handicaps, one comment from a union representing EPA employees, and one comment from an EPA Laboratory Office Director. The telephone comments and questions were received from EPA employees.

The Agency read and analyzed each comment. Most comments addressed more than one issue and expressed similar opinions.

The decisions the Agency made in response to these comments, however, were not made on the basis of the number of commenters addressing the issue, but on a thorough consideration of the merits of the points of view

expressed in the comments. Copies of the written comments will be made available for public inspection in Room 206 West Tower of the EPA Headquarters Office, 401 M Street, SW., Washington, DC from 9:00 am to 4:00 pm, Monday through Friday, except for legal holidays, until October 13, 1987.

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Agency has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504. The regulation will become effective on September 14, 1987.

This rule applies to all programs and activities conducted by EPA.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Environmental Protection Agency. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. 95-602, 92 Stat. 2982) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that

No otherwise qualified individual with handicaps 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794 (1978 amendment italicized).)

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal

regulations for programs or activities receiving Federal financial assistance. (See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs).) This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks or Rep. Brademas); *id.* at 38, 552 (remarks of Rep. Sarasin).

There are, however, some language differences between this final rule and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decisions in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. See *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander v. Choate*, 469 U.S. 287 712 (1985), where the Court held that the regulations to federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for individuals with handicaps. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modifications, *id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access" (*id.* at n.21) (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs, as they have been as interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in *Davis*, lower court cases interpreting *Davis*, and by the Supreme Court in

Alexander; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence, EPA relying on advice from the Civil Rights Division, U.S. Department of Justice, believes that there are no significant differences between this final rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive Agencies.

This regulation has also been reviewed by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

One commenter believed that small entities should comply with this rule because there is a substantial number of such entities which affect a considerable number of people. The Agency believes that the commenter is confusing federally assisted regulation governs only the activities and programs conducted by EPA. For example, the regulation applies to EPA's offices and laboratories, public meetings held by EPA, and accommodations for its employees and members of the public who are handicapped entering its properties. It applies to all EPA components regardless of their size.

Section-by-Section Analysis and Response to Comments

Section 12.101 Purpose.

Section 12.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

We received one written comment and several telephone inquiries regarding this section. Some commenters were concerned that this regulation did not also apply to EPA's grantees and contractors. EPA grantees are covered by its federally assisted nondiscrimination regulation. Employment activities of certain EPA contractors are covered by section 503 of the Rehabilitation Act of 1973, which is administered by the U.S. Department of Labor. In order to avoid future confusion, we have added a reference to the Agency's federally assisted nondiscrimination regulations found at 40 CFR Part 7 (1986).

Section 12.102 Application.

The regulation applies to all programs or activities conducted by the agency. It should be noted that EPA's programs are designed to promote a cleaner and healthier environment. Thus, at this time we anticipate, in a nonemployment context, that this regulation will have its greatest impact on ensuring that the various meetings, symposia, and hearings conducted by EPA are accessible. This regulation does, not, however, apply to programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

Section 12.103 Definitions.

"Agency." For purposes of this regulation "agency" means Environmental Protection Agency.

"Assistant Attorney General."

"Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 12.160(a)(1), they may also be necessary to meet other requirements of the regulation.

Two commenters suggested that this definition be expanded to include a "laundry list" of aids such as attendant services. The Agency believes, however, that such a list could be interpreted too literally thereby limiting the use of certain aids not mentioned. We believe it is necessary for the Agency to have flexibility to expand the use of auxiliary aids as individual needs, techniques and technology change. The decision to provide attendant services, as well as

all other auxiliary aids, will be made on an individual basis.

One commenter believed "that a specific statement that auxiliary aids are required in all aspects of EPA's federally conducted programs should be included in the regulation itself." The Agency believes that program accessibility does not necessarily require the use of auxiliary aids in every instance. For example, holding a public hearing in a place which is accessible to a person who uses a wheelchair and who plans to attend would make the program available to that person. However, providing a sign language interpreter at the hearing when no hearing-impaired person plans to attend would be a needless expense.

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary, because the 180-day period for the agency's investigation (see § 12.170(g)) begins when the agency receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs (28 CFR 41.3(f)) except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted because the term "facility," as used in the regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in § 12.149, § 12.150 and § 12.170(f).

One commenter objected to the deletion of the phrase "or interest in such property" as contained in the section 504 coordination regulation for federally assisted programs. As explained in the preamble to the NPRM, the term "facility" as used in this regulation refers to structures, and does not include intangible property rights. The definition, therefore, has no effect on the scope of coverage of programs, including those conducted in facilities not included in the definition. The phrase has been omitted because the requirement that facilities be accessible would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. The regulation applies to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned,

leased, or used on some other basis by the agency.

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" is a revised version of the definition "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) deviates from most existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in *Southeastern Community College v. Davis*, 422 U.S. 397 (1979). In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school

was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered—not whether the applicant could benefit or obtain results from some other program that the agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

Several commenters objected to this revised definition for a variety of reasons. Several commenters stated that the Agency incorrectly used *Davis* as the justification for explaining the differences between the federally assisted and the federally-conducted regulations because the Supreme Court upheld the validity of the existing regulations in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). This view misunderstands the Court's actions in *Darrone*. In that case the Court ruled on a series of issues, the most important of which was under what circumstances section 504 applies to employment discrimination by recipients. The Court did not concern itself either directly or indirectly with the definition of "qualified individual with handicaps" or whether section 504 included limitations based on "undue financial and administrative burdens".

These commenters stated that the proposal would change the definition of "qualified individual with handicaps" for employment. "Qualified individual with handicaps" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 12.140. Nothing in this part changes existing regulations applicable to employment.

Some commenters assumed that the definition would have the effect of placing on the individual with handicaps the burden of proving that he or she is qualified. The definition has been revised to make it clear that the agency

has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Further, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in § 12.150(a)(2) and § 12.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

Some commenters said that the definition of "qualified individual with handicaps" places individuals with handicaps in a "Catch-22" situation: because only qualified individuals with handicaps are protected by the statute, a determination that a person is not qualified would make enforcement remedies unavailable to that person. This concern is misplaced. If the Agency determined that an individual with handicaps was not "qualified", the person could use the procedures established by § 12.170 to challenge that determination, just as he or she could challenge any other decision that he or she believed to be discriminatory.

Some commenters argued that the definition of "qualified individual with handicaps" confused what should be two separate inquiries: Whether a person meets essential eligibility requirements and, if so, whether accommodation is required. They argued that the reference to "fundamental alteration" in the definition focuses attention on accommodations rather than on an individual with handicaps's abilities. As another commenter noted, however, the Supreme court in *Davis* developed the "fundamental alteration" language in a decision that was determining the nature and scope of what constitutes a qualified individual with handicaps. The Agency continues to believe that the concept of "qualified individual with handicaps" properly encompasses both the notion of "essential eligibility requirements" and the notion of program modifications that might fundamentally alter a program.

Some commenters argued that our analysis of *Davis* was inappropriate

because *Davis* was decided on the basis of individual facts unique to that case or because *Davis* involved federally assisted and not federally conducted programs. While cases are decided on the basis of specific factual situations, courts, especially the Supreme Court, develop general principles of law for use in analyzing facts. The *Davis* decision was the Supreme Court's first comprehensive view of section 504, a major new civil rights statute. The *Davis* holding, that a person who cannot achieve the purpose of a program without fundamental changes in its nature is not a "qualified individual with handicaps," is a general principle, a statement by the Court on how it views section 504. It is therefore necessary to reflect this principle in the Agency's regulation.

For programs or activities that do not fall under the first paragraph, paragraph (2) adopts the existing definition of "qualified individual with handicaps" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this part of the definition, a "qualified individual with handicaps" is an individual with handicaps who meets the essential eligibility requirements for participation in the program of activity.

Paragraph (3) explains that "qualified individual with handicaps" is defined for purposes of employment in the Equal Employment Opportunity Commission's regulation at 29 CFR 1613.702(f), which is made applicable to this part by § 12.140. Nothing in this part changes existing regulations applicable to employment.

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 12.110 Self-evaluation.

The agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The agency shall provide an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, and unions representing employees to participate in the self-evaluation process by submitting comments (both oral and written).

The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)).

Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

The self-evaluation will be concluded with a report to the Administrator of findings and recommendations. Within 60 days of the receipt of the report, the Administrator will direct that certain actions be taken as he/she deems appropriate.

We received one comment with respect to the self-evaluation section, while generally approving the section, the commenter suggested the section contain (1) an assurance that the effects of discrimination will be eliminated; (2) a transition plan for compliance; and, (3) a laundry list of specific modification requirements.

A requirement for a transition plan to ensure compliance with § 12.150 is contained in § 12.150 (d) and further reference would be redundant. When this final regulation becomes effective, the agency plans to appoint transition and self-evaluation teams to work in tandem toward achieving their respective goals. Under § 12.110(c), the Administrator will direct appropriate actions based on the findings of the self-evaluation. Including a laundry list of requirements in the rule would negate the purpose of the self-evaluation process. The purpose of self-evaluation is to formulate recommendations in light of particular circumstances being evaluated. Including specific modification requirements in the regulation would preclude the self-evaluation from taking into account specific circumstances which might make the regulatory requirements inappropriate.

Section 12.111 Notice.

Section 12.111 requires the agency to disseminate sufficient information to employees, unions representing employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Two comments were received about this section. One argued that notice of agency policy should be distributed in

recruitment materials. Inasmuch as this comment basically involves employment, it would be addressed not by this rule but by section 501 requirements. The other commenter argued that the agency should "effectively" apprise persons of their rights and protection against discrimination and suggested that we use the section promulgated by the Federal Election Commission (FEC) (11 CFR 6.111). We feel that § 12.111 adequately addresses this point by requiring the provision of "necessary" information.

Section 12.130 General prohibitions against discrimination.

Section 12.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 12.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in § 12.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the individual is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

One commenter argued that the use of an "irrebuttable presumption" is never justified, asked what expertise people had to make these decisions, and asked who would make such decisions. We agree to a point, referring the readers to the earlier discussion of the blind commercial vehicle operator. Agency officials making a decision based on irrebuttable presumptions would be required to research the presumption prior to making the decision.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 12.149-151) and communications (§ 12.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase

"criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in § 12.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

One commenter suggested that the prohibition concerning selection of sites should also apply to construction of additional buildings at an existing site. The suggested prohibition could possibly prevent EPA from fully utilizing existing sites. It could be extremely disruptive of EPA site utilization to retroactively apply this section, so we have not. However, new construction on those existing sites must be accessible.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the agency from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified individual with handicaps" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 12.103).

In addition, the agency may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. For example, the agency must comply with this requirement when establishing safety standards for the operations of licensees. In that case the agency must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the

Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program of activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

One commenter objected to the omission of a paragraph from the regulations for federally assisted programs that prohibits a recipient from providing significant assistance to an organization that discriminates. To the extent that assistance from the agency would provide significant support to an organization, the organization, as a recipient, would be covered by the agency's section 504 regulation for federally assisted programs. The regulatory "significant assistance" provision, however, would be inappropriate in a regulation applying only to federally conducted programs or activities.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d) provides that the agency must administer programs or activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section 12.140 Employment

Section 12.140 prohibits discrimination on the basis of handicap in employment by the Agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith v. United States Postal Service*, 742 F.2d 257, 259-260 (6th Cir. 1984); *Prewitt v. United States Postal Service*, 662 F.2d 292, 302-04 (5th Cir. 1981). *Contra McGuinness v. United States Postal Service*, 744 F.2d 1318, 1320-21 (7th Cir. 1984); *Boyd v. United States Postal Service*, 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304. Accordingly,

§ 12.140 (Employment) of this rule adopts the definitions, requirements and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, § 12.170(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

We received one comment which argued that the "whole section is too brief and weak, and does not give enough attention . . . to employment of disabled persons." The Agency disagrees. Section 501 and its implementing regulations are solely devoted to employment discrimination against individuals with handicaps. No purpose is served by duplicating them in this regulation once the public is put on notice that the employment standards under section 501 and section 504 are identical. However, to ensure that there is no misunderstanding, we have added to the definition of "qualified individual with handicaps" (§ 12.103), subparagraph (3), which incorporates the definition in 29 CFR 1613 (EEOC's section 501 regulation), for employment purposes.

Section 12.149 Program accessibility: Discrimination prohibited

Section 12.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 12.150 and 12.151. The Environmental Protection Agency (EPA) is committed to making its programs accessible to individuals with handicaps; however, as noted earlier, its programs are designed to promote a cleaner and healthier environment. Thus, as previously mentioned, we anticipate, in a nonemployment context, that this regulation will have its greatest impact on insuring that the various meetings, symposia, and hearings conducted by EPA are accessible. Please note that, as discussed above with respect to § 12.101, EPA-assisted programs and activities are not covered by this regulation but are covered by the regulation found at 40 CFR Part 7. It is that regulation which applies to EPA assistance such as building wastewater treatment plants.

Section 12.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, § 12.150 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (§ 12.150(a)(1)). However, § 12.150, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility (§ 12.150(a)(2)).

Paragraph (a)(2) generally codifies recent case law that defines the scope of the agency's obligation to ensure program accessibility.

The "undue financial and administrative burdens" language found at § 12.150(a)(2) (and paragraph (d) of § 12.160, discussed below) is based on the Supreme Court's *Davis* holding that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See also, e.g., *Dopico v. Goldschmidt*, *supra*; *American Public Transit Association v. Lewis (APTA)*, *supra*.

Paragraphs (a)(2) and 12.160(d) are also supported by the Supreme Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on individuals with handicaps. The Court assumed without deciding that section 504 reaches at least some conduct that has a unjustifiable disparate impact on individuals with handicaps but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. *Id.* at 299.

Relying on *Davis*, the Court said that section 504 guarantees qualified individuals with handicaps "meaningful access to the benefits that the grantee

offers," *id.* at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." *Id.* at n.21 (emphasis added). However, section 504 does not require "'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' . . . or that would constitute 'fundamental alteration[s] in the nature of a program.'" *Id.* at n.20 (citations omitted).

Alexander supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations, certain accommodations for an individual with handicaps may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

Some commenters asserted that the holding in *Davis* was that the plaintiff was not a qualified individual with handicaps and that the subsequent reference to "undue financial and administrative burdens" was mere *dicta*. This view overlooks the interpretations of *Davis* provided by the Federal circuit court cases mentioned above. The *APTA* and *Dopico* decisions make it clear that financial burdens can limit the obligation to comply with section 504. See also *New Mexico Association for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982). In addition, the Court in *Alexander* held that the "administrative costs" of subjecting any action affecting Medicaid recipients to a detailed analysis of its effects on individuals with handicaps "would be well beyond the accommodations that are required under *Davis*." 469 U.S. at 308.

One comment included a lengthy analysis opposing the undue burdens defense. This comment was premised on the assumption that the proposed regulation was substantively inconsistent with the regulations for federally assisted programs. This assumption is incorrect. Judicial interpretations have established that neither section 504 nor the regulations for federally assisted programs establish an unlimited obligation to modify programs or activities to accommodate individuals with handicaps. In fact, this comment acknowledged that the Department of Health, Education, and Welfare's regulation for its own federally assisted programs "took

'factors of burden and cost . . . into account.'

This comment also argued that *APTA* is no longer good law, in view of the Supreme Court's decision in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (*Conrail*), in which it said that Congress intended, through the 1978 amendments to the statute, to codify the HEW regulation. Other commenters also argued that *Conrail* prohibits departures from the language of the federally assisted regulation. As previously noted, however, *Conrail* addressed only the question of employment coverage under the statute and cannot be read to mean that Congress "codified" other parts of the regulation. Furthermore, the undue burdens defense is not inconsistent with the HEW regulation; in fact, the employment provisions of the HEW regulation—those addressed in *Conrail*—do include an "undue hardship" defense. That view is confirmed by the Supreme Court's decision in *Alexander*. There the Court referred to its previous recognition in *Conrail* of the regulation as "an important source of guidance on the meaning of Section 504," *Alexander*, at n.24, and at the same time, as discussed above, emphasized that section 504 does not mandate extensive costs and administrative burdens.

The agency is adopting the proposed rule's procedural requirements for application of the "fundamental alterations" and "undue financial and administrative burdens" language. The agency believes that, in most cases, making an agency program accessible will not result in undue burdens. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 21.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedure established in § 12.170.

Paragraph (a)(2) does not establish an absolute defense; it does not relieve the agency of all obligations to individuals

with handicaps. Although the agency is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

Three of the four commenters sought the deletion of "undue financial and administrative burdens" and asked that "undue hardship" be reinstated in its place. "Undue hardship" is a term of art used in the employment context. In order to be consistent with regulations issued by other executive agencies, we have retained the term "undue financial and administrative burdens" in this rule.

Two of the commenters argued that compliance decisions should be made after considering "all agency resources". As noted above and in the NPRM we agree. It should be pointed out, however, that certain of the funds which are appropriated to EPA are legislatively restricted to certain programs for which they can be used. Reprogramming of those funds may not be available to the Agency.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 12.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). Section 12.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required to meet accessibility standards merely by virtue of being leased. They are subject, however, to the program accessibility standards of § 12.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 12.151.

A commenter has recommended that the regulation should require that buildings leased after the effective date of the regulation should meet the new construction standards of § 12.151, rather than the program accessibility standard for existing facilities in § 12.150. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In *Rose v. United States Postal Service*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a

condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 12.160 Communications.

Section 12.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 12.160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the agency (§ 12.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 12.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (see *supra* preamble discussion of § 12.150(a)(2)). Unless not required by § 12.160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

It is our view that compliance with § 12.160 would in most cases not result in undue financial and administrative burdens on the agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 12.160 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency as set forth in § 12.160(d). The decision that compliance would result in such alteration or burdens must be made by the agency head or designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedures established in § 12.170.

In some circumstances, a notepad and written materials may be sufficient to

permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to make clear to the public (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the agency may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§ 12.160(a)(1)(ii)). For example, the agency need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

Three comments provided suggestions to include a "laundry list" of the types of auxiliary aids which could be used by individuals with handicaps. The agency believes the examples provided in the preamble and body of the regulation although not all-inclusive, are sufficient. We believe that other types of auxiliary aids described by the commenters can best be considered by the transition and self-evaluation teams.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 12.170 Compliance procedures.

Paragraph (a) specifies that paragraphs (c) through (1) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency is required to accept and investigate all complete complaints (§ 12.170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (§ 12.170(e)).

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (§ 12.170(g)).

Paragraph (h) requires appeals to be filed within 90 days of the receipt of the written notification required at the end of the investigation. The agency may extend this time for good cause. This time limit was increased from 30 days in the proposed rule.

Paragraph (i) provides for the Administrator or a designee to hear any appeal. In the proposed rule, the Judicial Officer was to decide appeals of agency determinations after investigation. In the interim, it was decided to preserve the Administrator's flexibility. Thus, in the final rule, all appeals are filed with the Administrator or designee.

Paragraph (j) requires that the Administrator or a designee notify the complainant of the results of the appeal within 60 days of the appeal request. If additional information is needed from the complainant, the Administrator has 60 days from receipt of this information to make an appeal determination.

Paragraph (k) allows the time limit for complaint investigation and appeal decisions to be extended with the permission of the Assistant Attorney General.

Paragraph (l) permits the agency to delegate its authority for investigating

complaints to other Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

Two commenters provided several recommendations concerning this section. It was suggested that the addresses of all EPA offices and laboratories be included in the final regulation. Such an address list would be impractical for the reader as well as the agency. The agency expects these regulations to remain in effect for some time. Regional offices and laboratories are moved from time to time and we found that once an address list is published it is usually out-of-date due to moves taking place while the list was awaiting publication. To publish such an address list would mean a continuous revision of the regulation.

The commenter also asked that the regulation provide an opportunity for a complainant to provide additional information and/or amend a complaint in the event a complete complaint is not submitted. The section allows for additional time if good cause exists which permits the Office of Civil Rights to provide additional time for a complainant to make the complaint complete.

The commenter further suggested that EPA has an absolute responsibility to refer complaints over which it has no jurisdiction to other agencies. However, complaints may be received over which no agency has jurisdiction. In other instances EPA may have no way of knowing that a particular agency has jurisdiction. In these situations, EPA cannot be held responsible for failure to refer a complaint. EPA will continue its practice of referring complaints to agencies with probable jurisdiction to the extent it can do so.

Finally, the commenter requested that EPA state that its rules and procedures do not curtail the right of a complainant to obtain direct judicial relief. Our regulation pertains to administrative processing. It in no way, in and of itself, affects a complainant's access to judicial relief.

The commenter further suggested that provisions be added addressing attorneys' fees in administrative proceedings and the availability of compensation to the prevailing party. Nothing contained in Title V of the Rehabilitation Act provides for attorneys' fees in administrative proceedings other than those involving Federal employment. We have, therefore, not included an attorneys' fee provision in the current regulation.

List of Subjects in 40 CFR Part 12

Blind, Buildings, Civil rights, Employment, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

For the reasons set forth in the preamble, 40 CFR Part 12 of the Code of Federal Regulations is amended as follows:

July 24, 1987.

Lee M. Thomas,
Administrator.

Part 12 is added to read as follows:

PART 12—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE ENVIRONMENTAL PROTECTION AGENCY

Sec.

- 12.101 Purpose.
- 12.102 Application.
- 12.103 Definitions.
- 12.104-109 [Reserved]
- 12.110 Self-evaluation.
- 12.111 Notice.
- 12.112-129 [Reserved]
- 12.130 General prohibitions against discrimination.
- 12.131-139 [Reserved]
- 12.140 Employment.
- 12.141-148 [Reserved]
- 12.149 Program accessibility: Discrimination prohibited.
- 12.150 Program accessibility: Existing facilities.
- 12.151 Program accessibility: New construction and alterations.
- 12.152-159 [Reserved]
- 12.160 Communications.
- 12.161-169 [Reserved]
- 12.170 Compliance procedures.

Authority: 29 U.S.C. 794.

§ 12.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service. Section 504 regulations applicable to recipients of financial assistance from the Environmental Protection Agency (EPA) may be found at 40 CFR Part 7 (1986).

§ 12.102 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 12.103 Definitions.

For purposes of this part, the term—"Agency" means Environmental Protection Agency.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

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

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

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity, without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 12.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); and the Rehabilitation, Comprehensive Services, and

Developmental Disabilities

Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§ 12.104-109 [Reserved]

§ 12.110 Self-evaluation.

(a) The agency shall, by November 13, 1987, begin a nationwide evaluation, of its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(b) The evaluation shall be concluded by September 14, 1988, with a written report submitted to the Administrator that states the findings of the self-evaluation, any remedial action taken, and recommendations, if any, for further remedial action.

(c) The Administrator shall, within 60 days of the receipt of the report of the evaluation and recommendations, direct that certain remedial actions be taken as he/she deems appropriate.

(d) The agency shall, for at least three years following completion of the evaluation required under paragraph (b) of this section, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of the areas examined and any problems identified; and

(3) A description of any modifications made.

§ 12.111 Notice.

The agency shall make available to employees, unions representing employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 12.112-12.129 [Reserved]

§ 12.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b) (1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

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

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

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

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the program or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 12.131–12.139 [Reserved]

§ 12.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 12.141–12.148 [Reserved]

§ 12.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 12.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 12.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 12.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in

making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 13, 1987, except that where structural changes in facilities are undertaken, such changes shall be made by September 14, 1990, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 14, 1988, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(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 compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

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

§ 12.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to

and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 12.152-12.159 [Reserved]

§ 12.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individuals with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial

and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 12.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 12.161-12.169 [Reserved]

§ 12.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for coordinating implementation of this section shall be vested in the Director of the Office of Civil Rights, EPA or his/her designee.

(d) The complainant may file a complete complaint at any EPA office. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause. The agency shall accept and investigate all complete complaints for which it has jurisdiction.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building of facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 12.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Administrator or a designee.

(j) The Administrator or a designee shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Administrator or designee determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in (g) and (j) of this section above may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§§ 12.171-12.999 [Reserved]

[FR Doc. 87-18485 Filed 8-13-87; 8:45 am]

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Best of the Best

Friday
August 14, 1987

Part X

Department of Education

34 CFR Parts 785, 786, 787, 789, and 796
National Diffusion Network; Final
Regulations

DEPARTMENT OF EDUCATION

34 CFR Parts 785, 786, 787, 788, 789 and 796

National Diffusion Network

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues final regulations for the National Diffusion Network. These changes implement amendments to the Education Consolidation and Improvement Act (ECIA) contained in the Higher Education Amendments of 1986, and improve the operation of the National Diffusion Network.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the *Federal Register* or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Lois N. Weinberg, Recognition Division, OERI, 555 New Jersey Avenue NW., Washington, DC, 20208; (202) 357-6134.

SUPPLEMENTARY INFORMATION: The National Diffusion Network (NDN) supports efforts to recognize and further excellence in education, including the nationwide dissemination of exemplary education programs. These programs have been developed at the local level by classroom teachers and other practitioners with funds provided by a variety of sources including school districts, private businesses and foundations, colleges and universities, State Educational Agencies and Federal programs. After field testing and evaluation, again at the local level, these programs have been validated by the Department's Joint Dissemination Review Panel (JDRP) after review of the evidence of effectiveness presented by the programs' developers. Programs that have JDRP approval may compete for funding by the NDN to operate as Developer Demonstrator projects which disseminate exemplary education programs nationwide. The NDN also supports Dissemination Process projects which provide information, instructional materials and services nationwide that will be of use to education service providers.

The NDN also supports a State Facilitator project in each state. State Facilitators provide information to local school districts and other education service providers about the programs in the NDN, help them select programs that are appropriate to meet local needs, and

assist in the process of installing selected programs in new sites.

On June 10, 1987, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the *Federal Register* (52 FR 22062).

A discussion of the major issues was included in the NPRM on pages 22062-22063. Major proposed changes included the addition of a Program Significance Panel to determine whether the content of program materials is appropriate for dissemination by the Federal Government; changing the name of the Joint Dissemination Review Panel to the Program Effectiveness Panel and adding a scoring system; and combining the reviews of the two panels for Dissemination Review Approval. Other changes included: (1) The addition of two new categories of grant programs—Dissemination Process Projects and a Private School Facilitator Project; (2) additions to the list of funding priorities; (3) a six-year limitation on funding by the NDN for Developer Demonstrator projects; and (4) the inclusion of the Secretary's School Recognition Program as part of the National Diffusion Network.

Several substantive changes have been made since the publication of the NPRM. A change has been made in the Dissemination Review Approval process. Review by the Program Significance Panel will occur after satisfactory review by the Program Effectiveness Panel, and the criteria for review by the Program Significance Panel have been revised. The Program Significance Panel is intended to ensure a meaningful level of review with respect to a program's need, content, and design. This second level of review will be initiated on a pilot basis, and it will be reassessed in the future on the basis of how well it operates. The Secretary's School Recognition Program will not be included in these regulations. The limitation of funding for Developer Demonstrator projects to six years has been removed. Instead, a preference for new applicants over those that have been funded for six or more years has been added, which will be applied according to 34 CFR 75.105, and will be described in the Application Notice for each grant competition. The definitions of the Program Effectiveness Panel and the Program Significance Panel have been revised to more clearly describe the membership. Other technical changes have also been made.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, three hundred parties submitted comments on the proposed regulations. An analysis of the

comments and of the changes in the regulations is published as an appendix to these final regulations.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority are not addressed.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

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

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

List of Subjects in 34 CFR Parts 785, 786, 787, 788, 789, and 796

Dissemination, Education, Educational Research, Grant programs—education, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance number 84.073—National Diffusion Network)

Dated: August 3, 1987.

William J. Bennett,
Secretary of Education.

The Secretary amends Title 34 of the Code of Federal Regulations (CFR) by redesignating Part 796 as Part 785, revising redesignated Part 785 and

adding new Parts 786, 787, 788 and 789, to read as follows:

PART 785—NATIONAL DIFFUSION NETWORK: GENERAL PROVISIONS

Subpart A—General

Sec.

785.1 What is the National Diffusion Network?

785.2 Who is eligible for an award?

785.3 What types of projects does the Secretary support?

785.4 What regulations apply?

785.5 What definitions apply?

Subpart B—[Reserved]

Subpart C—How does the Secretary Make an Award?

785.20 How does the Secretary evaluate an application?

Subpart D—What Conditions Must Be Met After an Award?

785.30 What costs are not allowed?

Authority: 20 U.S.C. 3851, unless otherwise noted.

Subpart A—General

§ 785.1 What is the National Diffusion Network?

Under the National Diffusion Network (NDN), the Secretary supports activities designed to recognize and further excellence in education throughout the Nation.

(Authority: 20 U.S.C. 3851)

§ 785.2 Who is eligible for an award?

A public or nonprofit agency, organization, or institution that meets the appropriate qualifications in § 786.2, 787.2, 788.2 or 789.2 is eligible for an award under the National Network.

(Authority: 20 U.S.C. 3851)

§ 785.3 What types of projects does the Secretary support?

The Secretary supports the following through grants and contracts:

(a) Developer Demonstrator projects, as described in 34 CFR Part 786.

(b) Dissemination Process projects, as described in 34 CFR Part 787.

(c) State Facilitator projects, as described in 34 CFR Part 788.

(d) A Private School Facilitator project, as described in 34 CFR Part 789.

(Authority: 20 U.S.C. 3851)

§ 785.4 What regulations apply?

(a) *Grants.* The following regulations apply to grants under the National Diffusion Network:

(1) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs—except § 75.650

(Participation of Students Enrolled in Private Schools)), Part 77 (Definitions that Apply to Department Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(2) The regulations in Parts 785 through 789.

(b) *Contracts.* The following regulations apply to contracts under the National Diffusion Network:

(1) The Federal Acquisition Regulation and the Education Department Acquisition Regulation in Title 48 of the Code of Federal Regulations.

(2) The regulations in Parts 785 through 789.

(Authority: 20 U.S.C. 3851)

§ 785.5 What definitions apply?

(a) *Definitions in EDGAR.* The following terms used in Parts 785, 786, 787, 788 and 789 are defined in 34 CFR 77.1:

Applicant
Application
Award
Budget Period
Department
EDGAR
Equipment
Facilities
Grantee
Local educational agency (LEA)
Nonprofit
Project
Private
Public
State educational agency (SEA)

(Authority: 20 U.S.C. 3851)

(b) *Other definitions.* The following definitions also apply to Parts 785, 786, 787, 788 and 789:

"Adoption" means the use of an exemplary education program by an education service provider in a new setting.

"Adoption agreement" means an understanding among a Developer Demonstrator grantee, a State Facilitator grantee or the Private School Facilitator grantee and the officials of an education service provider concerning the responsibilities of each for the adoption of an exemplary education program.

"Certified demonstration site" means an adoption site that utilizes all key elements of an exemplary education program and is authorized by the exemplary education program sponsor to receive visitors and demonstrate the program.

"Certified trainer" means an individual authorized by an exemplary education program sponsor to perform certain functions such as awareness

presentations, training and assistance in the adoption of an exemplary education program.

"Dissemination Review Approval" means that—

(1) A program has been reviewed and assigned a score by the Program Effectiveness Panel according to the criteria in § 786.11 or 787.11 and has received a score of at least 70 points; and

(2) The program has been reviewed and assigned a score by the Program Significance Panel according to the criteria in § 786.12 or 787.12.

"Education service provider" means any public or nonprofit agency or organization responsible for the provision of education services, including State educational agencies (SEAs), local educational agencies (LEAs), nonprofit private educational agencies, public or nonprofit private institutions of higher education and other education-related agencies.

"ERIC" means the Educational Resources Information Center sponsored and supported by the Department of Education to disseminate education research results, practitioner-related materials and other resource information.

"Exemplary education program" means a program, product, practice or Dissemination Process which has Dissemination Review Approval.

"Local facilitator" means a member of the central administrative or supervisory staff of an education service provider or a designee who is committed to installing an NDN program and who will provide needed administrative and logistical support for installing the program.

"Program Effectiveness Panel" or "PEP" means a panel of experts in the evaluation of education programs, and in other areas of education, at least two-thirds of whom are not Federal employees, who are appointed by the Secretary, and who review and assign scores to programs according to the criteria in § 786.11 or 787.11.

"Program Significance Panel" or "PSP" means a panel of people knowledgeable about education, including persons such as parents, teachers, principals, curriculum and subject experts, other education practitioners and members of the general public, who are not employees of the Department, and who are appointed by the Secretary to review and rate the instructional and classroom materials used by programs in accordance with § 786.12 or 787.12.

"Regional Educational Laboratories" means regional laboratories funded by

the Department to carry out applied educational research, development and related activities.

"Research and Development Centers" means centers funded by the Department to conduct educational research and development, and related activities.

(Authority: 20 U.S.C. 3851)

Subpart B—[Reserved]

Subpart C—How does the Secretary Make an Award?

§ 785.20 How does the Secretary evaluate an application?

The Secretary evaluates an application—

(a) For a Developer Demonstrator grant on the basis of the criteria in Part 786;

(b) For a Dissemination Process grant on the basis of the criteria in Part 787;

(c) For a State Facilitator grant on the basis of the criteria in Part 788; and

(d) For a Private School Facilitator grant on the basis of the criteria in Part 789.

(Authority: 20 U.S.C. 3851)

Subpart D—What Conditions Must Be Met After an Award?

§ 785.30 What costs are not allowed?

In addition to costs not allowed under 34 CFR Parts 74 and 75, funds may not be used for stipends for educational personnel to participate in training activities, or for construction, repair, remodeling, or alteration of facilities or sites. See EDGAR Part 74, Subpart 1—Cost Principles.

(Authority: 20 U.S.C. 3851)

PART 786—NATIONAL DIFFUSION NETWORK: DEVELOPER DEMONSTRATOR PROJECTS

Subpart A—General

Sec.

786.1 What is a Developer Demonstrator project?

786.2 Who is eligible for an award?

786.3 What priorities may the Secretary establish?

786.4 What regulations apply?

Subpart B—How Does One Apply for an Award?

786.10 What must an applicant submit for Dissemination Review Approval?

786.11 How does the Program Effectiveness Panel review a program, product, or practice?

786.12 How does the Program Significance Panel review a program, product, or practice?

786.13 How is Dissemination Review Approval granted?

Sec.

786.14 How long does Dissemination Review Approval last?

786.15 What activities must an applicant propose to carry out if it receives an award?

Subpart C—How Does the Secretary Make an Award?

786.20 How does the Secretary evaluate an application?

786.21 Selection criterion—plan of operation.

786.22 Selection criterion—quality of key personnel.

786.23 Selection criterion—budget and cost-effectiveness.

786.24 Selection criterion—evaluation plan.

786.25 Selection criterion—adequacy of resources.

786.26 Selection criterion—monitoring plan.

786.27 Selection criterion—special dissemination strategies.

786.28 What additional criteria exist for new awards?

786.29 What additional criteria exist for continuation awards?

Subpart D—What Conditions Must Be Met by the Recipient of an Award?

786.30 What disclaimers are required on printed materials?

786.31 What are a recipient's responsibilities for serving students enrolled in nonprofit private schools?

Authority: 20 U.S.C. 3851, unless otherwise noted.

Subpart A—General

§ 786.1 What is a Developer Demonstrator Project?

A Developer Demonstrator project must disseminate a specific exemplary education program nationwide.

(Authority: 10 U.S.C. 3851)

§ 786.2 Who is eligible for an award?

(a) *New awards.* (1) Any public or nonprofit private agency, organization or institution that has developed a program, product or practice that has Dissemination Review Approval and that is available to be visited may apply for a new Developer Demonstrator award.

(2) Exemplary education programs developed with either Federal or non-Federal funds are eligible for NDN funding.

(b) *Continuation awards.* Any Developer Demonstrator grantee, otherwise eligible to apply for a continuation award, may apply for the continuation award even if either the Dissemination Review Approval period or the JDRP approval period has expired.

(Authority: 20 U.S.C. 3851)

§ 786.3 What priorities may the Secretary establish?

(a)(1) Each year the Secretary may announce in a notice published in the

Federal Register the program priorities for which applicants may apply for assistance.

(2) The Secretary selects priorities under this section taking into account any unmet national needs.

(b) The Secretary may select priorities from the following subject areas or special needs:

(1) English, including literature.

(2) Science.

(3) History, geography, and civics, including special history programs in conjunction with the bicentennial of the Constitution of the United States.

(4) Mathematics or higher mathematics.

(5) Reading.

(6) Written or oral communications.

(7) Health, including drug abuse prevention programs.

(8) Ethics.

(9) The humanities.

(10) Programs that assist in improving school discipline and foster an atmosphere conducive to learning.

(11) Foreign languages.

(12) Computer science.

(13) Programs that advance students' educational and occupational goals, such as courses in the fine and performing arts, vocational education, and industrial arts.

(14) Programs that improve students' skills in comprehension, analysis, and problem solving, including programs in philosophy.

(15) Programs that improve teaching and the quality of instruction.

(16) Educational leadership.

(17) School-wide and district-wide school improvement efforts.

(18) Drop-out prevention programs and programs for at risk students.

(19) Programs that foster parental involvement in schools.

(20) Physical education.

(c) In addition to the priorities listed in paragraph (b) of this section, the Secretary may establish priorities as specified in one or both of the following paragraphs:

(1) The Secretary may establish priorities at specified instructional levels, such as preschool, elementary, secondary, postsecondary, or adult education.

(2) The Secretary may establish as a priority one or more of the following special populations:

(i) Gifted and talented students.

(ii) Socioeconomically disadvantaged students.

(iii) Limited English proficient students.

(iv) Handicapped students.

(v) Migrant students.

(vi) Functionally illiterate adults or adolescents.

(d) The Secretary may also limit a priority established under paragraph (b) of this section to—

- (1) An instructional level;
- (2) One or more of the special populations listed in paragraph (c)(2) of this section; or
- (3) Both an instructional level and one or more of the special populations listed in paragraph (c)(2) of this section.

(e) Each fiscal year the Secretary establishes, in accordance with 34 CFR 75.105(c)(2), a competitive preference for projects that have had fewer than six years total funding from the NDN.

(Authority: 20 U.S.C. 3851)

§ 786.4 What regulations apply?

The following regulations apply to Developer Demonstrator projects:

- (a) The regulations in 34 CFR Part 785.
- (b) The regulations in this Part 786.

(Authority: 20 U.S.C. 3851)

Subpart B—How Does One Apply for an Award?

§ 786.10 What must an applicant submit for Dissemination Review Approval?

For Dissemination Review Approval of a program, product or practice—

- (a) An applicant shall submit to the Secretary qualitative and quantitative evidence of the effectiveness of the program, product or practice for review by the Program Effectiveness Panel; and
- (b) If, in accordance with § 786.13(a), a score of at least 70 points is given by the Program Effectiveness Panel, of which at least 40 points are for the criterion in § 786.11(d)(2) (Results), an applicant shall submit to the Secretary copies of all instructional, classroom and curriculum materials that are part of the program, product, or practice for review by the Program Significance Panel.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.11 How does the Program Effectiveness Panel review a program, product or practice?

- (a) The PEP reviews each program, product or practice for educational effectiveness on the basis of the criteria in paragraph (d) of this section.
- (b) The PEP awards up to 100 points for these criteria.
- (c) The maximum score for each criterion is indicated in parentheses.
- (d) In reviewing each program, product or practice the PEP determines the following:

(1) *Evaluation design.* (40 points) The PEP determines the extent to which the evaluation design—

(i) Is appropriate for the program, product or practice;

(ii) Is based on a correct interpretation of relevant research and literature;

(iii) Demonstrates that a clear and attributable connection exists between the evidence of an educational effect and the program treatment; and

(iv) Addresses rival hypotheses.

(2) *Results.* (50 points) The PEP determines the extent to which the results indicate—

(i) That the program, product or practice's effect is convincing relative to similar programs; and

(ii) The outcome claims of the program, product or practice are valid.

(3) *Replication.* (10 points) The PEP determines the extent to which the program, product or practice can be used at other sites with the likelihood of achieving similar results.

(Authority: 20 U.S.C. 3851)

§ 786.12 How does the Program Significance Panel review a program, product or practice?

(a) For each program, product or practice, the Secretary selects a panel of at least five reviewers from the members of the PSP, of whom a majority must be experts in the subject of the program, product or practice.

(b) The PSP panel determines the extent to which the following criteria are met:

(1) *Need.* (25 points)

(i) There is an otherwise unmet need for the program, product or practice.

(ii) The need the program, product or practice is designed to meet is important.

(2) *Content.* (50 points)

(i) The content of the program, product or practice is accurate and up-to-date;

(ii) The content of the program, product or practice is appropriate to the grade level or target audience.

(iii) The content of the program, product or practice is educationally sound.

(iv) The information is clearly presented in a manner that will be readily understood by teachers, students and parents.

(v) The intended outcomes of the program, product or practice are desired by education service providers.

(3) *Program design.* (25 points)

(i) The program design is an improvement over the design of other programs with similar intended outcomes.

(ii) The program design incorporates up-to-date standards for the field, subject area and population served.

(Authority: 20 U.S.C. 3851)

§ 786.13 How is Dissemination Review Approval granted?

Dissemination Review Approval is granted if—

(a) The PEP has given the program, product or practice a score of at least 40 points for the criterion in § 786.11(d)(2) (*Results*) and a total score of at least 70 points; and

(b) The PSP finds that the program, product or practice is appropriate for dissemination by the NDN under the criterion in § 786.12.

(Authority: 20 U.S.C. 3851)

§ 786.14 How long does Dissemination Review Approval last?

(a) Dissemination Review Approval remains in effect for six years after the date of approval.

(b) Approval granted by the joint Dissemination Review Panel remains in effect for six years after the date of approval.

(Authority: 20 U.S.C. 3851)

§ 786.15 What activities must an applicant propose to carry out if it receives an award?

A Develop Demonstrator project must—

(a) Develop and provide materials for information about the exemplary education program and for training to install the program;

(b) Negotiate adoption agreements with State Facilitator grantees, the Private School Facilitator grantee and education service providers;

(c) Assist those seeking to adopt the exemplary education program in new settings by providing training and technical assistance if requested by education service providers;

(d) Monitor and evaluate the quality, effectiveness and educational results of the adoptions;

(e) Maintain records during the grant period concerning the use of the exemplary education program, including demographic and evaluation data;

(f) Develop and implement a system to identify and prepare Certified Trainers and Demonstration Sites;

(g) Participate with other NDN grantees in workshops and meetings arranged by the Secretary; and

(h) Cooperate with State Facilitator grantees and the Private School Facilitator grantee to carry out the activities in this section.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

Subpart C—How Does the Secretary Make an Award?

§ 786.20 How does the Secretary evaluate an application?

The Secretary evaluates an application according to the criteria in §§ 786.21 through 786.28.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.21 Selection criterion—plan of operation. (25 points)

The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(a) The quality of the design of the project (See § 786.16 for a description of the activities that a Developer Demonstrator project must propose.);

(b) A description of training required to install the exemplary education program in new settings;

(c) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(d) How well the objectives of the project relate to the purpose of the program;

(e) The quality of the applicant's plans to use its resources and personnel to achieve each objective; and

(f) If the applicant is an LEA or SEA, the quality of the applicant's plan to provide an opportunity for adoption of the exemplary education program by private schools in accordance with § 786.31.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.22 Selection criterion—quality of key personnel. (25 points)

(a) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(1) The qualification of the project director;

(2) The qualifications of each of the other key personnel to be used on the project;

(3) The time that each person referred to in paragraphs (a) (1) and (2) of this section will commit to the project; and

(4) how the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age or handicapping condition.

(b) To determine the qualifications of personnel referred to in paragraphs (a) (1) and (2) of this section, the Secretary considers—

(1) Experience and training in fields related to the objectives of the project; and

(2) Any other qualifications that pertain to the quality of the project.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.23 Selection criterion—budget and cost effectiveness. (5 points)

(a) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(b) The Secretary considers the extent to which—

(1) The costs to an adopter for installing the program in a new setting would be reasonable; and

(2) The projected number of educational service providers that would adopt the program each year is appropriate for the budget requested.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.24 Selection criterion—evaluation plan. (20 points)

(a) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate to the project; and

(2) To the extent possible, are objectives and produce data that are quantifiable.

(b) The Secretary reviews each applicant's plans for evaluating—

(1) The quality and effectiveness of informational materials, of training and follow-up, and of internal management plans; and

(2) The effectiveness of adoptions of the program, including impact on the students or the changes in teacher or administrator behavior.

Cross-reference. See 34 CFR 75.590 Evaluation by the grantee.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.25 Selection criterion—adequacy of resources. (5 points)

The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment and supplies.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.26 Selection criterion—monitoring plan. (15 points)

The Secretary reviews each application to determine the extent to which the applicant clearly details plans for post-adoption monitoring of the implementation of the program and resulting benefits at the adoption sites.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 786.27 Selection criterion—special dissemination strategies. (5 points)

The Secretary reviews each application to determine the extent to which the applicant proposes special dissemination strategies to meet specific characteristics of its program.

(Authority: 20 U.S.C. 3851)

§ 786.28 What additional criteria exist for new awards?

(a) In determining the order of selection under EDGAR § 75.217(d) for new Developer Demonstrator awards, the Secretary—

(1) Seeks diversity of projects funded under a particular competition or under this program;

(2) Gives equal weight to—

(i) The total rating under § 786.20;

(ii) The rating of the Program Significance Panel; and

(iii) The rating of the Program Effectiveness Panel; and

(3) For programs approved by the JDRP before the establishment of a scoring system, gives equal weight to—

(i) The total rating under § 786.20; and

(ii) The rating of the Program Significance Panel.

(b) Programs approved by the Joint Dissemination Review Panel whose approval period is still in effect must be reviewed by the Program Significance Panel according to the criteria in § 786.12 by July 1, 1988 in order to receive a new award.

(Authority: 20 U.S.C. 3851)

§ 786.29 What additional criteria exist for continuation awards?

In addition to the criteria for making a continuation award under 34 CFR 75.253, the Secretary may consider the effectiveness of the project during the previous budget period in determining the amount of funding for the next budget period.

(Authority: 20 U.S.C. 3851)

Subpart D—What Conditions Must be Met by the Recipient of an Award?**§ 786.30 What disclaimers are required on printed material?**

Developer Demonstrator projects must include disclaimers as follows on all instructional and curriculum materials reproduced or distributed with funds under this part—

(a) "The contents of this (insert type of publication; e.g., book, teacher's guide) were reproduced or are being distributed under a grant from the U.S. Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government," and

(b) "If an education service provider uses funds under a program subject to Section 439 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232h) to adopt this project, the education service provider must comply with Part 98 of Title 34 of the Code of Federal Regulations (Student Rights in Research, Experimental Programs and Testing) which contains the regulations implementing that section of GEPA."

(Authority: 20 U.S.C. 3851)

§ 786.31 What are a recipient's responsibilities for serving students enrolled in nonprofit private schools?

(a) *Responsibilities of LEAs and SEAs.* A grant to an LEA or SEA is subject to the requirements in Section 508 of the Education Consolidation and Improvement Act of 1981 concerning—

(1) Consultation with nonprofit private school officials in developing the application; and

(2) The opportunity for participation by nonprofit private school children. The requirements for consultation are governed by paragraph (b) of this section and 34 CFR 76.652.

(b) *Consultation.* (1) An applicant shall comply with paragraph (b)(2) of this section if the following conditions are met:

(i) The applicant is an LEA or SEA.

(ii) The applicant applies for a Developer Demonstrator award.

(iii) The project proposed under the application is designed for adoption at elementary or secondary schools.

(2) The applicant shall consult with officials of nonprofit private elementary and secondary schools to ensure that the project can benefit children in those schools.

(c) *Participation.* An LEA or SEA that receives a Developer Demonstrator award designed for adoption at elementary and secondary schools shall, based on the consultation under

paragraph (b)(1) of this section, ensure that nonprofit private elementary and secondary schools have an opportunity to adopt the program.

(d) *Other requirements.* An LEA or SEA grantee shall comply with the rules for subgrantees in EDGAR § 76.658, Funds not to benefit a private school.

(Authority: 20 U.S.C. 3851, 3862)

PART 787—NATIONAL DIFFUSION NETWORK: DISSEMINATION PROCESS PROJECTS**Subpart A—General**

Sec.

787.1 What is a Dissemination Process project?

787.2 Who is eligible for an award?

787.3 What priorities may the Secretary establish?

787.4 What regulations apply?

Subpart B—How does One Apply for an Award?

787.10 What must an applicant submit for Dissemination Review Approval?

787.11 How does the Program Effectiveness Panel review a Dissemination Process?

787.12 How does the Program Significance Panel review a Dissemination Process?

787.13 How is Dissemination Review Approval granted?

787.14 How long does Dissemination Review Approval last?

787.15 What activities must an applicant propose to carry out if it receives an award?

Subpart C—How Does the Secretary Make an Award?

787.20 How does the Secretary evaluate an application?

787.21 Selection criterion—plan of operation.

787.22 Selection criterion—quality of key personnel.

787.23 Selection criterion—budget and cost-effectiveness.

787.24 Selection criterion—evaluation plan.

787.25 Selection criterion—adequacy of resources.

787.26 Selection criterion—monitoring plan.

787.27 Selection criterion—special dissemination strategies.

787.28 What additional criteria exist for new awards?

787.29 What additional criteria exist for continuation awards?

Subpart D—What Conditions Must be Met by the Recipient of an Award?

787.30 What disclaimers are required on printed materials?

787.31 What are a recipient's responsibilities for serving students enrolled in nonprofit private schools?

Authority: 20 U.S.C. 3851, unless otherwise noted.

Subpart A—General**§ 787.1 What is a Dissemination Process project?**

A Dissemination Process project must provide information, instructional materials and services nationwide concerning specific content areas, bodies of research or fields of professional development, that will be of use to education service providers.

(Authority: 20 U.S.C. 3851)

§ 787.2 Who is eligible for an award?

Any public or nonprofit private agency, organization or institution that has in operation a dissemination process that has current Dissemination Review Approval may apply for a new Dissemination Process grant.

(Authority: 20 U.S.C. 3851)

§ 787.3 What priorities may the Secretary establish?

Each year the Secretary may announce in a notice published in the *Federal Register* the program priorities for which applicants may apply for assistance. The Secretary selects priorities in accordance with 34 CFR Part 786.3

(Authority: 20 U.S.C. 3851)

§ 787.4 What regulations apply?

The following regulations apply to Dissemination Process projects:

(a) The regulations in 34 CFR Part 785.

(b) The regulations in 34 CFR 786.3.

(c) The regulations in this Part 787.

(Authority: 20 U.S.C. 3851)

Subpart B—How Does One Apply for an Award?**§ 787.10 What must an applicant submit for Dissemination Review Approval?**

(a) For Dissemination Review Approval of a dissemination process, an applicant shall submit to the Secretary—

(1) A description of its dissemination process;

(2) A description of the procedures and criteria for selecting information, materials and services to be disseminated and for judging that they are educationally significant; and

(3) A description of the procedures and criteria for evaluating qualitative and quantitative evidence of the effectiveness of information, instructional materials and services to be disseminated.

(b) If, in accordance with § 787.13(a), a score of at least 70 points is given by the Program Effectiveness Panel, of which at least 20 points are for the criterion in § 787.11(d)(2) (*Results*), the applicant shall also submit—

(1) Samples of the information and instructional materials to be disseminated; and

(2) Descriptions of the services to be provided through the dissemination process and the methods for assuring broad dissemination.

(Authority: 20 U.S.C. 3851)

§ 787.11 How does the Program Effectiveness Panel review a Dissemination Process?

(a) The PEP reviews each dissemination process for educational effectiveness by examining the procedures and criteria for selecting information and instructional materials to be disseminated and for providing services according to the criteria in paragraph (d) of this section.

(b) The PEP awards up to 100 points for these criteria.

(c) The maximum score for each criterion is indicated in parentheses.

(d) In reviewing each dissemination process the PEP determines the following:

(1) *Evaluation design.* (50 points) The PEP determines the extent to which the evaluation design—

- (i) Is appropriate for the program;
- (ii) Is based on correct interpretation of relevant research and literature;
- (iii) Demonstrates that a clear and attributable connection exists between the evidence of an educational effect and the program treatment; and
- (iv) Addresses rival hypotheses.

(2) *Results.* (25 points) The PEP determines the extent to which the results indicate that the process is particularly effective relative to similar processes.

(3) *Replication.* (25 points) The PEP determines the extent to which the information, instructional materials and services can be used at other sites with the likelihood of achieving similar results.

(Authority: 20 U.S.C. 3851)

§ 787.12 How does the Program Significance Panel review a Dissemination Process?

(a) For each dissemination process, the Secretary selects a panel of at least five reviewers from the members of the PSP, of whom a majority must be experts in the subject of the dissemination process.

(b) The PSP panel determines the extent to which the dissemination process meets the following criteria:

(1) *Need* (25 points)

(i) There is an otherwise unmet need for the information, instructional materials, and services

(ii) The need, the information instructional materials and services are designed to meet is important.

(2) *Content.* (50 points)

(i) The content of the information, instructional materials and services is accurate and up-to-date.

(ii) The content of the information, instructional materials and services is appropriate to the grade level of target audience.

(iii) The content of the information and instructional materials is educationally sound.

(iv) The information, instructional materials, and services are clearly presented in a manner that will be readily understood by teachers, students and parents.

(v) The intended outcomes of the information, instructional materials and services are desirable.

(3) *Program design.* (25 points)

(i) The program design is an improvement over the design of other programs with similar intended outcomes.

(ii) The program design incorporates up-to-date standards for the field, subject area and population served.

(Authority: 20 U.S.C. 3851)

§ 787.13 How is Dissemination Review Approval granted?

Dissemination Review Approval is granted if—

(a) The PEP has given the procedures and criteria a score of at least 20 points for the criterion in § 787.11(d)(2) (*Results*) and a total score of at least 70 points; and

(b) The PSP finds that the procedures and criteria for selecting information and instructional materials to be disseminated and for providing services will ensure that they are appropriate for dissemination by the NDN under the criteria in § 787.12.

(Authority: 20 U.S.C. 3851)

§ 787.14 How long does Dissemination Review Approval last?

(a) Dissemination Review Approval remains in effect for six years after the date of approval.

(b) Approval granted by the Joint Dissemination Review Panel remains in effect for six years after the date of approval.

(Authority: 20 U.S.C. 3851)

§ 787.15 What activities must an applicant propose to carry out if it receives an award?

A Dissemination Process Project must—

(a) Develop and provide upon request of an education service provider, descriptions of the information, material

and services concerning the content areas, fields of professional development or bodies of research that are available through the dissemination process, for education service providers throughout the Nation to use in becoming familiar with the grantee's project;

(b) Provide upon request the information, material and services described in paragraph (a) of this section;

(c) Provide, if appropriate, training in support of the use of the information, materials and services provided;

(d) Evaluate the quality and effectiveness of the dissemination process as specified in the evaluation design for the project;

(e) Maintain records during the grant period concerning the dissemination of information and materials, and the provision of services;

(f) Monitor and evaluate the extent of use by teachers and students and the educational results obtained through use of the information, materials and services selected by education service providers;

(g) Participate with other NDN grantees in workshops and meetings arranged by the Secretary; and

(h) Cooperate with State Facilitator grantees and the Private School Facilitator project to carry out the activities in this section.

(Authority: 20 U.S.C. 3851)

(Approved by Office of Management and Budget under control number 1850-0086)

Subpart C—How Does the Secretary Make an Award?

§ 787.20 How does the Secretary evaluate an application?

The Secretary evaluates an application according to the criteria in § 787.21 through 787.28.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.21 Selection criterion—plan of operation. (30 points)

The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(a) The quality of the design of the project (See § 737.16 for a description of the activities that a Dissemination Process project must propose.);

(b) A clear description of the information and instructional materials to be disseminated, and the services to be provided;

(c) A description of any training to education service providers the program

might offer, if appropriate, in support of the use of the materials or information described above;

(d) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(e) How well the objectives of the project relate to the purpose of the program;

(f) The quality of the applicant's plans to use its resources and personnel to achieve each objective;

(g) If the applicant is an LEA and SEA, the quality of the applicant's plans to provide an opportunity for private schools to use the information, instructional materials and services.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.22 Selection criterion—quality of key personnel. (10 points)

(a) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each person referred to in paragraphs (a) (1) and (2) of this section plans to commit to the project; and

(4) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age or handicapping condition.

(b) To determine the qualifications of personnel referred to under paragraphs (a) (1) and (2) of this section, the Secretary considers—

(1) Experience and training in fields related to the objectives of the project; and

(2) Any other qualifications that pertain to the quality of the project.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.23 Selection criterion—budget and cost effectiveness. (10 points)

The Secretary reviews each application to determine the extent to which—

(a) The budget is adequate to support the project; and

(b) Cost are reasonable in relation to the objectives of the project;

(c) The estimated cost to the adopter for purchasing or using the materials, information or services that are

available through the Dissemination Process is reasonable.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.24 Selection criterion—evaluation plan. (15 points)

The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(a) Are appropriate for the project;

(b) To the extent possible, are objective and produce data that are quantifiable; and

(c) Are appropriate to evaluate—

(1) The quality and effectiveness of informational materials, of any training provided and follow-up, and of internal management plans; and

(2) The use and effectiveness of the materials and information provided to education service providers.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.25 Selection criterion—adequacy of resources. (10 points)

The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.26 Selection criterion—monitoring plan. (5 points)

The Secretary reviews each application to determine the extent to which the applicant clearly details plans that show promise of effective management of the project, including monitoring the use of materials and information provided through the Dissemination Process, and resulting benefits to educational service providers.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.27 Selection criterion—special dissemination strategies. (20 points)

The Secretary determines the extent to which the applicant proposes special dissemination strategies to meet specific characteristics of its program.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 787.28 What additional criteria exist for new awards?

(a) In determining the order of selection under EDGAR § 75.217(d) for new Dissemination Process awards, the Secretary—

(1) Seeks diversity of projects funded under a particular competition or under this program; and

(2) Gives equal weight to—

(i) The total rating under § 787.20;

(ii) The rating of the Program Significance Panel; and

(iii) The rating of the Program Effectiveness Panel.

(b) Programs approved by the Joint Dissemination Review Panel whose approval period is still in effect must be reviewed by the Program Significance Panel according to the criteria in § 787.12 by July 1, 1988 in order to receive a new award.

(Authority: 20 U.S.C. 3851)

§ 787.29 What additional criteria exist for continuation awards?

If the Secretary makes a continuation award under § 75.253, the Secretary may consider the effectiveness of the project during the previous budget period in determining the amount of funding for the next budget period.

(Authority: 20 U.S.C. 3851)

Subpart D—What Conditions Must be Met by the Recipient of an Award?

§ 787.30 What disclaimers are required on printer materials?

Dissemination Process projects must include disclaimers as follows on all instructional and curriculum materials reproduced or distributed with funds under this part:

(a) "The contents of this (insert type of publication; e.g., book, teacher's guide) were reproduced or are being distributed under grant from the U.S. Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government;" and

(b) "If an education service provider uses funds under a program subject to Section 439 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232h) to pay for information, instructional materials or services provided by this project, the education service provider must comply with Part 98 of Title 34 of the Code of Federal Regulations (Student Rights in Research, Experimental Programs and Testing) which contains the regulations implementing that section of GEPA."

(Authority: 20 U.S.C. 3851)

§ 787.31 What are a recipient's responsibilities for serving students enrolled in nonprofit private schools?

(a) *Responsibilities of LEAs and SEAs.* A grant to an LEA or SEA is subject to the requirements in Section 586 of the Education Consolidation and Improvement Act of 1981 concerning—

(1) Consultation with nonprofit private school officials in developing the application; and

(2) The opportunity for participation by nonprofit private school children. The requirements for consultation are governed by paragraph (b) of this section and 34 CFR 76.652 of EDGAR.

(b) *Consultation.* (1) An applicant shall comply with paragraph (b)(2) of this section if the following conditions are met:

(i) The applicant is an LEA or SEA;

(ii) The applicant applies for a Dissemination Process award;

(iii) The information, materials and services to be provided through the dissemination process would be used in elementary or secondary schools.

(2) The applicant shall consult with officials of nonprofit private elementary and secondary schools to ensure that the project can benefit children in those schools.

(c) *Participation.* An LEA or SEA that receives a Dissemination Process award designed to provide information, materials and services to elementary and secondary schools shall, based on the consultation under paragraph (b)(1) of this section, ensure that nonprofit elementary and secondary schools have an opportunity to use the information, instructional materials and services.

(d) *Other requirements.* An LEA or SEA grantee shall comply with the rules for subgrantees in EDGAR § 76.658, Funds not to benefit a private school.

(Authority: 20 U.S.C. 3851, 3862)

PART 788—NATIONAL DIFFUSION NETWORK: STATE FACILITATOR PROJECTS

Subpart A—General

Sec.

788.1 What is a State Facilitator project?

788.2 Who is eligible for an award?

788.3 What regulations apply?

Subpart B—How Does One Apply for an Award?

788.10 What activities must an applicant propose to carry out if it receives an award?

Subpart C—How Does the Secretary Make an Award?

788.20 How many awards does the Secretary make in each State?

788.21 How does the Secretary evaluate an application?

Sec.

788.22 Selection criterion—plan of operation.

788.23 Selection criterion—quality of key personnel.

788.24 Selection criterion—budget and cost effectiveness.

788.25 Selection criterion—evaluation plan.

788.26 Selection criterion—adequacy of resources.

788.27 Selection criterion—monitoring plan.

788.28 Selection criterion—consultation during application.

788.29 Selection criterion—consultation and participation during project.

788.30 Selection criterion—innovative dissemination strategies.

788.31 Selection criterion—provision of information about other programs.

788.32 What additional criteria exist for continuation awards?

Subpart D—What Conditions Must Be Met by the Recipient of an Award?

788.40 What are a recipient's responsibilities to students enrolled in nonprofit private schools?

(Authority: 20 U.S.C. 3851, unless otherwise noted.)

Subpart A—General

§ 788.1 What is a State Facilitator Project?

A State Facilitator Project must disseminate a wide variety of exemplary education programs within the particular State served by each project.

(Authority: 20 U.S.C. 3851)

§ 788.2 Who is eligible for an award?

Any public or nonprofit private agency, organization, or institution located in the State to be served may apply for a State Facilitator award.

(Authority: 20 U.S.C. 3851)

§ 788.3 What regulations apply?

The following regulations apply to State Facilitator projects:

(a) The regulations in 34 CFR Part 785.

(b) The regulations in this Part 788.

(Authority: 20 U.S.C. 3851)

Subpart B—How Does One Apply for an Award?

§ 788.10 What activities must an applicant propose to carry out if it receives an award?

A State Facilitator project must—

(a) Inform public and private education service providers about the availability of all exemplary education programs in the National Diffusion Network;

(b) Assist education service providers to select exemplary education programs to meet their needs;

(c) Negotiate adoption agreements with Developer Demonstrator and Dissemination Process grantees and education service providers;

(d) Arrange for Developer Demonstrator and Dissemination Process grantees to provide training and follow-up services when requested by education service providers;

(e) Arrange for the selection and training of Local Facilitators;

(f) Assist in the identification and preparation of Certified Trainers and Demonstration Sites;

(g) Maintain records during the grant period concerning the exemplary education programs adopted in the State, including demographic data and program retention rates;

(h) Monitor and evaluate the activities of the State Facilitator project;

(i) Participate with other NDN grantees in workshops and meetings arranged by the Secretary;

(j) Cooperate with Developer Demonstrator grantees, Dissemination Process grantees and the Private School Facilitator grantee to carry out the activities in this section; and

(k) Disseminate information about ERIC, Research and Development Centers and Regional Educational Laboratories, and educational

excellence recognition efforts, (such as federally and privately funded programs that identify outstanding educators, students, and schools).

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

Subpart C—How Does the Secretary Make an Award?

§ 788.20 How many awards does the Secretary make in each State?

The Secretary makes one award in each State.

(Authority: 20 U.S.C. 3851)

§ 788.21 How does the Secretary evaluate an application?

The Secretary evaluates an application according to the criteria in §§ 788.22 through 788.32.

(Authority: 20 U.S.C. 3851)
(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.22 Selection criterion—plan of operation. (15 points)

The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(a) The quality of the design of the project (See § 788.10 for a description of the activities that a State Facilitator must propose.);

(b) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(c) How well the objectives of the project relate to the purpose of the program;

(d) The quality of the applicant's plans to use its resources and personnel to achieve each objective;

(e) If the applicant is an LEA or SEA, the quality of the applicant's plans to provide an opportunity for participation of private schools in accordance with § 788.40.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.23 Selection criterion—quality of key personnel. (20 points)

(a) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each person referred to in paragraph (a) of this section will commit to the project; and

(4) The extent to which the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age or handicapping condition.

(b) To determine the qualifications of personnel referred to in paragraphs (a) (1) and (2) of this section, the Secretary considers—

(1) Experience and training in fields related to the objectives of the project; and

(2) Any other qualifications that pertain to the quality of the project.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.24 Selection criterion—budget and cost effectiveness. (5 points)

The Secretary reviews each application to determine the extent to which—

(a) The budget is adequate to support the project; and

(b) Costs are reasonable in relation to the objectives of the project.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.25 Selection criterion—evaluation plan. (10 points)

The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(a) Are appropriate to the project; and
(b) To the extent possible, are objective and produce data that are quantifiable.

Cross-reference. See 34 CFR 75.590 Evaluation by the grantee.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.26 Selection criterion—adequacy of resources. (5 points)

The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment and supplies.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.27 Selection criterion—monitoring plan. (15 points)

The Secretary reviews each application to determine the extent to which the applicant clearly details plans to monitor and assist sites that adopt the programs, and provide follow-up services after training.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.28 Selection criterion—consultation during application. (5 points)

The Secretary reviews each application to determine the extent to which the applicant, in developing its application, has consulted with the SEA, LEAs, Institutions of Higher Education, private schools and other educational service providers in the State to be served.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.29 Selection criterion—consultation and participation during project. (5 points)

The Secretary reviews each application to determine the extent to which the applicant, in carrying out the project activities, provides for consultation with, and participation of the SEA, LEAs, Institutions of Higher Education, private schools and other education service providers in the State.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.30 Selection criterion—innovative dissemination strategies. (10 points)

The Secretary reviews each application to determine the extent to which the applicant proposes innovative dissemination strategies.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.31 Selection criterion—provision of information about other programs. (10 points)

The Secretary reviews each application to determine the extent to which the applicant has the capacity to provide information about ERIC, Research and Development Centers and Regional Educational Laboratories, and educational excellence recognition efforts (such as federally and privately funded programs that identify outstanding educators, students, and schools), to educational personnel throughout the State.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 788.32 What additional criteria exist for continuation awards?

If the Secretary makes a continuation award under § 75.253, the Secretary may consider the effectiveness of the project during the previous budget period in determining the amount of funding for the next budget period.

(Authority: 20 U.S.C. 3851)

Subpart D—What Conditions Must be Met by the Recipient of an Award?

§ 788.40 What are a recipient's responsibilities to students enrolled in nonprofit private schools?

(a) *Responsibilities of LEAs and SEAs.* A grant to an LEA or SEA is subject to the requirements in § 586 of the Education Consolidation and Improvement Act of 1981 concerning—

(1) Consultation with nonprofit private school officials in developing the application; and

(2) The opportunity for participation by nonprofit private school children. The requirements for consultation are governed by paragraph (b) of this section and § 76.652 of EDGAR.

(b) *Consultation.* (1) An applicant shall comply with paragraph (b)(2) of this section if the following conditions are met:

(i) The applicant is an LEA or SEA.

(ii) The applicant applies for a State Facilitator award.

(2) The applicant shall consult with officials of nonprofit private elementary and secondary schools in the State served by the project to determine appropriate strategies to ensure that children in those schools can benefit from the project.

(c) *Participation.* An LEA or SEA that receives a State Facilitator grant shall use the strategies developed under paragraph (b)(1) of this section to ensure

that teachers and administrators from nonprofit private elementary and secondary schools have an opportunity to participate.

(d) *Other requirements.* An LEA or SEA grantee shall comply with the rules for subgrantees in EDGAR § 76.658, Funds not to benefit a private school.

(Authority: 20 U.S.C. 3851, 3862)

PART 789—NATIONAL DIFFUSION NETWORK: PRIVATE SCHOOL FACILITATOR PROJECT

Subpart A—General

Sec.

789.1 What is a Private School Facilitator project?

789.2 Who is eligible for an award?

789.3 What regulations apply?

Subpart B—How Does One Apply for an Award?

789.10 What activities must an applicant propose to carry out if it receives an award?

Subpart C—How Does the Secretary Make an Award?

789.20 How does the Secretary evaluate an application?

789.21 Selection criterion—plan of operation.

789.22 Selection criterion—quality of key personnel.

789.23 Selection criterion—budget and cost effectiveness.

789.24 Selection criterion—evaluation plan.

789.25 Selection criterion—adequacy of resources.

789.26 Selection criterion—consultation during application.

789.27 Selection criterion—consultation and participation during project.

789.28 Selection criterion—innovative dissemination strategies.

789.29 Selection criterion—previous experience.

789.30 Selection criterion—provision of information about other programs.

789.31 What additional criteria exist for continuation awards?

Authority: 20 U.S.C. 3851, unless otherwise noted.

Subpart A—General

§ 789.1 What is a Private School Facilitator Project?

A Private School Facilitator project must disseminate exemplary education programs to private schools nationwide.

(Authority: 20 U.S.C. 3851)

§ 789.2 Who is eligible for an award?

Any public or nonprofit private agency, organization, or institution may apply for a Private School Facilitator grant to serve private schools nationwide.

(Authority: 20 U.S.C. 3851)

§ 789.3 What regulations apply?

The following regulations apply to the Private School Facilitator project:

(a) The regulations in 34 CFR Part 785.

(b) The regulations in this Part 789.

(Authority: 20 U.S.C. 3851)

Subpart B—How Does One Apply for an Award?

§ 789.10 What activities must an applicant propose to carry out if it receives an award?

The Private School Facilitator project must—

(a) Inform private schools throughout the National about the availability of exemplary education programs in the National Diffusion Network;

(b) Assist private education service providers to select exemplary education programs to meet their needs;

(c) Negotiate adoption agreements with Developer Demonstrator and Dissemination Process grantees and private education service providers;

(d) Arrange for Developer Demonstrator and Dissemination Process grantees to provide information, training and follow-up services to staff members of private schools if requested;

(e) Arrange for the selection and training of local facilitators;

(f) Assist in the identification and training of Certified Trainers;

(g) Maintain records during the grant period concerning the exemplary education programs adopted by private schools, including demographic data and program retention rates;

(h) Monitor and evaluate the activities of the Private School Facilitator project;

(i) Participate with other NDN grantees in workshops and meetings arranged by the Secretary;

(j) Cooperate with Developer Demonstrator grantees, Dissemination Process grantees and State facilitator grantees in establishing linkages to private schools throughout the Nation; and

(k) Disseminate information about ERIC, Research and Development Centers and Regional Educational Laboratories, and educational excellence recognition efforts (such as federally and privately funded programs that identify outstanding educators, students, and schools).

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

Subpart C—How Does the Secretary Make an Award?

§ 789.20 How does the Secretary evaluate an application?

The Secretary evaluates an application for a Private School Facilitator award according to the criteria in §§ 789.21 through 789.30.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.21 Selection criterion—plan of operation. (15 points)

The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(a) The quality of the design of the project (See § 789.10 for a description of each of the activities that the Private School Facilitator must propose.);

(b) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(c) How well the objectives of the project relate to the purpose of the program;

(d) The quality of the applicant's plans to use its resources and personnel to achieve each objective; and

(e) The extent to which the applicant clearly details plans to monitor and assist sites that adopt programs, and provide follow-up services after training.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.22 Selection criterion—quality of key personnel. (10 points)

(a) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(1) The qualifications of the project director;

(2) The qualifications of each of the other key personnel to be used in the project;

(3) The time that each person referred to in paragraphs (a) (1) and (2) of this section will commit to the project; and

(4) The extent to which the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age or handicapping condition.

(b) To determine qualifications of personnel referred to under paragraphs (a)(1) and (2) of this section, the Secretary considers—

(1) Experience and training in fields related to the objectives of the project; and

(2) Any other qualifications that pertain to the quality of the project.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.23 Selection criterion—budget and cost effectiveness. (10 points)

The Secretary reviews each application to determine the extent to which—

(a) The budget is adequate to support the project and is cost effective; and

(b) Costs are reasonable in relation to the objectives of the project.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.24 Selection criterion—evaluation plan. (10 points)

The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which—

(a) The applicant's methods of evaluation—

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable, including evaluation of the impact of the adoptions in private schools; and

(b) The applicant will seek the assistance of national experts and professional associations concerned with private schools in designing and carrying out evaluation activities.

Cross-reference. See 34 CFR 75.590 Evaluation by the grantee.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.25 Selection criterion—adequacy of resources. (5 points)

The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment and supplies.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.26 Selection criterion—consultation during application. (5 points)

The Secretary reviews each application to determine the extent to which the applicant, in developing its application, has consulted with diverse private school educators.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.27 Selection criterion—consultation and participation during project. (5 points)

The Secretary reviews each application to determine the extent to which the applicant, in carrying out project activities, provides for consultation with, and participation of diverse private school educators.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.28 Selection criterion—innovative dissemination strategies. (10 points)

The Secretary reviews each application to determine the extent to which the applicant proposes innovative dissemination strategies.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.29 Selection criterion—previous experience. (20 points)

The Secretary reviews each application to determine the extent to which the applicant has had previous experience in successfully working with and providing services to many different types of private schools nationwide.

(Authority: 20 U.S.C. 3851)

§ 789.30 Selection criterion—provision of information about other programs. (10 points)

The Secretary reviews each application to determine the extent to which the applicant has the capacity to provide information about ERIC, Research and Development Centers and Regional Educational Laboratories, and schools, educators, and students recognized through federally and privately funded educational excellence recognition efforts, to educational personnel in private schools nationwide.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

§ 789.31 What additional criteria exist for continuation awards?

If the Secretary makes a continuation award under § 75.253, the Secretary may consider the effectiveness of the project during the previous budget period in determining the amount of funding for the next budget period.

(Authority: 20 U.S.C. 3851)

(Approved by the Office of Management and Budget under control number 1850-0086)

Appendix—Analysis of Comments and Changes

Editorial Note.—The following appendix will not appear in the Code of Federal Regulations.

Section 785.3 What types of projects does the Secretary support?

Comments: The Secretary received ninety-eight comments recommending that the Secretary's School Recognition Program should not be included in these regulations. Comments on this section were not critical of the School Recognition Program, but expressed the belief that it should not be funded through the National Diffusion Network.

Discussion: Although the Secretary sees a strong relationship between the NDN and the Secretary's School Recognition Program and believes that they will contribute more to school improvement efforts if coordinated, the Secretary has decided that regulations are not necessary to effect that coordination. Although the Secretary's School Recognition Program has been funded through the National Diffusion Network in the past, the Secretary does not plan to use NDN funds for this program in the future.

Changes: References to the Secretary's School Recognition Program have been deleted. However, the State Facilitators and the Private School Facilitator will be expected to disseminate information about the Secretary's School Recognition Program.

Section 785.5 What definitions apply?

Program Effectiveness Panel

Comments: Sixteen commenters expressed support for changing the name of the Joint Dissemination Review Panel to the Program Effectiveness Panel. Several commenters requested that the membership be more clearly described, and asked in what areas the members would be experts.

Discussion: The PEP membership was more clearly described in the preamble than in the definition in the regulations. It is the Secretary's intention that PEP members shall be primarily evaluation experts, and experts in other areas related to education programs.

Changes: The definition of the Program Effectiveness Panel has been revised to state that the members will be experts in evaluation and education.

Program Significance Panel

Comments: Seventy-one commenters expressed support for the inclusion of parents and other members of the general public in the review process.

Discussion: Possible Program Significance Panel members, including parents and members of the general

public, were listed in the preamble to the NPRM, but not in the definition of the PSP. It is the Secretary's intention that all of those groups listed be included in the Panel.

Changes: The definition of the Program Significance Panel has been revised to include examples of the membership, and to specify that persons such as parents and other members of the general public will be included.

Section 786.2 Who is eligible for an award?

Comments: The Secretary received one hundred and fifty-three comments against the limitation of funding for Developer Demonstrator projects to six years. Many commenters felt that the effectiveness of the program, and continued demand by education service providers, should be the determining factors concerning continued funding. Several others asked if any other program in the Department had this limit to eligibility. Others asked for some criteria for the circumstances that would allow exceptions.

Discussion: The Secretary believes that newer projects should receive preference over projects which have been funded for six or more years, so that the pool of projects available through the NDN will continually reflect changing national needs. The Secretary has decided that the procedures in the Education Department General Administrative Regulations (EDGAR) at 34 CFR 75.105(c)(2) for establishing priorities will provide adequate flexibility to accomplish this objective. The announcement of each grant competition in the *Federal Register* will include specific information concerning how a preference for new projects will be applied for that competition.

Changes: The eligibility criterion concerning previous funding has been removed, and a preference for applicants that have been funded for fewer than six years has been added under § 786.3.

Section 786.3 What priorities may the Secretary establish?

Comment: A commenter requested that "physical education" be added to the list of priorities the Secretary may establish each year.

Discussion: The Secretary agrees that physical education is an important aspect of young people's development and should be included among the priorities the Secretary may select for funding each year.

Changes: The change has been made.

Section 786.11 How does the Program Significance Panel review a program, product or practice? and § 787.11 How does the Program Significance Panel review a Dissemination Process?

Comments: The Secretary received one hundred and forty-six comments recommending that the proposed Program Significance Panel not be added to the program review system. Some felt that it would interfere with the authority of local school districts to select curricular materials. Others felt it could become a means of censorship by the Federal Government, and others were concerned that it was the beginning of the establishment of a "national curriculum."

Several commenters asked about the logistics of the PSP review. They expressed concern about the cost to the applicant of submitting materials, and asked whether materials would be returned.

Discussion: The Secretary has carefully considered the concerns of those who submitted comments and is taking the following actions to address those concerns. First, the order of submission of materials to the Program Significance Panel and the Program Effectiveness Panel will be reversed. Only those programs that receive a score of at least 70 points from the Program Effectiveness Panel, including at least 40 points for the criterion "Results," will be asked to submit student and teacher materials for review by the PSP. This will simplify the process and will eliminate the needless submission of materials to the PSP by program developers who have insufficient evaluation data to prove their effectiveness to the PEP. Second, the PSP will not act as a censor or otherwise interfere with the authority of local school districts to select curricular materials. The Secretary has amended the final regulations to require the PSP only to consider criteria related to need, content, and program design in determining whether or not a project is appropriate for dissemination through the NDN. The Secretary believes that these criteria will serve as adequate factors in ensuring that only appropriate materials receive Dissemination Review Approval.

The PSP will be made up of individuals knowledgeable about education, including parents, teachers, principals, curriculum and subject experts, other educational practitioners and members of the general public. The PSP will not make its determinations as to whether a program is appropriate for dissemination through the NDN on the basis of pedagogy, ideology, or politics.

Rather, the PSP will make its determinations solely on the basis of the criteria stated in the final regulations.

Changes: A change has been made in the order in which the two panels will conduct their reviews. The Program Effectiveness Panel will first review the quantitative and qualitative evidence of effectiveness of programs, products, and practices according to the criteria in § 786.11. Programs that receive a score of at least 70 points, with at least 40 points for the criterion "Results," will then submit instructional and classroom materials for review by the Program Significance Panel according to the criteria in § 786.12.

For Dissemination Process projects, the Program Effectiveness Panel will first examine the procedures and criteria for selecting information and materials to be disseminated according to the criteria in § 787.11. If a score of at least 70 points is given, with at least 20 points for the criterion "Results," the materials will then be reviewed by the Program Significance Panel according to the criteria in § 787.12.

In addition, the criteria in § 786.12 and § 787.12 have been revised. In determining whether the programs are appropriate for dissemination, the PSP will consider only the criteria related to need, content and program design. Each project will be reviewed by at least five panel members, and a majority of these reviewers will be experts in the subject of the project.

Sections 786.29, 787.29, 788.32 and 789.31 What additional criteria exist for continuation awards?

Comments: Two parties recommended that items concerning program implementation and implementation assistance be added to the criteria for evaluating program effectiveness for continuation awards.

Discussion: Program effectiveness is determined by a review of a variety of measures of program accomplishments, including several items related to program implementation.

Changes: None.

Part 787 Dissemination Process Projects

Comments: The Secretary received one hundred and thirteen comments recommending the Dissemination Process projects not be established as a separate category of program. Some commenters were concerned that there would not be adequate assurance of the quality and effectiveness of the information and materials to be disseminated. Others were concerned about the size of the proposed grants to

organizations that are presumed to have an already high funding level.

Discussion: This is a pilot activity that the Secretary believes will enhance the NDN by providing additional programs and materials to assist schools in their school improvement efforts. Dissemination Processes must undergo the same scrutiny as Developer Demonstrators by both the PEP and the PSP to assure that they are effective and of high quality. If Dissemination Processes prove to be effective, the Department will expand the activity. If Dissemination Processes are not effective, they will be dropped from the NDN.

Changes: None.

Section 788.10 What activities must an applicant propose to carry out if it receives an award?

Comments: The Secretary received ten comments concerning the requirement that State Facilitators provide information about certain other programs sponsored by the Department, including ERIC, Research and Development Centers and Regional Educational Laboratories and schools recognized through the Secretary's School Recognition Program. Some commenters felt that the products, materials and other activities included

in these programs had not been validated nor proven to be transportable, and were therefore not appropriate for dissemination by the NDN. Others were concerned that State Facilitators would not have the resources to take on those additional responsibilities.

Discussion: The Secretary believes that the National Diffusion Network is an appropriate vehicle for the dissemination of information about other Department programs related to school improvement. However, State Facilitators and the Private School Facilitator will not be expected to make the dissemination of that information a major part of their activities, but will be expected to be able to refer interested persons in their States, or private school personnel, to sources of information.

Changes: No change has been made in the basic requirements of this section. However, a technical change has been made to replace "the Secretary's School Recognition Program" with broader language.

Part 789 Private School Facilitator

Comments: The Secretary received ninety-nine comments opposed to the establishment of a Private School Facilitator and ten comments in support of this new program. Many commenters expressed concern about the overlap of

responsibilities with State Facilitators, and felt that the relationships between the two kinds of projects were unclear. Others felt that it would be logistically unfeasible for one grantee to provide the kinds of services State Facilitators provide on a nationwide scope. Those who supported the addition of the Private School Facilitator felt that it would greatly improve the access of private schools to participation in the National Diffusion Network. Some comments were based upon philosophical concerns about setting up separate facilitators: State Facilitators for public schools and a Private School Facilitator for private schools. Other comments were based on the belief that support for State Facilitators would be cut to provide funds for the Private School Facilitator.

Comments: The Secretary believes that a Private School Facilitator working with the State Facilitators will help to improve the services to both public and private schools as they generate more exemplary projects. The Secretary hopes that the details of the day-to-day working relationships among the various kinds of projects will be developed with input from project personnel.

Changes: None.

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