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Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831dd.

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To refer, where there is an indication of a violation of statute, regulation, order, or similar requirement, whether criminal, civil, or regulatory in nature, to the appropriate entity, including Federal, State, or local agencies or other entities charged with enforcement, investigative, or oversight responsibility.

To provide information to a Federal, State, or local entity (1) in connection with the hiring or retention of an individual, the letting of a contract, or issuance of a license, grant, or other benefit by the requesting entity to the extent that the information is relevant to a decision on such matters or (2) in connection with any other matter properly within the jurisdiction of such other entity and related to its prosecutive, investigatory, regulatory, administrative, or other responsibilities.

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To respond to a request from a Member of Congress regarding an individual.

To the parties or complainants, their representatives, and impartial referees, examiners, or administrative judges, or

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In litigation to which TVA is a party or in which TVA provides legal representation for a party by TVA attorneys or otherwise, for use for any purpose including the presentation of evidence and disclosure in the course of discovery. In all other litigation, to respond to process issued under color of authority of a court of competent jurisdiction.

To a consultant, private firm, or individual who contracts or subcontracts with TVA, to the extent necessary to the performance, of the contract.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

Records are maintained on automated data storage devices, hard-copy printouts, and in file folders.

RETRIEVABILITY:

Hard-copy records are indexed by card access number; automated files may be retrieved by any key data element.

SAFEGUARDS:

Security is provided by physical, administrative, and computer system safeguards. Records are kept in secured

facilities not accessible to authorized individuals.

RETENTION AND DISPOSAL:

Records are retained and disposed of in accordance with established TVA records retention schedules.

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Manager, Public Safety Service, TVA, Knoxville, TN 37902-1499.

NOTIFICATION PROCEDURE:

Individuals seeking to learn if information on them is maintained in this system of records should address inquiries to the system manager named above. Individuals should provide name and social security number.

RECORD ACCESS PROCEDURES:

Requests for access may be addressed to the system manager named above. Individuals should provide name and social security number.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information about them maintained in this system should direct their request to the system manager named above.

RECORD SOURCE CATEGORIES:

The individual about whom the record pertains; requesting organization; TVA personnel records.

Louis S. Grande,

Vice President, Information Services.

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Part IV Department of Education

34 CFR Part 302

Chapter 1 State-Operated or Supported Programs for Handicapped Children Program; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 302

RIN 1820-AA83

Chapter 1 State Operated or Supported Programs for Handicapped Children Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the chapter 1 State Operated or Supported Programs for Handicapped Children program (chapter 1 Handicapped program) authorized under chapter 1 of title I of the Elementary and Secondary Education Act of 1965. This program provides financial assistance to State operated and supported programs and projects to supplement the provision of special education and related services or early intervention services to handicapped infants, toddlers, and children.

EFFECTIVE DATE: These final regulations take effect either October 9, 1990, or later if the Congress takes certain adjournments, with the exception of § 302.22. Section 302.22 will become effective after the information collection requirements contained in that section have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. If you want to know the effective date of these final regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. William Tyrrell, Director, Division of Assistance to States, Office of Special Education Programs, Department of Education, 400 Maryland Avenue, SW., Switzer Building, room 3609, MES 2720, Washington, DC 20202; telephone: (202) 732-1025.

SUPPLEMENTARY INFORMATION:**A. Background**

On April 28, 1988, the President signed into law the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Public Law 100-297 (the Act). Title I of the Act amends the Elementary and Secondary Education Act of 1965 (ESEA) to include new and reauthorized Federal education programs. One of the programs that was reauthorized and substantively revised is the chapter 1 Handicapped program. This program provides financial

assistance, through Stated educational agencies, to State agencies and local educational agencies to supplement the provision of special education and related services or early intervention services to handicapped infants, toddlers, and children participating in programs and projects assisted under this part.

On October 17, 1989, the Secretary published a notice of proposed rulemaking (NPRM) for the chapter 1 Handicapped program in the *Federal Register* (54 FR 42704-42714). The preamble included a summary of the most significant statutory changes resulting from the reauthorization of the chapter 1 Handicapped program.

B. Analysis of Comments

In the October 17, 1989 NPRM, the Secretary allowed 62 days for interested parties to comment on the proposed regulations. At public request, a notice was published in the *Federal Register* at 55 FR 1217 (January 12, 1990), extending the public comment period to January 26, 1990.

The Secretary received 42 written comments on the NPRM from a variety of agencies, individuals, and organizations, many of which have had long experience with the chapter 1 Handicapped program. An analysis of the comments and the changes that have been made in the regulations since publication of the NPRM is included as the Appendix to these final regulations.

As a result of public comment on the NPRM, the Secretary has made a number of changes in the final regulations. In addition, some other changes have been made to clarify and unify the treatment of common issues that appear throughout the final regulations. The most significant changes in these final regulations are summarized below.

C. Major Changes in the Regulations**1. Clarification of Terminology**

In response to a request from commenters, the term "have been fully served" in §§ 302.1(c) and 302.60, which is statutory language, has been deleted and replaced with language that clarifies the statutory requirement. The revised language clarifies that other handicapped infants, toddlers, and children aged birth through twenty-one, who do not meet the description in § 302.1(a) and (b) of these final regulations, are eligible for services under the chapter 1 Handicapped program only if the State educational agency determines that all the handicapped infants, toddlers, and children described in § 302.1(a) and (b)

are enrolled in programs or projects that are designed to supplement their special education or early intervention needs, and in the case of handicapped children, are receiving special education and related services in accordance with an individualized education program (IEP) under part B of the Education of the Handicapped Act (EHA) or in the case of handicapped infants and toddlers, are receiving early intervention services in accordance with an individualized family service plan (IFSP) under part H of the EHA.

Section 302.5(a) of these final regulations has been revised by adding the definition of "children" in section 1221(a) of the statute to the list of definitions in the Elementary and Secondary Education Act of 1965 that applied to this part. This change was made to clarify that references to children throughout these final regulations include handicapped children as defined in part B of the EHA and handicapped infants and toddlers as defined in this part. The definition of "handicapped children" in 34 CFR 302.5(e) of the NPRM has been deleted. The definition of "handicapped children" in 34 CFR 300.5 of the regulations for part B of the EHA has been made applicable to this part, except with respect to individuals from birth through aged two, and that definition has been added to § 302.5(c) of these final regulations, which contains the definitions from 34 CFR part 300 that apply to this part.

2. Application of the Education Department General Administrative Regulations

The references to the Education Department General Administrative Regulations (EDGAR) in the NPRM have been substantially retained in these final regulations. However, two changes were made to ensure consistency with parallel requirements in other Department regulations. Another change was necessary because of regulations. Another change was necessary because of additional requirements under other regulations that were made applicable to this part since the publication of the NPRM. The reasons for the Secretary's decision are set forth in the appendix.

On October 23, 1989, the President signed into law the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990. Under this law, as of December 23, 1989, all recipients of Federal grant funds, including funds under the chapter 1 Handicapped program, (and their subtier contractors and/or subgrantees) are prohibited from using appropriated

funds for lobbying Congress or any Federal agency in connection with the award of a particular contract, grant, cooperative agreement, or loan. In addition, for each award action over \$100,000 after December 22, 1989, this law requires each recipient and its subtier contractors and/or subgrantees (1) To certify that they have neither used nor will use any appropriated funds for payment to lobbyists, (2) to disclose the name, address, payment details, and purpose of any agreements with lobbyists whom recipients or their subtier contractors or subgrantees will pay with nonappropriated funds after December 22, 1989, and (3) to file quarterly updates about the use of lobbyists if material changes occur in their use. The Secretary published final regulations in the *Federal Register* on February 26, 1990 (55 FR 6736-6746), to be codified in 34 CFR part 82 (New Restrictions on Lobbying), which became effective on April 16, 1990. Therefore, a new paragraph (a)(5), which makes 34 CFR part 82 (New Restrictions on Lobbying) applicable to this part, has been added to § 302.4 of these final regulations.

As with other parts of EDGAR that the Secretary has determined are applicable to this part, the Secretary believes that these final regulations are the minimum necessary for ensuring basic accountability without imposing undue paperwork and additional administrative burdens on State and local educational agencies.

3. Activities That May Be Assisted

Section 302.3 of the NPRM provided that the Secretary makes payments to States to carry out activities, programs, and projects that are designed to supplement the special education or early intervention needs of handicapped children participating in programs funded under this part. The Secretary has determined that this provision of the NPRM was not entirely consistent with the relevant statutory authority in section 1222(a) of the Act. Under the statute, the Secretary makes payments to States to carry out activities, programs, and projects that are designed to supplement the provision of special education and related services to handicapped children participating under this part or early intervention services to handicapped infants and toddlers participating under this part. Therefore, language has been added to § 302.3 to specify that payments made to States under this part may be used to support programs, projects, and activities that supplement the provision of special education and related services to handicapped children and

early intervention services to handicapped infants and toddlers, consistent with § 302.63 of these final regulations. This change reflects clarification provided throughout these final regulations that all handicapped infants and toddlers participating in programs and projects assisted under this part must receive early intervention services, and not a free appropriate public education, except in States participating in part H of the EHA during the phase-in period for part H services.

4. Assurances in a State Educational Agency's Application to the Secretary

In response to comments concerning which standards State educational agencies should apply to early intervention programs and projects assisted under this part, § 302.11(a)(2)(ii) has been added to specify that the early intervention standards in the regulations for part H of the EHA at 34 CFR part 303 (Early Intervention Program for Infants and Toddlers with Handicaps) apply to programs and projects designed to supplement the provision of early intervention services to handicapped infants and toddlers.

The Secretary received a number of comments requesting clarification of data collection requirements in § 302.11(h) of the NPRM. Language has been added to § 302.11(h)(1)-(2) specifying that handicapped children aged six through twenty-one must be counted by age and disability, but that handicapped infants and toddlers aged birth through two and handicapped children aged three through five are counted only by age, and not by disability. These data collection requirements are consistent with the requirements of section 618 of the EHA, which is referenced in section 1221(b)(5)(a) of the Act.

Further, the Secretary believes that the application of these data collection requirements to individuals aged birth through five is particularly important since it prevents unnecessary labeling of these individuals with a specific handicapping condition.

In response to a request from commenters that the Secretary clarify a State educational agency's monitoring responsibility for early intervention program services in § 302.11(e), a comment has been added following § 302.11 of these final regulations regarding the standards that States are to apply in monitoring programs and projects that are designed to supplement the provision of early intervention services to handicapped infants and toddlers.

5. Child Count Requirements

The Secretary received many comments requesting clarification as to whether handicapped infants and toddlers, who transferred from State operated or supported programs in which they received early intervention services in order to participate in local educational agency programs in which they receive a free appropriate public education, could become transfer students. Paragraph (a)(3) has been added to § 302.22 to clarify that handicapped infants and toddlers may become transfer students only if they transfer from State agency programs in which they were receiving a free appropriate public education for at least one school year, as that period is defined by State law for handicapped as well as nonhandicapped infants, toddlers, and children, in order to participate in local educational agency programs in which they continue to receive a free appropriate public education, provided that the State received a part H grant award for the previous fiscal year and also receives a part H grant.

In light of the Secretary's experience in administering the Chapter 1 Handicapped program since the effective date of the reauthorized Chapter 1 Handicapped program statute, the Secretary has determined that a provision must be added to § 302.22 by including a new paragraph (c) to clarify that the only children eligible to be counted for purposes of computing a grant or subgrant under this part are those handicapped children enrolled on December 1 who are receiving a free appropriate public education, and, except as provided in § 302.63(a), those handicapped infants and toddlers enrolled on December 1 who are receiving early intervention services at no cost to parents, in accordance with § 302.63(c) of these final regulations. This clarification is consistent with the Department's longstanding practice that parents of all participants in the Chapter 1 Handicapped program may not be charged for required services.

The Secretary received many comments on the provision at § 302.23(d) of the NPRM, redesignated as § 302.23(b) in these final regulations, which prohibits the counting of infants and toddlers who are at risk of becoming developmentally delayed if early intervention services are not provided. The Secretary recognizes that States participating under part H of the EHA may serve "at risk" infants and toddlers with part H funds. Under the Chapter 1 Handicapped program statute,

infants and toddlers, who are at risk of becoming developmentally delayed if early intervention services are not provided and who are not "Handicapped," are ineligible to be counted for the purpose of computing a grant or subgrant under this part. Therefore, the Secretary has no legal authority to make "at risk" infants and toddlers, as defined in § 303.18(a) of the regulations for part H of the EHA, eligible to be counted under this part.

6. State Agency Responsible for Providing Free Appropriate Public Education on Early Intervention Services

Section 302.24 has been revised to clarify that if a handicapped infant or toddler receives early intervention services from more than one State agency, the State agency that is primarily responsible for the provision of early intervention services must count that infant or toddler under this part.

7. Assurances in a Subgrantee's Application to the State Educational Agency

In order to ensure consistency of data collection requirements throughout these final regulations for grantees and subgrantees, and in response to requests for clarification from commenters, changes in data collection requirements for subgrantees in § 302.31(b)(1)-(2) have been made in these final regulations. These revised requirements correspond to the changes made to § 302.11(h)(1)-(2) of these final regulations and also reflect applicable statutory requirements in part B of the EHA that apply to this part.

In response to a comment, § 302.31(b)(5) of these final regulations has been revised to require that a subgrantee's application contain a description of the opportunities that parents have received to participate in the development of the project application. This change is consistent with the Secretary's authority to require that project applications contain such information as is necessary to insure that a subgrantee has met its obligation to provide parents with opportunities to participate in the development of the project application. Since the project application is not submitted to the State until parents have had opportunities to participate in its development, § 302.31(b)(5) has been revised in these final regulations to require that this information be submitted with the project application.

8. Allowable Expenditures

In the NPRM, the Secretary specifically requested public comment regarding services that can or cannot be

paid for with funds provided under this part. Clarification as to allowable expenditures under this part is provided in the Appendix to these final regulations, which includes an analysis of the comments the Secretary received on subpart F of the NPRM. The following is a summary of the changes in these final regulations to fiscal requirements which have been made in response to public comment.

Section 302.51(b) of the NPRM, which provided that parents cannot be charged for room and board for a residential placement required for educational purposes, has been changed from a regulatory provision to a Comment following § 302.62 of these final regulations, since it is already required under part B of the EHA and need not be included as a specific regulatory provision in this part.

Section 302.51(c) of the NPRM, redesignated as § 302.51(b), has also been revised to clarify that funds distributed under this part can be used to pay for tuition and fees only if the tuition and fees are associated with activities other than special education and related services that are specified in a handicapped child's IEP or early intervention services that are specified in a handicapped infant's or toddler's IFSP.

9. Post-Award Conditions

Section 302.63(a) of the NPRM made it permissible for States that did not participate in part H of the EHA to assure that handicapped infants and toddlers participating in programs and projects assisted under this part received a free appropriate public education and that the procedural safeguards in part B of the EHA and 34 CFR part 300 were afforded to them and their parents. However, in light of statutory requirements that mandate assurances from grantees and subgrantees that all handicapped infants and toddlers participating under this part receive early intervention services, and that they and their families are afforded all the rights and procedural safeguards in part H of the EHA, the Secretary has determined that § 302.63(a) of the NPRM should be deleted from these final regulations. This change has been made because the Secretary has concluded that except for the situation described in § 302.63(a) of these final regulations, it is impermissible for States to receive assistance under this part based on their provision of a free appropriate public education to handicapped infants and toddlers in lieu of early intervention services.

Based upon the legislative history of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, the provisions in § 302.63(b) of the NPRM concerning services during the phase-in period for part H services for States participating in part H of the EHA have been retained and redesignated as § 302.63(a) of these final regulations. With this exception, States receiving assistance under this part must assure that all handicapped infants and toddlers participating in programs and projects assisted under this part receive early intervention services, and that they and their families are afforded all the rights and procedural safeguards under part H of the EHA.

In the NPRM, the Secretary invited comment on whether early intervention services required under this part should be provided at no cost to parents. Based on an analysis of these comments and, in particular, the experience of State educational agencies that had previously served handicapped infants and toddlers under this part without charging parents for required services, § 302.63(d) of the NPRM has been retained and redesignated as § 302.63(c) in these final regulations.

The Secretary has determined that, at the time, all required early intervention services provided to handicapped infants and toddlers under this part should be provided at no cost to parents. The Secretary believes that the prohibition against charging parents for required early intervention services under this part is consistent with the Department's longstanding practice that all participants in the Chapter 1 Handicapped program not be charged for required services in order to be counted for purposes of computing a grant or subgrant under this part, consistent with § 302.22(c) of these final regulations.

At the current time, data are not available on the effects of charging parents under an income-based sliding fee scale with regard to State program incentives and family disincentives for participation in the Chapter 1 Handicapped Program. Part H of the EHA currently allows States to implement a sliding fee schedule in providing early intervention services to handicapped infants and toddlers. The Secretary will undertake an evaluation of States that implement such a sliding fee scale under part H, and re-evaluate the Department's position regarding the Chapter 1 Handicapped Program as the data become available.

Executive Order 12291

These final 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.

List of Subjects in 34 CFR Part 302

Education, Education of handicapped, Elementary and Secondary education, Grant programs education.

Dated: June 28, 1990.

Lauro F. Cavazos,
Secretary of Education.

(Catalog of Federal Domestic Assistance No. 84.009; Chapter 1 State Operated or Supported Programs for Handicapped Children Program)

The Secretary amends title 34 of the Code of Federal Regulations by revising part 302 to read as follows:

PART 302—CHAPTER 1 STATE OPERATED OR SUPPORTED PROGRAMS FOR HANDICAPPED CHILDREN PROGRAM

Subpart A—General

Sec.

- 302.1 What is the Chapter 1 State Operated or Supported Programs for Handicapped Children program?
- 302.2 Who is eligible for an award?
- 302.3 What kinds of activities may be assisted?
- 302.4 What regulations apply?
- 302.5 What definitions apply to this program?
- 302.6–302.9 [Reserved]

Subpart B—How Does a State Apply for a Grant?

- 302.10 How does a State apply for a grant?
- 302.11 What must be included in an application for a grant?
- 302.12–302.19 [Reserved]

Subpart C—How Does the Secretary Make a Grant to a State?

- 302.20 How does the Secretary determine the amount of a grant to a State?
- 302.21 What are the dates for counting and reporting the number of enrolled children?
- 302.22 Which children are to be counted?
- 302.23 Which individuals may not be counted?
- 302.24 Which agency must count a child receiving services from more than one agency?
- 302.25–302.29 [Reserved]

Subpart D—How Does an Applicant Apply for a Subgrant?

- 302.30 What are the requirements for a State agency or local educational agency to receive a subgrant?
- 302.31 What are the contents of an application for a subgrant?

- 302.32 What are the simplified application procedures for certain local educational agencies?

302.33–302.39 [Reserved]

Subpart E—How Does a State Make a Subgrant to an Applicant?

- 302.40 How does the State educational agency determine the amount of a subgrant to a State agency?
- 302.41 How does the State educational agency determine the amount of a subgrant to a local educational agency?
- 302.42 How are funds attributable to children who leave the local educational agency distributed?
- 302.43 How does the State educational agency redistribute excess funds under this part?
- 302.44–302.49 [Reserved]

Subpart F—What Fiscal Requirements Must Be Met by a State and Its Subgrantees?

- 302.50 How must funds be used under this program?
- 302.51 What are allowable costs under this program?
- 302.52 What maintenance of effort requirements apply to the programs and projects under this part?
- 302.53 Under what circumstances may a State educational agency waive the maintenance of effort requirement?
- 302.54 What is the supplement, not supplant, requirement that applies to programs and projects under this part?
- 302.55 What is the prohibition against using Chapter 1 funds to provide general aid?
- 302.56 What funds are available to a State educational agency to carry out its responsibilities under the Chapter 1 Handicapped program?
- 302.57 What is the prohibition against considering payments under this part in determining State aid?
- 302.58–302.59 [Reserved]

Subpart G—What Other Post-Award Conditions Must Be Met by a State and Its Subgrantees?

- 302.60 May uncounted children be served in programs and projects under this part?
- 302.61 What evaluation and assessment requirements apply for a State and its subgrantees?
- 302.62 What special requirements apply under this part?
- 302.63 How does a State educational agency administer this program in a manner consistent with Part H of the EHA?
- 302.64 What complaint procedures shall a State adopt?
- 302.65 What minimum complaint procedures shall a State adopt?
- 302.66 How may an organization or individual file a complaint?
- 302.67 What requirements apply to State rulemaking and other State educational agency responsibilities?
- 302.68–302.69 [Reserved]
- Authority: 20 U.S.C. 2791 *et seq.*, unless otherwise noted.

Subpart A—General**§ 302.1 What is the Chapter 1 State Operated or Supported Programs for Handicapped Children program?**

Under the Chapter 1 State Operated or Supported Programs for Handicapped Children program (Chapter 1 Handicapped program), the Secretary provides financial assistance to State educational agencies and, through them, to State agencies and local educational agencies to provide services designed to supplement special education or early intervention services for children—

(a)(1) For whom the State is directly responsible for providing special education or early intervention services (including schools or programs providing special education and related services for handicapped children under contract or other arrangements); and

(2) Who are participating in a State operated or State supported school or program for handicapped infants, toddlers, or children (including schools and programs operated under contract or other arrangement with a State agency); or

(b) Who previously participated in a State operated or State supported program and are receiving special education or early intervention services from local educational agencies; and

(c) Other handicapped infants, toddlers, and children if the State educational agency has determined that all the handicapped infants, toddlers, and children aged birth through twenty-one described in paragraphs (a) and (b) of this section—

(1) Are enrolled in programs or projects assisted under this part that are designed to supplement their special education or early intervention needs; and

(2)(i) In the case of handicapped children, are receiving special education and related services in accordance with an individualized education program (IEP) under part B of the EHA; or

(ii) In the case of handicapped infants and toddlers, are receiving early intervention services in accordance with an individualized family service plan (IFSP) under part H of the EHA.

(Authority: 20 U.S.C. 2792(a), 2795)

§ 302.2 Who is eligible for an award?

(a) Each State educational agency that meets the requirements of this part is eligible to receive a grant for each fiscal year to support programs and projects under this part.

(b) The following public agencies are eligible to receive subgrants from the State educational agency:

(1) State agencies that operate or support schools and programs for handicapped infants, toddlers, or children.

(2) Local educational agencies that provide services to handicapped children who formerly were enrolled in schools or programs operated or supported by a State agency in accordance with the requirements in § 302.22(a).

(Authority: 20 U.S.C. 2791(a)(1), 2794)

§ 302.3 What kinds of activities may be assisted?

The Secretary makes payments to a State to carry out activities, programs, and projects, including the acquisition of equipment, that are designed to supplement the provision of special education and related services to handicapped children participating in programs and projects funded under this part or early intervention services to handicapped infants and toddlers participating in programs and projects funded under this part, consistent with § 302.63.

(Authority: 20 U.S.C. 2792(a))

§ 302.4 What regulations apply?

The following regulations apply to this part:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 76 (State-Administered Programs) as follows:

(i) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must Be Met by the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.580–76.581 (Coordination).

(B) Sections 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(C) Section 76.684 (Day care services).

(D) Section 76.690 (Energy conservation awareness).

(v) Subpart G (What Are the Administrative Responsibilities of the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.770 through 76.772 (State Administrative Responsibilities).

(B) Section 76.780 (A State shall adopt complaint procedures).

(C) Section 76.781 (Minimum complaint procedures).

(D) Section 76.782 (An organization or individual may file a complaint).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 78 (Education Appeal Board).

(4) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(6) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for a Drug-Free Workplace (Grants)).

(b)(1) A State shall have fiscal and administrative requirements for expending and accounting for all funds received by State educational agencies, other State agencies, and local educational agencies under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State and local governments.

(2) A State may satisfy this requirement by—

(i) Using fiscal and administrative requirements applicable to the use of its own funds;

(ii) Adopting new fiscal and administrative requirements; or

(iii) Applying the provisions in 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(c) The regulations in this part (34 CFR part 302).

(d) The regulations in 34 CFR part 300 (Assistance to States for Education of Handicapped Children), with respect to the rights and procedural safeguards under Part B of the EHA.

(e) The regulations in 34 CFR part 303 (Early Intervention Program for Infants and Toddlers with Handicaps), with respect to the rights and procedural safeguards under part H of the EHA that apply to public agencies receiving funds under this part.

(Authority: 20 U.S.C. 1412(1)–(6), 1413(a), 2791–2796, 2831(a))

§ 302.5 What definitions apply to this program?

(a) *Definitions in the Elementary and Secondary Education Act of 1965.* (1) The following terms used in this part are defined in section 1471 of the Elementary and Secondary Education Act of 1965:

Equipment
Free public education
Local educational agency
Parent
State educational agency
(Authority: 20 U.S.C. 2891)

(2) The following term used in this part is defined in section 1221(a) of the Elementary and Secondary Education Act of 1965:

Children
(Authority: 20 U.S.C. 2791(a)(2))

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Budget
Contract
EDGAR
Facilities
Fiscal Year
GEPA
Grant
Grantee
Private
Project
Public
Secretary
State
Subgrant
Subgrantee

(Authority: 20 U.S.C. 2791 *et seq.*)

(c) *Definitions in 34 CFR part 300.* The following definitions in 34 CFR Part 300 apply to this part:

Free appropriate public education (34 CFR 300.4)
Handicapped children (34 CFR 300.5) (except for individuals from birth through age two)
Individualized education program (34 CFR 300.340)
Public agency (34 CFR 300.11)
Related services (34 CFR 300.13)
Special education (34 CFR 300.14)
(Authority: 20 U.S.C. 1401)

(d) *Definitions in part H of the EHA.* The following definition in section 672(2) of part H of the EHA applies to this part, except for section 672(2)(B):

Early intervention services
(Authority: 20 U.S.C. 1472(2))

(e) *Other definitions.* The following definitions also apply to this part:

Act means chapter 1 of title I of the Elementary and Secondary Education Act of 1965, as amended.

(Authority: 20 U.S.C. 2701)

EHA means the Education of the Handicapped Act.

(Authority: 20 U.S.C. 1401 *et seq.*)

Handicapped infants and toddlers means individuals from birth through age two, who need early intervention services because they—

(1) Are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: Cognitive development, physical development, language and speech development, psychosocial development, or self-help skills; or

(2) Have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

(Authority: 20 U.S.C. 1472(1))

State agency means an institution or agency of the State that has direct responsibility established under State statute, State regulation, signed agreement between respective agency officials, or other document, for providing free appropriate public education or early intervention services to handicapped infants, toddlers, or children in schools or programs operated or supported by the State agency. The term does not include an agency whose responsibility for handicapped infants, toddlers, or children is limited solely to the distribution of State financial assistance to other agencies that State law makes directly responsible for providing free appropriate public education or early intervention services.

(Authority: 20 U.S.C. 2791(c)(1))

State operated program means a school or program for handicapped infants, toddlers, or children that is administered directly by a State agency.

(Authority: 20 U.S.C. 2791(c)(1))

State supported program means a school or program for handicapped infants, toddlers, or children that is operated under contract or other arrangement with a State agency.

(Authority: 20 U.S.C. 2791(c)(1))

§§ 302.6–302.9 [Reserved]

Subpart B—How Does a State Apply for a Grant?

§ 302.10 How does a State apply for a grant?

In order to receive funds under this part, the State educational agency shall submit an application to the Secretary that meets the requirements in § 302.11.

(Authority: 20 U.S.C. 2791(b))

§ 302.11 What must be included in an application for a grant?

A State educational agency shall include the following assurances in its application:

(a) Each program or project assisted under this part for handicapped infants, toddlers, or children receiving funds under this part, including each program or project administered by any other public agency—

(1) Is under the general supervision of the persons responsible for programs or projects assisted under this part for handicapped infants, toddlers, or children in the State educational agency; and

(2) Meets—(i) The education standards of the State educational agency; or

(ii) The early intervention standards consistent with the requirements of 34 CFR part 303 if it is a program or project that is designed to supplement the provision of early intervention services to handicapped infants and toddlers.

(b) All child count information reported under § 302.22 is accurate and submitted in the manner required by the Secretary

(c) All handicapped children in a State, other than handicapped infants and toddlers, who are participating in programs and projects funded under this part receive a free appropriate public education, and these children and their parents are provided all the rights and procedural safeguards under part B of the EHA and this part.

(d) All handicapped infants and toddlers in the State participating in programs and projects funded under this part receive early intervention services, and these infants and toddlers and their families are provided the rights and procedural safeguards under part H of the EHA and this part.

(e) Programs and projects receiving assistance under this part are administered in a manner consistent with this part, subpart 2 of part F of the Act, part B of the EHA, and, as determined by the Secretary to be appropriate, part H of the EHA, including the monitoring by the State educational agency of compliance under those programs listed in paragraphs (c) and (d) of this section.

(f) Programs and projects funded under this part are coordinated with services under the EHA.

(g) For fiscal year 1991, and each subsequent fiscal year, the State educational agency will administer the program authorized by this part through the State office responsible for administering part B of the EHA.

(h) The State educational agency will report annually to the Secretary—

(1) The number of handicapped children aged three through twenty-one served under this part, as described in section 618(b)(1) of the EHA—

(i) For handicapped children aged three through five by age category; and

(ii) For handicapped children aged six through twenty-one by age and disability category;

(2) The number of handicapped infants and toddlers aged birth through two served under this part by age category as described in section 618(b)(1) of the EHA;

(3) The number of handicapped children served under this part in State operated or supported programs and the number of handicapped children served in local educational agency programs for handicapped children previously served in those State programs; and

(4) The uses and allocations of funds under this part.

(i) The State educational agency will report to the Secretary such other information as the Secretary may reasonably request.

(Approved by the Office of Management and Budget under control number 1820-0573)

(Authority: 20 U.S.C. 1412(6), 1476(b), 2791(b), 2792(a))

Comment: In monitoring programs and projects that are designed to supplement the provision of early intervention services to handicapped infants and toddlers, the standards to be applied by the State educational agency to these programs and projects are the standards for early intervention services that apply under part H of the EHA. The State educational agency may develop paired monitoring teams, i.e., one person (or persons) from the State educational agency and one person (or persons) from the State's part H lead agency can jointly conduct monitoring and evaluation activities.

§§ 302.12–302.19 [Reserved]

Subpart C—How Does the Secretary Make a Grant to a State?

§ 302.20 How does the Secretary determine the amount of a grant to a State?

The Secretary awards grants to participating States in the amounts calculated in accordance with the formula described in section 1221 (c), (d), and (e) of the Act.

(Authority: 20 U.S.C. 2791(c)–(e))

§ 302.21 What are the dates for counting and reporting the number of enrolled children?

(a) Each State agency and local educational agency shall count the handicapped infants, toddlers, and children described in § 302.22 enrolled on December 1 of each year and shall

report that count to the State educational agency.

(b) The State educational agency shall submit a report to the Secretary by the following February 1 that provides the information required by paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1820-0543)

(Authority: 20 U.S.C. 1411(a)(3), 2791(c))

§ 302.22 Which children are to be counted?

(a) The following children are to be counted for purposes of computing a grant under this part:

(1) Handicapped infants, toddlers, and children from birth through twenty-one years of age enrolled in programs or schools for handicapped infants, toddlers, and children operated or supported by a State agency that is directly responsible for providing free appropriate public education for handicapped children or early intervention services for handicapped infants and toddlers (including schools or programs providing special education and related services or early intervention services under contract or other arrangement with those agencies); and

(2) A handicapped child to whom the State was directly responsible for providing special education and related services and who was enrolled in a State operated or supported program, including schools or programs providing special education and related services under contract or other arrangement with a State agency, and is now enrolled in a program operated or supported by a local educational agency if that child—

(i) Was enrolled in a State operated or supported program for at least one school year, as that period is defined under State law for schools serving nonhandicapped as well as handicapped children and has left that program in order to participate in such a program operated or supported by a local educational agency;

(ii) Was receiving and continues to receive a free appropriate public education; and

(iii) The State educational agency transfers to the local educational agency in whose program the child participates an amount equal to the sums received by the State educational agency under this part that are attributable to the child, to be used for the purposes set forth in § 302.51.

(3) A handicapped infant or toddler can only be eligible to become a local educational agency transfer student if—

(i) The requirements in § 302.22(a)(2) are met;

(ii) The State was authorized to provide the handicapped infant or toddler with a free appropriate public education, in accordance with the requirements in § 302.63(a); and

(iii) The State received a part H grant award for the previous fiscal year and also receives a part H grant award for the first fiscal year in which the handicapped child is counted as a local educational agency transfer student.

(b) Children in State operated or supported programs for neglected or delinquent children or in adult correctional institutions who are also eligible for programs under this part—

(1) May be counted for the purposes of generating funds under both this part and the chapter 1 program for neglected and delinquent children if they are served under each of these programs; and

(2) May be served under each of those programs.

(c) In order for a child described in paragraphs (a) and (b) of this section to be included in the report of children enrolled on December 1 of each year—

(1) A handicapped child must be receiving a free appropriate public education; and

(2) Except as provided in § 302.63(a), a handicapped infant or toddler must be receiving early intervention services at no cost to parents, consistent with § 302.63(c).

(Authority: 20 U.S.C. 2791, 2792, 2795, 2812))

§ 302.23 Which individuals may not be counted?

(a) For purposes of computing an allocation under this part, handicapped infants, toddlers, and children may not be counted who—

(1) Are counted under part B of the EHA;

(2) Are counted under the Chapter 1 Migrant Education Program (34 CFR part 201);

(3) Are not receiving a free appropriate public education or early intervention services at no cost to parents, consistent with § 302.63; or

(4) Are handicapped children aged three through five if a State is not eligible for a grant under section 619 of the EHA (see 34 CFR part 301).

(b) Individuals from birth through age two who are not handicapped infants and toddlers, but who are at risk of becoming developmentally delayed if early intervention services are not provided, may not be counted for the purpose of computing a grant or subgrant under this part.

(Authority: 20 U.S.C. 1411(a)(1)(A), 2791)

§ 302.24 Which agency must count a child receiving services from more than one agency?

If more than one State agency is directly responsible for providing a free appropriate public education to a handicapped child, or early intervention services to a handicapped infant or toddler, the State agency that is primarily responsible for the provision of education to that handicapped child or early intervention services to that handicapped infant or toddler, as determined by the State educational agency, is the only State agency that must count that handicapped infant, toddler, or child under this part.

(Authority: 20 U.S.C. 2791)

§§ 302.25-302.29 [Reserved]

Subpart D—How Does an Applicant Apply for a Subgrant?

§ 302.30 What are the requirements for a State agency or local educational agency to receive a subgrant?

(a) *General.* A State agency, including a State educational agency, or a local educational agency within a participating State may receive a subgrant under this part for any fiscal year if—

(1) It has on file with the State educational agency an application that contains the assurances and information required under § 302.31; and

(2) The application has been approved by the State educational agency.

(b) *Frequency of submission.* A State agency or a local educational agency shall file an application for a subgrant under this part with the State educational agency for a project period of not more than three fiscal years, including the first fiscal year for which a subgrant is made under that application.

(c) *Amendments to the application: updating of information in the application.* Prior to the receipt of project funds for any fiscal year, an eligible subgrantee shall update its project application by submitting to the State educational agency—

(1) Data showing that the agency has maintained fiscal effort in accordance with the requirements of § 302.52 if those data are not otherwise available to the State educational agency;

(2) A budget for the expenditure of funds under this part for that fiscal year;

(3) Any changes in policies or procedures that have occurred since the submission of the most recent application; and

(4) Any other programmatic or fiscal information that the State educational agency may require to perform its duties under this part.

(Approved by the Office of Management and Budget under control number 1820-0510)
(Authority: 20 U.S.C. 2794(a)-(b))

§ 302.31 What are the contents of an application for a subgrant?

An application for a subgrant under this part must include—

(a) Assurances that—

(1) All handicapped children age three through twenty-one who are participating in programs and projects funded under this part receive a free appropriate public education, and that they and their parents are provided all the rights and procedural safeguards under part B of the EHA and this part;

(2) All handicapped infants and toddlers from birth through age two who are participating in programs and projects under this part receive early intervention services, and that they and their families are provided all the rights and procedural safeguards under part H of the EHA and this part;

(3) Services, programs, and projects conducted under this part are of sufficient size, scope, and quality to give reasonable promise toward meeting the special education and early intervention needs of children to be served;

(4) Funds made available under this part will be used to supplement, not supplant, State and local funds in accordance with § 302.54;

(5) The agency will maintain its fiscal effort in accordance with § 302.52;

(6) The agency will conduct such evaluations and assessments as may be necessary to demonstrate that the programs and projects are beneficial to the children served;

(7) The parents of children to be served with funds under this part are provided an opportunity to participate in the development of the project application; and

(8) The agency will comply with all reporting requirements in a timely manner;

(b) Program information that—

(1) Indicates the projected number of handicapped infants, toddlers, and children to be served;

(2) Shows the projected number of handicapped infants and toddlers aged birth through two and handicapped children aged three through five by age category and the projected number of handicapped children aged six through twenty-one for each handicapping disability and age category as described in 34 CFR 300.5, 300.751, and 302.22;

(3) Describes the purpose or purposes of the project and the method or methods of evaluating the effectiveness of the services, projects, or programs to be provided under this part;

(4) Specifies the types of services to be provided with the funds furnished under this part; and

(5) Describes the opportunities that parents have received to participate in the development of the project application; and

(c) Any other information the State educational agency may request.

(Approved by the Office of Management and Budget under control number 1820-0510)
(Authority: 20 U.S.C. 2794(b)-(c))

§ 302.32 What are the simplified application procedures for certain local educational agencies?

The State educational agency may accept, instead of a project application, a letter of request for payment from a local educational agency that serves handicapped children who have transferred from a State operated or supported program, if the local educational agency—

(a) Intends to serve with its payment fewer than five handicapped children who have transferred from a State operated or supported program; and

(b) Includes in its letter of request an assurance that the funds received under this part will be used to supplement the provision of the special education and related services provided to participating handicapped children.

(Approved by the Office of Management and Budget under control number 1820-0510)
(Authority: 20 U.S.C. 2794(d))

§§ 302.33-302.39 [Reserved]

Subpart E—How Does a State Make a Subgrant to an Applicant?

§ 302.40 How does the State educational agency determine the amount of a subgrant to a State agency?

(a) For each fiscal year, the State educational agency shall distribute the funds allocated under a grant to the State under this part to each eligible State agency on the basis of the December 1 child count.

(b) The State educational agency shall distribute to each eligible State agency an equal amount for each child counted.

(Authority: 20 U.S.C. 2791(c)-(d))

§ 302.41 How does the State educational agency determine the amount of a subgrant to a local educational agency?

A local educational agency receives the total amount of funds generated by each child who has transferred from a State operated or supported program if—

(a) The child was counted the previous December 1 according to the requirements in § 302.22(a)(1)-(2); and

(b) The local educational agency meets the requirements in §§ 302.30 and 302.31.

(Authority: 20 U.S.C. 2791(d))

§ 302.42 How are funds attributable to children who leave the local educational agency distributed?

(a) A local educational agency shall notify the State educational agency when a handicapped child counted under this part leaves that agency's program or project.

(b) If the State educational agency has distributed funds generated by any of those handicapped children to the local educational agency, the State educational agency shall require the local educational agency either to—

(1) Retain funds generated by those handicapped children under this part to serve other handicapped children in the project or program supported under this part; or

(2) Return all or a portion of those funds to the State educational agency.

(c) The State educational agency may not transfer funds to a local educational agency if all handicapped children counted under this part cease to be enrolled in that local educational agency.

(Authority: 20 U.S.C. 2791, 2831)

§ 302.43 How does the State educational agency redistribute excess funds under this part?

(a) *Reporting dates for estimated expenditures and redistribution.* (1) In any fiscal year, the State educational agency may set a date by which each State agency and local educational agency that receives an allocation under this part must report to the State the amount of funds that it estimates it will expend in carrying out the project described in its application.

(2) The State educational agency shall determine whether any of the amounts available to subgrantees as provided in §§ 302.40 and 302.41 will not be expended during the period of availability (excess funds).

(b) *Redistribution of excess funds.* The State educational agency shall make available any excess funds for allocation to other subgrantees, in the manner provided in §§ 302.41 (a) and (b) and 302.42, if the State educational agency determines that a subgrantee will be able to use additional funds to carry out the programs or projects described in an approved application.

(Authority: 20 U.S.C. 3831)

§§ 302.44–302.49 [Reserved]

Subpart F—What Fiscal Requirements Must Be Met by a State and Its Subgrantees?

§ 302.50 How must funds be used under this program?

Funds under this program must be used to supplement the provision of special education and related services to handicapped children or early intervention services to handicapped infants and toddlers, except in accordance with § 302.63(a).

(Authority: 20 U.S.C. 2792(b))

§ 302.51 What are allowable costs under this program?

(a) Funds provided under this part may be used for programs and projects including, but not limited to—

- (1) Services provided in early intervention, preschool, elementary, secondary, and transition programs;
- (2) Acquisition of equipment and instructional materials, and telecommunications, sensory, and other technological aids and devices;
- (3) Employment of special personnel;
- (4) Training and employment of educational aides;
- (5) Training in the use and provision of assistive devices and other specialized equipment;
- (6) Training of teachers and other personnel;
- (7) Training of parents of handicapped infants, toddlers, and children;
- (8) Training of nonhandicapped children to facilitate their participation with handicapped infants, toddlers, and children in joint activities;
- (9) Training of employers and independent living personnel involved in assisting the transition of handicapped children from school to work and independent living;
- (10) Outreach activities to involve handicapped infants, toddlers, and children and their families more fully in a wide range of educational and recreational activities in their communities;
- (11) Planning for, evaluating, and disseminating information about the programs and projects funded under this part.

(b) Funds under this part may not be used for the payment of tuition and fees unless the tuition and fees are associated with activities and services other than—

- (1) Special education and related services that are specified in a handicapped child's IEP under Part B of the EHA; or

(2) Early intervention services that are specified in a handicapped infant's or toddler's IFSP under part H of the EHA.

(Authority: 20 U.S.C. 2791(b), 2792(b), 2793)

§ 302.52 What maintenance of effort requirements apply to the programs and projects under this part?

(a)(1) *Basic standard.* A State educational agency, another State agency, or a local educational agency is eligible to receive its allocation of funds under this part for any fiscal year if the State educational agency finds that either the combined State and local fiscal effort per child or the aggregate expenditures of State and local funds with respect to the provision of required services to handicapped infants, toddlers, and children for the preceding fiscal year were maintained at a level not less than 90 percent of the combined fiscal effort per child or the aggregate expenditures of that agency and the State for the second preceding fiscal year.

(2) *Meaning of "preceding fiscal year."* For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year or the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, the "preceding fiscal year" is Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is Federal fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the twelve-month period ending on June 30, 1988 and the "second preceding fiscal year" is the period ending on June 30, 1987.

(b) *Failure to maintain effort.* (1) If a State educational agency, another State agency, or a local educational agency fails to maintain effort and a waiver under § 302.53 is not granted, the State educational agency shall reduce that subgrantee's allocation of funds under this part in any fiscal year in the exact proportion to which the subgrantee fails to meet 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the subgrantee) for the second preceding fiscal year.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the subgrantee failed to maintain effort, the State educational agency shall consider the subgrantee's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined

fiscal effort per student or aggregate expenditures (using the measure most favorable to the subgrantee) for the third preceding fiscal year.

Example: For the fiscal year in which funds are first made available on July 1, 1989, a subgrantee fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the subgrantee maintained effort during the next fiscal year (1991), the State educational agency may consider the subgrantee's expenditures for the second preceding fiscal year (1988) (the year that caused the subgrantee's failure to maintain effort) to be no less than 90 percent of the subgrantee's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a)(1)–(2), 2794)

§ 302.53 Under what circumstances may a State educational agency waive the maintenance of effort requirement?

(a)(1) A State educational agency may waive, for one fiscal year only, the maintenance of effort requirement in § 302.52 if the State educational agency determines that a waiver would be equitable due to exceptional or uncontrollable circumstances. These circumstances include but are not limited to—

- (i) A natural disaster; or
- (ii) A precipitous and unforeseen decline in the financial resources of the subgrantee.

(2) A State educational agency may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b)(1) If the State educational agency grants a waiver under paragraph (a) of this section, the State educational agency may not reduce the amount of the funds the subgrantee is otherwise entitled to receive under this part.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the State educational agency shall consider the subgrantee's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate (using the measure most favorable to the subgrantee) for the third preceding fiscal year.

Example: For the fiscal year in which funds are first made available on July 1, 1989, a subgrantee secures a waiver because its fiscal effort in the preceding year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the subgrantee maintained effort during the next fiscal year (1991), the State educational agency may consider the subgrantee's expenditures for

the second preceding fiscal year (1988) (the year for which the subgrantee needed a waiver) to be no less than 90 percent of the subgrantee's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a)(3))

§ 302.54 What is the supplement, not supplant, requirement that applies to programs and projects under this part?

A State educational agency, another State agency, or a local educational agency may use funds received under this part only to supplement and, to the extent practical, increase the level of non-Federal funds that would, in the absence of such Federal funds, be made available for the provision of services to handicapped infants, toddlers, and children participating in programs and projects assisted under this part and in no case may funds under this part be used to supplant those non-Federal funds.

(Authority: 20 U.S.C. 2728(b), 2794))

§ 302.55 What is the prohibition against using Chapter 1 funds to provide general aid?

A State educational agency, another State agency or a local educational agency participating under this part may use chapter 1 funds provided under this part only for programs and projects that are designed to supplement the provision of special education and related services or early intervention services to handicapped infants, toddlers, and children who are eligible to be served in accordance with the provisions of this part.

(Authority: 20 U.S.C. 2792)

§ 302.56 What funds are available to a State educational agency to carry out its responsibilities under the Chapter 1 Handicapped program?

(a) *Funds for State administration.* (1) Except as provided in paragraph (a)(2) of this section, a State educational agency shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its State administrative duties under the Chapter 1 Handicapped program.

(2) The State educational agency may not use more than 15 percent of the funds referred to in paragraph (a)(1) of this section of indirect costs.

(b) *Funds for programs and projects.* A State educational agency that meets the requirements of §§ 302.2 and 302.31, and receives a subgrant under §§ 302.40, may use those funds only in accordance with the fiscal requirements of subpart F of this part.

(Authority: 20 U.S.C. 2793, 2794, 2824)

§ 302.57 What is the prohibition against considering payments under this part in determining State aid?

A State may not take into consideration payments under this part in determining—

(a) The eligibility of a State agency or local educational agency for State aid; or

(b) The amount of State aid to be paid to a State agency or local educational agency for free public education.

(Authority: 20 U.S.C. 2854)

§ 302.58–302.59 [Reserved]

Subpart G—What Other Post-Award Conditions Must Be Met by a State and Its Subgrantees?

§ 302.60 May uncounted children be served in programs and projects under this part?

Handicapped infants, toddlers, and children who are not eligible to be counted, as described in § 302.23, are eligible for services under this part if the state educational agency has determined that all handicapped infants, toddlers, and children aged birth through twenty-one described in paragraphs (a) and (b) of § 302.1 are enrolled in programs or projects assisted under this part that are designed to supplement their special education or early intervention needs and, in the case of handicapped children, are receiving special education and related services in accordance with an IEP under Part B of the EHA or, in the case of handicapped infants and toddlers, are receiving early intervention services in accordance with an IFSP under part H of the EHA.

(Authority: 20 U.S.C. 2795(2))

§ 302.61 What evaluation and assessment requirements apply for a State and its subgrantees?

A State educational agency, another State agency, or a local educational agency that receives funds under this part shall collect and maintain evaluations and assessments needed to demonstrate the extent to which children benefitted from the services provided by those programs and projects.

(Approved by the Office of Management and Budget under control number 1820-0510)

(Authority: 20 U.S.C. 2792(c))

§ 302.62 What special requirements apply under this part?

A State educational agency, another State agency, or a local educational agency that provides services through contracts or other arrangements is responsible for ensuring that their requirements of this part, 34 CFR part

300, and 34 CFR part 303 are met in providing these services.

(Authority: 20 U.S.C. 2791(c))

Comment: One of the part B requirements that must be met for this part is that services must be provided at no cost to parents (see 34 CFR 300.4). This includes the cost of room and board and non-medical care that are provided in an institutional residential care facility in which a handicapped child is placed for educational reasons (see 34 CFR § 300.302).

§ 302.63 How does a State educational agency administer this program in a manner consistent with Part H of the EHA?

(a) If a State participates in part H of the EHA, during years one through four of its participation, the State can elect to provide handicapped infants and toddlers receiving services under this part either with a free appropriate public education and afford them and their parents the procedural protections required by part B of the EHA and 34 CFR part 300 or with early intervention services and afford them and their parents the procedural protections required by part H of the EHA and 34 CFR part 303.

(b) Except as provided in paragraph (a) of this section, a State shall ensure that all handicapped infants and toddlers participating under this part receive early intervention services and that they and their parents are afforded the procedural protections required by part H of the EHA and 34 CFR part 303.

(c) Early intervention services required under this part must be provided at no cost to parents.

(Authority: 20 U.S.C. 2792(a), 2831(a))

§ 302.64 What complaint procedures shall a State adopt?

A State shall adopt written procedures for—

(a) Receiving and resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to the chapter 1 Handicapped program;

(b) Reviewing an appeal from a decision of a subgrantee with respect to a complaint; and

(c) Conducting an independent on-site investigation of a complaint if the State determines that an on-site investigation is necessary.

(Approved by the Office of Management and Budget under control number 1820-0510)

(Authority: 20 U.S.C. 2831(a))

§ 302.65 What minimum complaint procedures shall a State adopt?

A State shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after the State receives a complaint—

- (1) If necessary, to carry out an independent on-site investigation; and
- (2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the State.

(Authority: 20 U.S.C. 2831(a))

§ 302.66 How may an organization or individual file a complaint?

An organization or individual may file a written signed complaint with a State. The complaint must include—

- (a) A statement that the State or a subgrantee has violated a requirement of a Federal statute or regulations that apply to the Chapter 1 Handicapped program; and
- (b) The facts on which the statement is based.

(Approved by the Office of Management and Budget under control number 1820-0510)

(Authority: 20 U.S.C. 2831(a))

§ 302.67 What requirements apply to State rulemaking and other State educational agency responsibilities?

(a)(1) Except as provided in paragraph (b) of this section, that Act does not preempt, prohibit, or encourage State rules, regulations, or policies issued pursuant to State law.

(2) If a State issues rules, regulations, or policies, they may not be inconsistent with the provisions of the following:

- (i) The Act.
- (ii) The regulations in this part.
- (iii) Other applicable Federal statutes and regulations.

(b) A State may not issue rules, regulations, or policies that limit State agencies' or local educational agencies' decisions affecting funds received under this part regarding—

- (1) Grade levels to be served;
- (2) Basic skill areas to be addressed;
- (3) Instructional settings, materials, or teaching techniques to be used;
- (4) Instructional staff to be employed, so long as the staff meets State certification and licensing requirements for education personnel; or
- (5) Other essential support services.

(c) Nothing in paragraph (b) of this section limits a State educational agency's—

- (1) Authority to review and approve a State agency's or local educational agency's application; or
- (2) Responsibility to ensure that a State agency or local educational agency uses funds under this part in accordance with all applicable requirements.

(d) The State shall identify any State rule, regulation, or policy relating to the administration and operation of Chapter 1 Handicapped programs funded under this part, including those based on State interpretation of any Federal law, regulation, or guideline, as a State-imposed requirement.

(e)(1)(i) Except as provided in paragraph (e)(1)(ii) and (iii) of this section, if a State issues major rules or regulations relating to the administration or operation of programs funded under this part, the State shall convene a State committee of practitioners to review before publishing any major proposed or final rule or regulation.

(ii) In an emergency situation in which a major rule or regulation must be issued within a very limited time to assist State agencies and local educational agencies with the operation of programs under this part, the State—

(A) May issue the regulation without consulting the committee of practitioners; but

(B) Shall immediately thereafter convene the State committee of practitioners to review the emergency rule or regulation prior to issuance in final form.

(iii) The State shall ensure that the committee of practitioners reviews non-major rules or regulations before publication.

(2) If a State does not issue rules or regulations relating to the administration or operation of programs funded under this part but issues policies that the State educational agency, other State agencies, and local educational agencies are required to follow, the State must comply with the requirements in this section for issuing rules and regulations.

(3)(i) The committee of practitioners must include—

- (A) Administrators;
- (B) Teachers;
- (C) Parents;
- (D) Members of local boards of education; and
- (E) Representatives of private school children.

(ii) A majority of the committee must be representatives of State agencies and local educational agencies.

(iii) Members of the committee must be knowledgeable about the Chapter 1 Handicapped program.

(4) State educational agencies are encouraged to request from appropriate organizations recommendations for membership on the committee.

(Authority: 20 U.S.C. 2792, 2851)

§§ 302.68–302.69 [Reserved]

Note: This Appendix will not be codified in the Code of Federal Regulations.

Appendix—Analysis of Comments and Changes

Subpart A—General

Section 302.1 What is the Chapter 1 State Operated or Supported Programs for Handicapped Children Program?

Comment: Some commenters requested clarification of the phrase "have been fully served" in § 302.1(c) and questioned how the State educational agency could make this determination so that other handicapped infants, toddlers, and children could participate under this part.

Discussion: The Secretary agrees that the clarification requested by these commenters is needed. The phrase, "have been fully served," reflects a new statutory requirement and is taken directly from section 1225(b) of the Act, which describes eligible children under this part. Formerly, children could be served in this program on a space available basis if they were otherwise eligible to be counted but were not enrolled in a program or project on the count date. However, under the new statutory provision, priority for services is not given to children counted. Instead, priority for services under this part is given to all of the handicapped infants, toddlers, and children aged birth through twenty-one who are described in § 302.1(a) and (b), and who are receiving either special education and related services in accordance with an IEP under part B of the EHA or early intervention services in accordance with an IFSP under part H of the EHA. If the State educational agency determines that all of these infants, toddlers, and children are so served, then other handicapped infants, toddlers, and children who do not meet the description in § 302.1(a) and (b) also may participate in programs and projects assisted under this part.

Change: Paragraph (c) is changed to specify when other handicapped infants, toddlers, and children may be served.

Section 302.2 Who Is Eligible for an Award?

Comment: Some commenters requested that local educational agencies that serve children who have not transferred from State-operated or State-supported programs be allowed to qualify as eligible subgrantees under this part if:

- (1) The local educational agency programs were programs providing special education and related services that were intended to facilitate the deinstitutionalization of handicapped children; or
- (2) The local educational agency programs were programs providing early intervention services to handicapped infants and toddlers.

Discussion: The Secretary has no authority to expand the categories of local educational agencies that are public agencies eligible to receive subgrants under this part. Under section 1221(d) of the Act, the only local educational agencies that are eligible subgrantees under this part are local educational agencies that serve handicapped children who have transferred to a local

educational agency program from a program operated or supported by a State agency that was directly responsible for providing special education and related services, and if those children were receiving a free appropriate public education in the State agency program and continue to receive a free appropriate public education in the local educational agency program. Thus, the change requested by these commenters cannot be made.

Change: None.

Comment: One commenter asked for clarification as to whether the State agency that is the part H lead agency could be an eligible grantee under this part in States where the State educational agency is not the lead agency for the program under part H of the EHA.

Discussion: Under section 1221 of the Act, a State educational agency must submit an application to the Secretary in order to receive assistance under this part. Thus, the statute makes the State educational agency the sole eligible grantee in each State under this part, regardless of whether a State's lead agency for the part H program is the State educational agency or another State agency, as defined in 34 CFR 302.5(e). Therefore, the Secretary is without statutory authority to make the change suggested by this commenter. However, a State agency that is the State's lead agency for the program under part H of the EHA is eligible to receive a subgrant under this part if it meets the eligibility conditions in § 302.2(b)(1).

Change: None.

Section 302.4 What Regulations Apply?

Comment: One commenter requested that the Secretary make 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) applicable to this part in order to make this part consistent with parts B and H of the EHA.

Discussion: The Secretary has determined that the change requested by this commenter should not be made. The approach outlined in the proposed regulations made 34 CFR part 80 applicable to this part unless States chose to formally adopt their own written procedures for expending and accounting for funds received by the State educational agency, other State agencies, and local educational agencies. At the Education Summit, which took place in September 1989, the Department made a commitment to give States flexibility in Department regulations. Therefore, the Secretary has modified the applicability of EDGAR in these final regulations in ways that balance the important principle of minimum Federal interference in State and local affairs with the need for all States to have appropriate systems of financial accountability. Section 302.4(a)(4) of the proposed regulations has been deleted, and a new paragraph (b) has been added, which requires States to have fiscal and administrative requirements for expending and accounting for all funds received by the State educational agency, other State agencies, and local educational agencies. Under this revised requirement, States have the option of using fiscal and administrative requirements applicable to the use of their own funds, adopting new fiscal

and administrative requirements, or applying part 80 requirements to satisfy their obligation to ensure fiscal and administrative accountability of funds expended by recipients of Chapter 1 Handicapped program funds.

The changes in these final regulations conform to the parallel requirement contained in regulations for chapter 2 of title I of the Elementary and Secondary Education Act of 1965 in 34 CFR part 298 (Federal, State, and Local Partnership for Educational Improvement). For a description of the changes and the reasons for adopting them, see 55 FR 14810 (April 18, 1990). The Secretary does not believe that this approach need be inconsistent with parts B and H of the EHA, since part 80 requirements are applicable to those programs, and recipients of Chapter 1 Handicapped program funds have the option of applying Part 80 requirements in meeting their responsibilities to ensure financial accountability of Chapter 1 Handicapped program funds.

Change: Section 302.4(a)(4) of the proposed regulations is deleted. A new paragraph (b) has been added to § 302.4, which conforms to the parallel requirement in 34 CFR part 298, as discussed above.

Comment: Several commenters sought clarification of proposed § 302.4(d), redesignated as § 302.4(e) in these final regulations, and the extent to which the regulations for part H of the EHA in 34 CFR part 303 are applicable to this part. These commenters recommended that the part H regulations be made fully applicable to this part and requested that proposed § 302.4(d) be modified to read "public agencies receiving funds under part H [of the EHA]."

Discussion: Under section 1224(c)(1) of the Act, public agencies must assure, in their applications for subgrant funds under this part, that all handicapped infants and toddlers in the State participating under this part receive early intervention services, and these infants and toddlers and their families are provided the rights and procedural safeguards under part H of the EHA. Further, sections 1221(b)(1) of the Act requires the State educational agency to include a similar assurance in its application to the Secretary for grant funds under this part. Therefore, the Secretary has determined that the regulation in § 302.4(e) must provide that the assurances required by section 1221(b) and 1224(c) of the Act apply to all public agencies receiving assistance under this part that provide early intervention services and are not limited only to agencies receiving part H funds.

In addition, at section 1221(b)(2), the statute vests in the Secretary the discretion to determine the extent to which requirements in part H of the EHA will apply to this part. The Secretary has determined that the regulations in 34 CFR part 303 governing the rights and procedural safeguards afforded to handicapped infants and toddlers and their families are the appropriate provisions to be made applicable to public agencies receiving funds under this part regardless of whether a public agency receives part H funds.

Change: None.

Section 302.5 What Definitions Apply to the Program?

Comment: Several commenters asked that the definition of "handicapped children" in part B of the EHA at 34 CFR 300.5 be made fully applicable to this part.

Discussion: The Secretary agrees with these commenters that the definition of "handicapped children" used in the proposed regulations for this part also should have included 34 CFR 300.5(a) of the part B definition, which describes "handicapped children" as "children evaluated in accordance with 34 CFR 300.530-300.534 as having one or more of the specified physical or mental impairments defined in § 300.5(b)(1)-(11), which cause them to need special education and related services." However, the applicability of this definition to this part has been modified to exclude individuals from birth through age two to avoid potential confusion with the definition of handicapped infants and toddlers in § 302.5(e) of these regulations.

Change: The definition of "handicapped children" in 34 CFR 302.5(e) of the proposed regulations is deleted. Section 302.5(c) is changed by adding "Handicapped children (34 CFR 300.5) except for individuals from birth through age two" after "Free appropriate public education (34 CFR 300.4)".

Comment: Several commenters asked for clarification of the differences between the categories of infants and toddlers defined as "handicapped infants and toddlers" under § 302.5(e) and the population of infants and toddlers who are not handicapped but are at risk of becoming developmentally delayed if early intervention services are not provided. Some of these commenters stated that the definition of "handicapped infants and toddlers" in this part was too narrow and requested that it be broadened to permit States that include in their part H program infants and toddlers who are at risk of becoming developmentally delayed if early intervention services are not provided to count those children under this part.

Discussion: The Secretary has determined that no change can be made since the statute requires that all infants and toddlers participating under this part must be diagnosed as having physical or mental impairments that cause them to need early intervention services. While the Secretary recognizes that some confusion could arise in States participating under part H of the EHA, the Secretary has no authority under this part to broaden the definition of "handicapped infants and toddlers" to include infants and toddlers who are at risk of becoming developmentally delayed if early intervention services are not provided.

Change: None.

Comment: One commenter recommended that the definitions of "State agency" and "State-operated program" be broadened to include local educational agency programs, if those programs were established to serve handicapped children who, prior to the implementation of EHA-B's least restrictive environment requirements, would have been placed in programs that were formerly operated in State institutions.

Discussion: The Secretary has no statutory authority to make the change recommended by these commenters, since it would expand the categories of local educational agencies that are eligible for subgrants under this part. By statute, the only local educational agencies that are eligible for subgrants under this part are local educational agencies that serve transfer students (see discussion on § 302.2 regarding eligible public agencies under this part).

Change: None.

Comment: One commenter asked that the definition of "State agency" in § 302.5(e) be clarified to ensure that a State agency other than the State educational agency that is responsible for the provision of early intervention services to handicapped infants and toddlers could be eligible for a subgrant under this part.

Discussion: The Secretary does not believe that clarification is needed. The term "State agency," as defined in § 302.5(e) of these final regulations, includes any State agency that has direct responsibility established under State statute, State regulation, signed agreement between respective agency officials, or other documents, for providing free appropriate public education or early intervention services to handicapped infants, toddlers, or children enrolled in schools or programs operated or supported by the State agency. Under § 302.2(b)(1) of these regulations, State agencies that operate or support schools or programs for handicapped infants, toddlers, or children are eligible to receive subgrants under this part. Thus, regardless of whether the State educational agency is the State's lead agency for the part H program, a State agency that is directly responsible for the provision of early intervention services to handicapped infants and toddlers and that operates or supports a program providing early intervention services to those handicapped infants and toddlers is eligible for a subgrant under this part.

Change: None.

Subpart B—How does a State Apply for a Grant

Section 302.11 What Must Be Included in an Application for a Grant?

Comment: Many commenters stated that the provisions in § 302.11 (a)(1) and (a)(2), requiring a State educational agency to assure that it will exercise general supervision over programs and projects assisted under this part, would be difficult to implement for programs for handicapped infants and toddlers in States where the State educational agency is not the lead agency for the program under part H of the EHA. These commenters requested that the language in § 302.11(a)(2) "meets the education standards of the State educational agency" be supplemented with the language "and the part H lead agency (where the lead agency for the part H program is not the State educational agency)." The specific concerns of these commenters were:

(1) It is inappropriate for the State educational agency to develop standards for programs for handicapped infants and toddlers participating in programs and projects under this part; and

(2) The policies of the State educational agency that have formerly governed

programs and projects assisted under this part for children aged birth through two were not written for the part H program and are, therefore, inapplicable to current programs and projects assisted under this part that are designed to supplement the provision of early intervention services to handicapped infants and toddlers.

Discussion: The Secretary agrees that the regulations should be clarified to provide that the appropriate standards for programs and projects that are designed to supplement the provision of early intervention services to handicapped infants and toddlers are the standards in 34 CFR part 303, which implement the part H Early Intervention Program. Under a new statutory requirement in section 1221(b)(2) of the Act, the State educational agency is responsible for general supervision of programs and projects assisted under this part providing both special education to handicapped children and early intervention services to handicapped infants and toddlers. Thus, the State educational agency applies the early intervention standards in 34 CFR part 303 to programs and projects providing early intervention services.

Change: Section 302.11(a)(2) is changed by adding a new paragraph (a)(2)(ii) which specifies that early intervention standards consistent with 34 CFR part 303 apply to early intervention program services.

Comment: A number of commenters were concerned that the requirement at § 302.11(e) that the State educational agency monitor compliance under this part would cause administrative burdens for State educational agencies and part H lead agencies and strongly recommended that this regulation be expanded to specify applicable procedures for compliance. These commenters believed that in States where the State educational agency is not the lead agency for the program authorized under part H of the EHA, it would not be necessary for the State educational agency to monitor programs and projects assisted under this part that are designed to supplement the provision of early intervention services to handicapped infants and toddlers and suggested that the part H lead agency could assume this responsibility.

Discussion: The Secretary agrees with these commenters that some clarification is needed. Under section 1221(b)(2) of the Act, the State educational agency is specifically required to monitor programs and projects assisted under this part for compliance with parts B and H of the EHA. The Secretary believes that one effective and efficient way of meeting the responsibility for monitoring early intervention programs would be for the State educational agency to conduct joint monitoring visits with the part H lead agency.

Change: A comment is added following § 302.11 regarding a State educational agency's responsibility to monitor programs and projects that are designed to supplement the provision of early intervention services to handicapped infants and toddlers.

Comment: One commenter requested that clarification be added to § 302.11(h) to indicate that section 618(b)(1) of the EHA does not require that handicapped infants and toddlers be counted according to disability category.

Discussion: The Secretary agrees with this commenter that clarification is needed. The

requirement in § 302.11(h)(1)(i) of these final regulations is taken directly from section 1221(b)(5)(A) of the Act, which requires the State educational agency to report annually to the Secretary the number of children served under this part for each disability and age category as described in part B of the EHA. Under section 618(b)(1) of the EHA, the State educational agency is required to report annually to the Secretary only "the number of handicapped infants, toddlers, children and youth in each State receiving a free appropriate public education or early intervention services in age groups from birth through 2 and 3 through 5." However, unlike requirements that govern age groups six through twenty-one, which also provide that reporting be done by disability category, there is no reporting requirement in the EHA that the population of handicapped infants, toddlers, and children from birth through age five be counted by disability category. The Secretary is particularly concerned that this population of handicapped infants, toddlers, and children served under the EHA and the Chapter 1 Handicapped program not be unnecessarily labeled with specific handicapping conditions. Therefore, the Secretary has determined that changes are necessary.

Change: Section 302.11(h) is changed to clarify that States are not required to report data on handicapped infants, toddlers, and children from birth through age five by disability category.

Comment: Some commenters asked for clarification as to why reporting requirements for this part that are applicable to State educational agencies require only a description of handicapped children in educational placements and do not require a description of handicapped infants and toddlers in early intervention programs.

Discussion: The requirement in § 302.11(h)(2) of these final regulations is taken directly from section 1221(b)(5)(B) of the Act, which incorporates by reference section 618(b)(2) of the EHA. Section 618(b)(2) of the EHA does not require the collection of data on placements for handicapped infants and toddlers. However, section 1221(b)(6) of the Act also provides an assurance that the State educational agency will report to the Secretary such other information as the Secretary may reasonably request. This assurance is reflected in § 302.11(i) of these final regulations.

The Secretary is especially concerned that to the extent appropriate, all handicapped infants and toddlers receiving early intervention services under this part are provided those services in the types of settings in which infants and toddlers without handicaps would participate, in accordance with 34 CFR 303.12(b) of the regulations for part H of the EHA. Thus, pursuant to his authority under section 1221(b)(6) of the Act, the Secretary has determined that the State educational agency must report annually to the Secretary data on the locations of early intervention services provided to handicapped infants and toddlers participating in programs and projects assisted under this part. Therefore, the Secretary believes that no change is

necessary since this data collection is consistent with the Secretary's statutory authority to impose reasonable reporting requirements that apply to each State educational agency receiving assistance under this part.

Change: None.

Subpart C—How Does the Secretary Make a Grant to a State.

Section 302.22 Which Children Are To Be Counted?

Comment: One commenter requested that there be a requirement that infants and toddlers be counted under the definition of developmental delay rather than on the basis of category of handicapping condition.

Discussion: The definition of "handicapped infants and toddlers" in § 302.5(e) of these final regulations requires either that an individual from birth through age two experience a developmental delay as measured by appropriate diagnostic instruments in one of the specified areas or have a diagnosed physical or mental condition that has a high probability of resulting in a developmental delay. The definition of "handicapped infants and toddlers" used in this part is consistent with the statutory definition of "handicapped children" in section 1221(a)(2)(B) of the Act and the Department's longstanding policy that all participants under this part must have diagnosed handicapped conditions. By contrast, the term "developmental delay," as defined in 34 CFR 303.300 in the regulations for part H of the EHA, does not require the existence of a diagnosed physical or mental condition "as measured by appropriate diagnostic instruments and procedures" in areas of cognitive, physical, language and speech, and psychosocial development or self-help skills. Therefore, the Secretary has determined that the change requested by this commenter cannot be made.

Change: None.

Comment: Several commenters objected to the requirement in § 302.22(a)(2)(i) prohibiting local educational agencies from counting a handicapped infant, toddler, or child under this part as a transfer student, unless that student had been enrolled in a State operated or supported program for at least one school year, as that period is defined under State law, prior to transfer to a local educational agency program. Some commenters requested that the one school year requirement be eliminated entirely since it would exclude infants and toddlers from being eligible to be counted under the transfer provision. One commenter requested that the time period be shortened to three months, since new techniques and more extensive therapy programs could expedite the transfer of children placed in institutions to local educational agency programs. One commenter also suggested that an exception to the one school year requirement be made for handicapped infants and toddlers who are served in early intervention programs for less than one school year and become eligible to receive special education and related services from a local educational agency program when they reach age three. One commenter requested that "early intervention services" be added following the words "was

receiving and continues to receive a free appropriate public education" to clarify that the transfer provision includes students who were receiving early intervention services in a State agency program.

Discussion: The Secretary has determined that some clarification is needed, but that the changes requested by these commenters cannot be made. These final regulations retain the requirement in the prior regulations for this part, previously codified at 34 CFR 302.41(a)(3)(ii), that a transfer student must have been enrolled in a State operated or supported program for at least one school year, as that period is defined under State law for schools serving handicapped as well as nonhandicapped infants, toddlers, and children, in order to be counted for the purpose of generating funds under this part. Without this stipulation, the Secretary is concerned that students who are enrolled in programs under this part for shorter periods of time would be eligible to be counted and to generate funding under the transfer provision until they reached age twenty-two. Thus, the Secretary has determined that the one school year requirement should be retained in these final regulations.

In addition, the statute requires that in order for a local educational agency to count a handicapped child under the transfer provision, that child must have been enrolled in a school or program operated or supported by a State agency, including schools or programs under contract or other arrangement. By statute, such a child must have been receiving a free appropriate public education in the State operated or supported program and must continue to receive a free appropriate public education in a local educational agency program. Thus, the one school year enrollment requirement applies to educational programs providing free appropriate public education and not to programs providing early intervention services.

The Secretary believes, however, that some clarification is needed with respect to the eligibility of handicapped infants and toddlers to become transfer students. The only circumstance under which handicapped infants and toddlers can become eligible to be counted as transfer students is if they received a free appropriate public education from a State agency program in a State participating in the Part H program during the phase-in period for part H services, consistent with § 302.63 of these final regulations. In addition, during the previous fiscal year, the State must have received a Part H grant award, and must be receiving a Part H grant award for the first fiscal year in which the handicapped child is counted as a transfer student. Consequently, handicapped infants and toddlers, even those who enrolled in programs operated or supported by a State agency in which they were receiving early intervention services for one school year, as that period is defined by State law, are ineligible to be counted under the local educational agency transfer provision.

Changes: Section 302.22 has been changed by adding a new paragraph (a)(3) to clarify when handicapped infants and toddlers may become transfer students. A new paragraph (c) has also been added to § 302.22 to clarify

that the only children who may be included in the count of children enrolled on December 1 are handicapped children who are receiving a free appropriate public education and except as provided in § 302.63(a) of these final regulations, handicapped infants and toddlers who are receiving early intervention services at no cost to parents, consistent with § 302.63(c) of these final regulations.

Comment: One commenter requested that § 302.22(b)(1) be clarified to provide that a duplicate count of neglected and delinquent handicapped children under this part and the chapter 1 program for neglected and delinquent children is permissible only when these handicapped children are served in State operated programs for neglected and delinquent children, and it is impermissible for handicapped children served in local institutions for neglected and delinquent children.

Discussion: The Secretary does not believe that the change suggested by this commenter is needed since local institutions for neglected and delinquent children are not public agencies that are eligible for subgrants under this part unless they are local educational agencies that serve transfer students. These final regulations retain the provision in the proposed regulations permitting handicapped children participating under this part to be counted under both this part and the Chapter 1 Programs for Neglected and Delinquent Children program, if they are eligible to be counted and served under both programs. This provision is derived from section 1292 of the Act and encompasses all eligible children enrolled in State operated or supported programs for neglected and delinquent children or in adult correctional institutions.

If the local institutions described by this commenter operate programs under contract or other arrangement with a State agency directly responsible for the provision of special education and related services to handicapped children, that State agency could receive a subgrant under this part and would be eligible to count the handicapped children enrolled in that local institution's program. Therefore, the Secretary has determined that no change is needed.

Change: None.

Section 302.23 Which Individuals May Not Be Counted?

Comment: One commenter asked for clarification as to whether it is permissible to count a handicapped infant or toddler under both this part and part H of the EHA.

Discussion: Funds under part H of the EHA are not distributed to State educational agencies based upon a child count of handicapped infants and toddlers who are being served. Nothing in part H or this part prohibits a State from both counting all handicapped infants and toddlers being served under this part and receiving its full part H grant award.

Change: None.

Comment: Several commenters expressed the view that under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, all infants and toddlers eligible under part H of

the EHA are eligible to be counted under this part. Other commenters supported proposed § 302.23(d), redesignated as § 302.23(b) in these final regulations, which prohibits the counting of infants and toddlers who are at risk of becoming developmentally delayed if early intervention services are not provided. These commenters were concerned that the scope of the "at risk" population of infants and toddlers is so broad that their participation under this part would jeopardize the continuation of the Chapter 1 Handicapped program.

Discussion: The Secretary agrees with those commenters who endorse the prohibition against counting "at risk" infants and toddlers under this part. Further, the Secretary is without authority to expand the statutory criteria for children eligible to be counted or served under this part to include "at risk" infants and toddlers. The statute requires that all handicapped infants, toddlers, or children participating in programs or projects assisted under this part be diagnosed as having physical or mental impairments, who by reason of those impairments, in the case of handicapped children, require special education and related services or, in the case of handicapped infants and toddlers, require early intervention services. Thus, without the prohibition against counting "at risk" infants and toddlers, a broad population of "at risk" infants and toddlers, so designated under State definitions, could be incorrectly identified as handicapped and unnecessary labeled as having specified handicapping conditions. Therefore, the Secretary has determined that no change should be made.

Change: None.

Comment: One commenter recommended that proposed § 302.23(d) be changed to exclude only those infants and toddlers who are at environmental risk but to include infants and toddlers who have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

Discussion: The Secretary believes that the change requested by this commenter is not needed since the entire population of "at risk" infants and toddlers, regardless of the etiology of the risk, is ineligible to be counted or served under this part. (see discussion of § 302.5(e) regarding the definition of "handicapped infants and toddlers".) Further, no change in this provision is warranted since under § 302.22(a) those infants and toddlers with diagnosed physical or mental conditions, with a high probability of resulting in developmental delay, are included within the definition of handicapped infants and toddlers in § 302.5(e) of these final regulations and are eligible to be counted and served under this part.

Change: None.

Section 302.24 Which Agency Must Count a Child Receiving Services From More Than One Agency?

Comment: One commenter asked that this regulation be clarified with respect to handicapped infants and toddlers who receive early intervention services from more than one agency.

Discussion: The Secretary agrees that the clarification requested by this commenter is

needed. This regulation was taken from prior regulations for the Chapter 1 Handicapped program, previously codified at 34 CFR 302.42. However, under the new statutory requirement in section 1221(c)(1)(ii) of the Act, the State agency that is primarily responsible for the provision of early intervention services to handicapped infants and toddlers participating in programs or projects assisted under this part must count those handicapped infants and toddlers under this part, if they receive early intervention services from more than one State agency.

Change: Section 302.24 is revised to include early intervention services and to clarify which State agency must count a handicapped infant or toddler receiving early intervention services from more than one State agency.

Subpart D—How Does an Applicant Apply for a Subgrant?

Section 302.30 What Are the Requirements for a State Agency or Local Educational Agency To Receive a Subgrant?

Comment: One commenter recommended that § 302.30(c)(2) be amended to require grantees to submit budgets for the three fiscal years covered by the grant application submitted under this part.

Discussion: The Secretary does not believe that the change recommended by this commenter is needed. Section 1224(b)(5) of the Act requires a subgrantee to include an assurance in its application for a subgrant that it will provide other information that the Secretary or State educational agency may reasonably request. Thus, the Secretary has determined that under § 302.30(c) of these final regulations, subgrantees must update, on an annual basis, certain categories of information in their applications, including data concerning a budget for the projected expenditure of funds under this part for the fiscal year for which funds are being awarded. The Secretary believes that an annual requirement is more appropriate than a triennial requirement since it would more accurately reflect current expenditures. Further, the Secretary does not believe that this requirement imposes an undue administrative burden on subgrantees.

Change: None.

Section 302.31 What are the Contents of an Application for a Subgrant?

Comment: One commenter asked that the term "infants and toddlers" referenced in subsection (b)(1) be used in conjunction with the term "children." A number of commenters also recommended the need to clarify whether § 302.31(b)(1) and § 302.31(b)(2) are separate and distinct requirements.

Discussion: The Secretary agrees that the change requested by this commenter is needed to clarify that the projected data required in an application for a subgrant under this part must include handicapped infants, toddlers, and children.

The Secretary also agrees that the clarification recommended by these commenters is needed to differentiate the data collection requirements for handicapped infants, toddlers, and children aged birth through five years and handicapped children

aged six through twenty-one years. Although § 302.31(b)(1) is a data requirement for the total number of handicapped infants, toddlers, and children to be served, § 302.31(b)(2) requires that data on the total number of handicapped infants, toddlers, and children referenced in paragraph (b)(1) be divided by disability and age category. However, as previously discussed in § 302.11(h) of these final regulations, there is no requirement in this part or the EHA that data be collected on handicapped infants and toddlers or handicapped children aged birth through five by disability category. Data by disability category are to be reported only for handicapped children aged six through twenty-one. Therefore, to clarify these requirements, the Secretary has determined that changes are needed.

Change: Paragraphs (b)(1) and (b)(2) of § 302.31 are changed to clarify these data requirements.

Comment: A number of commenters asked that the reference in § 302.31(b)(2) to 34 CFR 300.751 of the regulations under part B of the EHA be deleted because it appears to exceed the statute.

Discussion: The Secretary does not agree that the reference to 34 CFR 300.751 of the regulations for part B of the EHA exceeds the statute. Under section 1221(b)(5) of the Act, the State educational agency must provide an assurance in its application for assistance under this part that it will report annually to the Secretary the number of children served under this part for each disability and age category as described in part B of the EHA. Further, sections 1224(b)(1) and (2) of the Act require a subgrantee to submit this information in its application for a subgrant under this part. Thus, the reference to 34 CFR 300.751, which describes annual reporting requirements for handicapped children served under part B of the EHA, is consistent with these statutory requirements. The Secretary is also especially concerned that similar data is collected on handicapped children served under this part and part B of the EHA, since it has been the Secretary's practice to aggregate the information for the EHA and this part in the annual report to Congress. In addition, the Secretary requires the State educational agency to use the same reporting format in reporting children served under this part and part B of the EHA. Therefore, the Secretary has determined that no change is needed.

Change: None.

Comment: Several commenters asked whether it is permissible to use the actual child count data in an application for a subgrant under this part in lieu of projected data on children to be served.

Discussion: The Secretary recognizes that subgrantees may use actual child count data if it is available at the time of their applications and would accurately reflect the number of handicapped infants, toddlers, and children to be served.

Change: None.

Comment: One commenter objected to § 302.31(b)(5), which requires that a description of the opportunities parents have to participate in the development of an application for a subgrant be included in a

subgrantee's application because this requirement exceeds the statute.

Discussion: Section 1224(c)(6) of the Act provides that a subgrantee include in its application an assurance that parents are provided an opportunity to participate in the development of the project application. In addition to this assurance, § 302.31(b)(5) of the proposed regulations also required a subgrant application to include a description of "the opportunities that parents will have to participate in the development of the project application." Contrary to the position of the commenter, the Secretary believes that under the Act, the Secretary has authority to require that project applications contain such information as is necessary to insure that the obligation to provide parents the opportunities to participate in the development of the project application is met. Since the project application is not submitted to the State until parents have had opportunities to participate in its development, the provision has been revised to require that this information be submitted with the project application.

Change: Section 302.31(b)(5) is changed to require a description of the opportunities that parents have received to participate in the development of the project application.

Section 302.32 What Are the Simplified Application Procedures for Certain Local Educational Agencies?

Comment: One commenter asked whether a local educational agency also may make a letter of request for payment to generate funds under this part to supplement the provision of early intervention services.

Discussion: Section 1224(d)(1) of the Act gives a State educational agency the option of accepting, in lieu of a project application, a letter of request for payment from a local educational agency if that local educational agency intends to serve fewer than five children. The statute requires that those letters of request include an assurance that the payment will be used to supplement the provision of special education and related services. However, the only local educational agencies eligible to receive subgrants under this part, whether they submit a project application or a letter of request, are local educational agencies that serve transfer students. In order for a handicapped infant or toddler to become eligible to be counted as a transfer student, that student must have transferred from an educational program for handicapped children operated or supported by a State agency in order to participate in a program operated or supported by a local educational agency. In addition, that student must have received a free appropriate public education in the State operated or supported program for at least one school year, as that period is defined by State law for schools serving handicapped as well as nonhandicapped infants, toddlers, and children, and must continue to receive a free appropriate public education in the local educational agency program. (See discussion under § 302.22(a)(3)). The term "free appropriate public education" is defined in section 602(18) of the EHA and 34 CFR 300.4 as including "special education and related services," and does not include "early

intervention services," as defined in part H of the EHA. Therefore, the Secretary has determined that no change can be made.

Change: None.

Comment: One commenter requested that a local educational agency be allowed to submit a letter of request for payment to the State educational agency, in lieu of a project application for a subgrant, if it is serving fewer than five students enrolled in a program operated under contract or other arrangement with a State agency.

Discussion: As discussed under the previous comment, the option of making a letter of request for payment, in lieu of a project application, is available only to local educational agencies that intend to serve fewer than five transfer students. The statute does not extend the letter of request option to local educational agencies that serve handicapped infants, toddlers, or children under contract or other arrangement with a State agency since it is the State agency, not the local educational agency, that is the public agency eligible to receive a subgrant under this part. (See discussion of § 302.2). Therefore, the Secretary has no statutory authority to make the change requested by this commenter.

Change: None.

Subpart E—How Does a State Make a Subgrant to an Applicant?

Section 302.40 How Does the State Educational Agency Determine the Amount of a Subgrant to a State Agency?

Comment: One commenter asked that proposed §§ 302.41 and 302.42 be changed to provide that a local educational agency is eligible for funds under this part if it serves any eligible children, not just those who transfer from a State supported or State operated program to a local educational agency program.

Discussion: Section 1224(a) of the Act provides that local educational agencies may apply for subgrants under this part only to serve transfer students who were previously enrolled in State operated or supported programs under this part and were receiving a free appropriate public education from a State agency program and continue to receive a free appropriate public education from the local educational agency program. There is no other statutory provision authorizing the State educational agency to make subgrants to local educational agencies who serve other handicapped infants, toddlers, or children. (See discussion under § 302.2). The Secretary emphasizes that under section 1225(2) of the Act, other handicapped children may participate in programs and programs funded under this part if all the handicapped children who have transferred are fully served. However, the local educational agencies cannot count those handicapped children for the purpose of receiving a subgrant under this part.

Change: None.

Section 302.41 How Does the State Educational Agency Determine the Amount of a Subgrant to a Local Educational Agency?

Comment: One commenter requested clarification of whether proposed § 302.42(a) would make it permissible for local

educational agencies to count under the transfer provision eligible children who were served but were not counted by the responsible State agency on the previous December 1.

Discussion: Section 1221(d)(1) of the Act provides that if a handicapped infant, toddler, or child leaves an educational program operated or supported by a State agency to participate in a program operated or supported by a local educational agency and was receiving and continues to receive a free appropriate public education, that child shall be counted under the local educational agency transfer provision. Further, § 302.22(a)(2) of these final regulations provides that in order for a handicapped child to be counted by a local educational agency as a transfer student, that student must have been enrolled in a State operated or supported program for at least one school year, as that period is defined by State law. Thus, under § 302.42(a) of these final regulations, a local educational agency may receive the total amount of funds generated by a transfer student only if that transfer student had been counted the previous December 1 according to the requirements in § 302.22(a)(1) and (a)(2).

Change: Section 302.41, previously § 302.42 in the proposed regulations, is changed by adding "§ 302.22(a)(1) and" before the references to § 302.22(a)(2).

Section 302.42 How Are Funds Attributable to Children Who Leave the Local Educational Agency Distributed?

Comment: Several commenters were concerned that proposed § 302.43 does not address the option of the State educational agency to determine whether a State agency may retain funds or must transfer those funds to local educational agencies.

Discussion: The Secretary believes that the change requested by these commenters is not authorized under the Act. Therefore, the Secretary has determined that no change is needed.

Change: None.

Comment: One commenter objected to the provision in proposed § 302.43 requiring a local educational agency to notify the State educational agency when any child counted as a transfer student leaves the local educational agency's program. This commenter believed that under the Chapter 1 Handicapped program, the funds do not have to follow each child, and requested that the requirement be deleted or be made optional on the part of the State educational agency.

Discussion: The Secretary does not agree with the changes requested by this commenter since this requirement is necessary to enable the State educational agency to determine that the transfer of funds to a local educational agency is permissible. Under section 1221(d) of the Act, a local educational agency may count a handicapped student under the transfer provision if that handicapped student leaves a State operated or supported program which provides a free appropriate public education and is participating in a local educational agency program that continues to provide a free appropriate public education. Further, under

section 1221(d)(2) of the Act, a State educational agency may transfer funds to a local educational agency only for those children participating in a local educational agency program. Thus, to ensure that these statutory requirements are satisfied, § 302.42 of these final regulations provides that a local educational agency must notify the State educational agency when a handicapped child counted under the transfer provision leaves a local educational agency program or project. This requirement is consistent with the statutory requirement that a handicapped child must participate in a local educational agency program in order to be counted under the transfer provision. Upon receipt of this notice from the local educational agency, the State educational agency then has the option under § 302.42 of these final regulations of determining whether the funds attributable to that transfer student, which were distributed to that local educational agency, may be retained by the local educational agency, or whether all or a portion of those funds must be returned to the State educational agency. The Secretary believes that this requirement should be retained to ensure that a local educational agency receives funds under the transfer provision for handicapped children actually participating in its programs or projects. Therefore, the Secretary has determined that no change should be made.

Change: None.

Section 302.43 How Does the State Educational Agency Redistribute Excess Funds Under This Part?

Comment: Several commenters objected to the provision in proposed § 302.44 that State educational agencies could only redistribute excess funds on a per capita basis as described in § 302.42 (a) and (b) and requested that this section be modified to give each State the discretion to ensure that funds can be used to meet the greatest need within the State.

Discussion: The Secretary does not believe that additional clarification is needed. Section 302.43 of these final regulations authorizes the State educational agency to redistribute excess funds to other subgrantees when funds received by a subgrantee that were attributable to children counted under this part cannot be expended by that subgrantee during the period of availability. A State educational agency's allocation of excess funds to other subgrantees is based on the distribution procedure set out in § 302.40 (a) and (b) of these final regulations, under which the amount of a State agency's subgrant is determined on a per capita basis. Under § 302.43(b), however, the State educational agency may redistribute excess funds to subgrantees only when it determines that the subgrantee will be able to use the excess funds to carry out approved programs or projects under this part. Before the excess funds can be redistributed, the State educational agency must determine where there is a need for these excess funds and whether a subgrantee is able to use the additional funds for programs or projects assisted under this part. If the State educational agency determines that a subgrantee cannot use the excess funds for

approved programs or projects, no excess funds can be redistributed to that subgrantee. Therefore, since the procedures for redistribution of excess funds in this regulation give States the flexibility to redistribute excess funds to those subgrantees who can use additional funds for approved programs or projects the Secretary has determined that the change requested by this commenter is not needed.

Change: None.

Subpart F—What Fiscal Requirements Must Be Met by a State and Its Subgrantees?

Section 302.51 What Are Allowable Costs Under This Program?

Comment: One commenter asked for clarification of the language "including, but not limited to," as used in § 302.51(a) of the proposed regulations.

Discussion: The Secretary does not believe that the clarification requested by this commenter is needed, since the language "including, but not limited to" is taken directly from section 1223(a) of the Act. The Secretary interprets the statutory language "including, but not limited to" as affording State educational agencies the flexibility to use funds under this part for programs and projects not listed in the statute or these final regulations, provided those programs and projects would satisfy sections 1222 and 1223 of the Act and are included in a subgrantee's application in accordance with section 1224 of the Act and § 302.31 of these final regulations. Therefore, the Secretary has determined that no change is needed.

Change: None.

Comment: One commenter asked whether student transportation is an allowable expenditure under this part.

Discussion: The Secretary recognizes that 34 CFR 302.63 of prior regulations for the Chapter 1 Handicapped program specified the circumstances under which program funds could be used for transportation. However, the Secretary has determined that a similar requirement is not needed in these final regulations. Since transportation is an allowable expenditure under this part, the Secretary wishes to give States as much flexibility as possible in using funds under this part for allowable costs. The Secretary has decided not to impose any additional restrictions that were contained in prior regulations on the expenditure of funds under this part for transportation. Section 1222(a) of the Act provides that a State educational agency shall use payments under this part to support programs and projects that are designed to supplement the provision of special education and related services or early intervention services to handicapped infants, toddlers, and children. Section 1221(b) of the Act further requires that the State educational agency assure that all handicapped children participating in programs or projects funded under this part receive a free appropriate public education and such children and their parents are provided all the rights and procedural safeguards under part B of the EHA. Such an assurance must also provide that all handicapped infants and toddlers participating under this part receive early intervention services and that they and their

families receive all the rights and procedural safeguards in part H of the EHA. Under section 602(18) of the EHA and 34 CFR 300.4 of the regulations for part B of the EHA, a free appropriate public education includes the provision of special education and related services provided without charge and in conformity with an IEP. Further, the definition of related services at 34 CFR 300.13 of the regulations for part B of the EHA, which includes transportation at 34 CFR 300.13(b)(13), has been made applicable to this part by 34 CFR 302.5(c) of these final regulations. Transportation is defined as including travel to and from school and between school, as well as travel in and around school, that is required to assist a handicapped child to benefit from special education. In order for transportation to qualify as a related service, it must be included in the IEP of a handicapped child participating in programs and projects assisted under this part. As an element of free appropriate public education, it must be provided at no cost to parents. Similarly, the definition of "early intervention services" in 34 CFR 303.12(d)(14) made applicable to this part by § 302.5(d) of these final regulations, also includes transportation to and from and in and around, early intervention programs. The Secretary emphasizes that where transportation is included in the IFSP of a handicapped infant or toddler participating in programs or projects assisted under this part, the transportation must be provided at no cost to parents in accordance with § 302.63(c) of these final regulations.

The Secretary also believes that transportation is an allowable expenditure under this part for a handicapped infant, toddler, or child who is participating in an approved program or project under this part. Section 1223 of the Act provides examples of programs and projects for which funds under this part may be used, and this list of programs and projects is reflected in § 302.51(a)(1)-(11) of these final regulations. Under § 302.51(a)(1), transportation could be considered "services included in early intervention, preschool, elementary, secondary, and transition programs." Further, under § 302.51(a)(10), transportation could be considered an allowable cost as one of the "[o]utreach activities to involve handicapped infants, toddlers, and children and their families more fully in a wide range of educational and recreational activities in their communities." Therefore, the Secretary has determined that no change should be made.

Change: None.

Comment: One commenter suggested that § 302.51(a)(8), which makes it permissible for funds awarded under this part to be used for training of nonhandicapped children to facilitate their participation with handicapped infants, toddlers, and children in joint activities, be clarified to ensure that funds are not used for unauthorized purposes.

Discussion: The requirement in § 302.51(a)(8) is taken directly from section 1223(a)(8) of the Act, which makes it permissible for funds under this part to be used for programs and projects for the training of nonhandicapped children. The

Secretary does not believe that the clarification sought by this commenter is needed since under section 1224(a) of the Act, programs and projects funded under this part, described in a subgrantee's application, must be reviewed and approved by the State educational agency before funds can be awarded to a subgrantee. Thus, the State educational agency has responsibility for determining whether a program or project for training nonhandicapped children, described in a subgrantee's application, complies with the requirements of this part.

Change: None.

Comment: One commenter requested clarification of whether § 302.51(b) requires that parents cannot be charged for the cost of special education and related services provided only in connection with residential placement. Another commenter requested that § 302.51(b) be clarified to provide that charges for early intervention services required under this part for handicapped infants and toddlers and their families are allowable costs under this part.

Discussion: Section 1221(b) of the Act requires each State educational agency receiving assistance under this part to assure that all handicapped children participating in programs and projects under this part receive a free appropriate public education and that those children and their parents are afforded all the rights and procedural safeguards under part B of the EHA. Section 300.302 of the part B regulations specifically requires that where a public agency places a handicapped child in a public or private residential program in order to receive special education and related services, the program, including non-medical care and room and board, must be at no cost to parents. Because this provision along with the other part B requirements already applies to this part, it is not necessary to include it as a specific requirement at § 302.51(b). Section 302.4(d) of these final regulations specifically provides that the requirements in part B of the EHA at 34 CFR part 300 are applicable to this part with respect to the rights and procedural safeguards under part B of the EHA. The Secretary has determined based upon these two comments that the inclusion of § 302.51(b) in the list of allowable expenditures by States is unnecessary and confusing. In response to the second commenter, the Secretary believes that it is unnecessary, and would be inappropriate, to include the language in § 302.63(c) in § 302.51.

Change: The requirement in § 302.51(b) of the NPRM that parents cannot be charged for room and board is deleted from the list of allowable expenditures and incorporated as a comment following § 302.62.

Comment: One commenter objected to the requirement in proposed § 302.51(c) that funds awarded under this part not be used for the payment of tuition and fees and requested clarification regarding the intent of this prohibition. This commenter believed that in the past, funds awarded under this program have been used for the payment of tuition and fees related to summer school and recreation programs.

Discussion: The Secretary agrees with this commenter that a change is needed. Funds distributed under this part may not be used

for the payment of tuition and fees for special education and related services included in a handicapped child's IEP or for early intervention services included in a handicapped infant's or toddler's IFSP. However, the Secretary believes that it is permissible to expend Chapter 1 Handicapped program funds for tuition and fees only if such tuition and fees are associated with activities other than the special education and related services specified in a handicapped child's IEP or the early intervention services specified in a handicapped infant's or toddler's IFSP.

Change: Section 302.51(c) of the NPRM, redesignated as § 302.51(b), is changed to clarify that Chapter 1 Handicapped program funds may be expended for tuition and fees under certain circumstances.

Comment: One commenter requested that § 302.51 include a requirement that funds awarded under this part may not be used for construction.

Discussion: The Secretary does not agree that the clarification suggested by this commenter is needed here, as this provision is addressed elsewhere in these final regulations. Although construction costs were allowable expenses under the Chapter 1 Handicapped program in the past, section 1223(b) of the Act prohibits the use of Chapter 1 Handicapped program funds for construction costs. This prohibition is reflected in these final regulations at 34 CFR 302.4(a)(1)(iv), which incorporates by reference 34 CFR 76.533 of EDGAR. Section 76.533 provides that no State or subgrantee may use its grant or subgrant for construction unless specifically permitted by the authorizing statute or the implementing regulations for the program. Since the statute expressly prohibits the use of funds under this part for construction, the expenditure of Chapter 1 Handicapped grant or subgrant funds for construction is impermissible.

Change: None.

Section 302.52 What Maintenance of Effort Requirements Apply to the Programs and Projects Under This Part?

Comment: One commenter requested clarification of evidence of compliance with maintenance of effort requirements for expenditures of State and local funds for the provision of required services to handicapped infants and toddlers.

Discussion: The standard for compliance with the maintenance of effort requirement in § 302.52 for handicapped infants and toddlers who participate under this part is the same standard used for determining compliance with the maintenance of effort requirement for agencies serving handicapped children participating under this part. The Secretary recognizes that some confusion may arise in situations where State educational agencies, other State agencies, or local educational agencies previously have not provided services to handicapped infants and toddlers since these agencies would have no data on which to demonstrate maintenance of effort. In these situations, while the maintenance of effort requirement applies, such agencies need not demonstrate compliance with this requirement until the third fiscal year in which they apply for funds under this part for

programs and projects for handicapped infants and toddlers.

Change: None.

Comment: One commenter stated that in the past, maintenance of effort was figured in the same manner for all chapter 1 programs. In this commenter's view, § 302.52(a)(1) could be interpreted to require that maintenance of effort for the chapter 1 Handicapped program be based only on the fiscal effort for special education and early intervention services.

Discussion: The statute provides that maintenance of effort under this part must be in accordance with section 1018(a) of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, which refers to basic requirements for all chapter 1 programs. The maintenance of effort requirement is basically the same for all chapter 1 programs and is based on the provision of free appropriate public education, which includes the special education and related services and early intervention services provided to handicapped infants, toddlers, and children. Therefore, the Secretary does not believe that further clarification of this requirement is needed.

Change: None.

Section 302.56 What Funds Are Available to a State Educational Agency To Carry Out Its Responsibilities Under the Chapter 1 Handicapped Program?

Comment: One commenter requested that § 302.56 be changed to increase from one percent to five percent of a State educational agency's total grant award the amount that State educational agencies could expand for State administration under this part. This commenter believed that one percent was not a sufficient amount to enable the State educational agency to administer the Chapter 1 Handicapped program effectively.

Discussion: The Secretary has no authority to make the change requested by this commenter, since the one percent administrative cost allowance in prescribed in section 1404(a)(1) of the Act and applies to all chapter 1 programs. By statute, State educational agencies receiving one percent of their total grant award for all chapter 1 programs for State administration. Further, the Secretary believes that the one percent State administrative cost allowance is necessary to ensure that most of a State educational agency's total grant award for all chapter 1 programs in which that State educational agency participates is expended to provide supplemental services to children eligible for services under this part.

Change: None.

Comment: One commenter asked whether it would be appropriate for States whose lead agency for the part H program is not the State educational agency to reduce the flow through allowance by imposing an administering charge, and if so, what are the limitations for the percentage of this charge.

Discussion: Section 1222(a) of the Act requires that all payments made to a subgrantee under this part must be used for programs and projects that are designed to supplement the provision of special education

and related services or early intervention services to handicapped infants, toddlers, and children. Under section 1221(c)(1) of the statute, the State educational agency must distribute, on the basis of the December 1 child count, to each eligible State agency or local educational agency an equal amount for each child counted. There is no statutory authority authorizing a State educational agency to give preference to one subgrantee over other subgrantees in the distribution of funds. Therefore, the Secretary is without authority to make the change requested by this commenter.

Change: None.

Section 302.57 What Is the Prohibition Against Considering Payments Under This Part in Determining State Aid?

Comment: One commenter requested clarification of the purpose of § 302.57, which prohibits a State from considering payments under this part in determining State aid.

Discussion: The Secretary believes that the clarification requested by this commenter is not needed. The requirement that Chapter 1 Handicapped program funds not be considered in determining State aid is statutory and is taken directly from section 1454 of the Act. This requirement was intended to ensure that amounts of grant awards received by agencies participating in chapter 1 programs not be considered in allocating available State aid to such agencies. Therefore, the Secretary has determined that no change is needed.

Change: None.

Subpart C—What Other Post-Award Conditions Must be Met by a State and Its Subgrantees?

Section 302.60 May Uncounted Children Be Served in Programs and Projects Under This Part?

Comment: One comment recommended that criteria be added for determining when children described in paragraphs (a) and (b) have been fully served. This commenter also suggested that this section be combined with § 302.51.

Discussion: The Secretary agrees with this commenter that additional guidance is needed on criteria for determining which children have been fully served. The language "have been fully served" is taken directly from Section 1225(2) of the Act and was also used in § 302.1 of the proposed regulations under this part, which describes the Chapter 1 Handicapped program. In responding to a comment on § 302.1, the Secretary has determined that a change was necessary and has amended § 302.1 of this part to replace the statutory language. Similarly, the Secretary has determined that a change is also needed in § 302.60 to ensure consistent interpretation of statutory language in these final regulations. However, the Secretary does not agree with this commenter that combining § 302.60 with § 302.51 of these final regulations would be helpful, since criteria for eligibility of children for services under this part are separate from allowable cost criteria.

Change: Section 302.60 is changed to replace the language "have been fully served" with language to specify when other

handicapped children can be served with funds under this part.

Section 302.61 What Evaluation and Assessment Requirements Apply for a State and Its Subgrantees?

Comments: One commenter asked what data grantees will be expected to maintain to demonstrate that children benefit from this program and asked whether the State educational agency will be expected to collect this information from subgrantees. This commenter recommended that the data be maintained at the local level and that an assurance be included in a subgrantee's application to the State educational agency that services provided under this part have been reviewed and evaluated and determined to be beneficial to students.

Discussion: The Secretary has determined that the changes suggested by this commenter are not needed. This requirement is statutory and is taken from section 1222(c) of the Act. Similarly, section 1224(c)(5) of the Act, as reflected in § 302.31(a)(6) of these final regulations, requires an assurance in an application that a subgrantee will conduct those evaluations and assessments necessary to demonstrate that programs and projects assisted under this part are beneficial to the children served. However, the statute does not prescribe the methods for meeting this statutory requirement and does not impose any specific data collection requirements on recipients, as suggested by this commenter. The Secretary has determined that each recipient should have the flexibility to develop its own procedures to ensure compliance with this requirement. Therefore, the Secretary has determined that no change is needed.

Change: None.

Section 302.62 What Special Requirements Apply Under This Part?

Comment: A number of commenters asked the Secretary to insert after the reference to part 303 the phrase, "for States participating in part H."

Discussion: References in this part to 34 CFR part 303 are to the regulations implementing Part H of the EHA in 34 CFR Part 303 (Early Intervention Program for Infants and Toddlers with Handicaps). In general, services for handicapped infants and toddlers under this part must meet the requirements of part H of the EHA. (see 34 CFR 302.63). States may only provide services to handicapped infants and toddlers under this part in accordance with 34 CFR part 300 if (1) They are participating in the part H program and (2) they are in the phase-in period for part H services. Therefore, the Secretary does not believe that the clarification requested by this commenter is needed. However, the Secretary has determined that it is necessary to clarify that when a handicapped child is placed in a public or private residential institutional facility for educational reasons, that child's program, including non-medical care and room and board, must be at no cost to the parents, in accordance with 34 CFR 300.302 of the regulations for part B of the EHA.

Change: A comment is added following § 302.62 to clarify the applicability of this part B requirement.

Section 302.63 How Does a State Educational Agency Administer This Program in a Manner Consistent With Part H of the EHA?

Comment: One commenter asked for clarification as to whether all handicapped infants and toddlers participating under this part must receive early intervention services or if special education may be provided to handicapped infants and toddlers participating in programs and projects assisted under this part.

Discussion: The Secretary agrees with this commenter that clarification is needed. Section 1221(b)(1) of the Act requires each State educational agency receiving assistance under this part to assure: (1) That all handicapped children in the State, other than handicapped infants and toddlers, participating in programs and projects assisted under this part receive a free appropriate public education; and (2) that those handicapped children and their parents are afforded all the rights and procedural safeguards under part B of the EHA. The statute also requires the State educational agency to assure that all handicapped infants and toddlers in the State participating under this part receive early intervention services and that they and their families are afforded all the rights and procedural safeguards in part H of the EHA. Section 1224(c)(1) of the Act also requires an assurance to this effect as a condition of assistance for any subgrantee under this part. Further, section 1222(a) of the Act provides that the State educational agency may use funds under this part for programs and projects that are designed to supplement the provision of special education and related services to handicapped children (other than handicapped infants and toddlers) and early intervention services to handicapped infants and toddlers. The Secretary believes that § 302.63(a) of the proposed regulations, which made it permissible for a State educational agency to provide a free appropriate public education to handicapped infants and toddlers, instead of early intervention services, exceeded his statutory authority. Therefore, the Secretary has determined that proposed § 302.63(a) should be deleted. However, the Secretary has determined that proposed paragraph (b) should be retained because the legislative history of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 specifically expresses congressional intent that States be permitted to provide free appropriate public education to handicapped infants and toddlers participating in programs and projects assisted under this part until the fifth year of implementation of part H of the EHA (see H. Rept. No. 195, 100th Cong., 1st Sess., 43 (1987)). With the exception of this phase-in period under part H of the EHA, States are required to provide early intervention services to handicapped infants and toddlers participating under this part.

Change: Section 302.63 is changed to provide that except during the phase-in period for part H services, early intervention services must be provided to handicapped

infants and toddlers served under this part. Paragraphs (b), (c), and (d) of proposed § 302.63 are redesignated as paragraphs (a), (b), and (c) of § 302.63 of these final regulations.

Comment: One commenter requested clarification as to whether the phrase "under this part," as used in proposed § 302.63(d), refers to 34 CFR part 302 or 34 CFR part 303.

Discussion: Section 302.63(c) of these final regulations provides: "Early intervention services required under this part must be provided at no cost to parents." The phrase "under this part," as used in these final regulations, refers to 34 CFR Part 302—The Chapter 1 State Operated or Supported Programs for Handicapped Children program. Thus, § 302.63(c) of these final regulations encompasses all early intervention services that are required to be provided to handicapped infants and toddlers participating in programs or projects assisted under this part. Therefore, the Secretary has determined that no change is needed.

Change: None.

Comment: Many comments were received on the provision at § 302.63(d) of these proposed regulations, which provides that required early intervention services under this part must be provided at no cost to parents. Many commenters requested clarification as to the breadth of this provision and asked whether only those services to which handicapped infants and toddlers participating under this part are entitled under part H of the EHA could be provided without charge or whether all early intervention services provided to handicapped infants and toddlers participating under this part must be provided at no cost. Generally, comments from State Departments of Education strongly urged that § 302.63(d) be retained since in the past, the chapter 1 Handicapped program has been closely linked to part B of the EHA and has always been free to parents of handicapped infants and toddlers. Other commenters objected that § 302.63(d) conflicted with § 303.521 of the regulations for part H of the EHA, under which parents may be charged for early intervention services on a sliding fee scale basis. Several commenters suggested that it be permissible to charge fees if the service is educational in nature and eligible for payment under the chapter 1 Handicapped program and impermissible if the service is not educational in nature and would not be eligible for payment under the chapter 1 Handicapped program. Other commenters objected to the requirement that early intervention services such as nutritional services and coordination of the IFSP be provided at no cost, as going beyond the intent of the chapter 1 Handicapped program or part B of the EHA.

Discussion: The Secretary agrees with commenters who urge that this requirement be retained. Section 1222(a) of the Act vests in the Secretary the policy discretion to determine the extent to which requirements in part H of the EHA are applicable to this part. The Secretary believes that the Department's longstanding interpretation that parents of participants in this program not be

charged for required services should be reflected in its policy under the chapter 1 Handicapped program regarding fees for required early intervention services provided to handicapped infants and toddlers participating under this part because similar services under this program have traditionally been provided at no cost to parents. Further, the Secretary emphasizes that historically, State Departments of Education that have served handicapped infants and toddlers without charging fees have strongly urged the Secretary to continue this policy of not charging fees for early intervention services provided under this part. The Secretary believes that this experience is particularly relevant for the Department in formulating policy for the chapter 1 Handicapped program.

The Secretary does not agree with commenters who urge that the at no cost requirement be eliminated because it conflicts with part H of the EHA. The chapter 1 Handicapped program and part H of the EHA are derived from different statutes that are intended to address different needs, and the Secretary has determined that early intervention services required to be provided to handicapped infants and toddlers under this part must be provided at no cost, regardless of whether parents of infants and toddlers participating in part H of the EHA may be charged for early intervention services. While the chapter 1 Handicapped program is intended to support programs and projects that are designed to supplement the provision of special education and related services or early intervention services to handicapped infants, toddlers, and children, part H of the EHA is intended to assist each participating State in developing an effective early intervention program. The Secretary has determined that retaining the at no cost requirements under this part will not inhibit coordination between these two programs. Further, it is not necessary for the Secretary to provide guidance on which early intervention services must be provided at no cost to parents because the Secretary intends the at no cost requirement to encompass all early intervention services required to be provided to handicapped infants and toddlers participating under this part. The definition of early intervention services in part H of the EHA has been made applicable to this part by § 302.5(c) of these final regulations, and this definition includes such services as nutritional services and coordination of the individualized family service plan. The Secretary does not agree with some commenters who suggested that parents can be charged for early intervention services provided under this part that are not traditional educational services since the Secretary has determined that all required early intervention services under this part must be provided at no cost to parents. Thus, under these final regulations, the service need not be one to which the child is "entitled" under part H of the EHA for the service to be provided at no cost to parents of handicapped infants and toddlers participating under this part since all required early intervention services under this part must be provided at no cost to parents.

Change: None.

Comment: A few commenters were concerned that the requirement that early intervention services be provided at no cost to parents could jeopardize the use of insurance proceeds.

Discussion: Early intervention services, like special education and related services, provided to handicapped infants, toddlers, and children participating in programs or projects assisted under this part must be provided at no cost to parents. The Secretary does not interpret Part H of the EHA or this part as precluding agencies responsible for the provision of early intervention services from requiring parents to use their insurance proceeds to pay for the cost of required early intervention services in circumstances where the parents would suffer no financial loss. For examples of financial losses, see Notice of Interpretation on Use of Insurance Proceeds, published at 45 FR 86390 (December 30, 1980).

Change: None.

Comment: One commenter asked the Secretary to provide a single format for due process procedures under part H of the EHA and this part.

Discussion: The Secretary does not agree that a single format for due process procedures under part H of the EHA and this part can be implemented. Section 1221(b)(1) of the Act requires each State educational agency receiving a grant under this part to assure that all handicapped children participating in programs or projects assisted under this part and their parents are afforded all the rights and procedural safeguards in part B of the EHA. In addition, the State educational agency must assure that all handicapped infants and toddlers participating in programs and projects assisted under this part and their families are afforded all the rights and procedural safeguards under part H of the EHA. Thus, the due process procedures in part B of the EHA are applicable to parents of handicapped children, and the due process procedures in part H of the EHA are applicable to parents of handicapped infants and toddlers. However, 34 CFR 303.169 of the regulations for part H of the EHA states that the lead agency participating in part H of the EHA may elect either the due process procedures that are consistent with § 303.402(b) and §§ 303.421–303.425 of the regulations for part H of the EHA or the due process procedures in 34 CFR 303.506–303.513 of the regulations for part B of the EHA. Therefore, the Secretary has determined that no change can be made.

Change: None.

Section 302.64 What Complaint Procedures Shall a State Adopt?

Comment: One commenter suggested that the complaint procedures be deleted from this part or that provisions be made that complaint procedures for this part could be implemented through those in part B and part H of the EHA.

Discussion: The Secretary has elected to move the complaint procedures from 34 CFR 76.780–76.782 of EDGAR to the program

specific regulations to which they apply. Therefore, the Secretary has determined that compliant procedures requirements must be included in these final regulations. Sections 302.64-302.66 of this part incorporate and make applicable to this part the general complaint procedures in §§ 76.780-76.782 of EDGAR.

In implementing their complaint procedures for programs for handicapped infants, toddlers, and children, States have the discretion to apply similar procedures in resolving complaints alleging violations of the part B statute and regulations and the part H statute and regulations, as those they use in resolving complaints alleging violations of the Chapter 1 Handicapped program statute and the regulations in this part. Alternatively, States can elect to adopt separate complaint procedures for all three programs.

Change: None.

Section 302.67 What Requirements Apply to State Rulemaking and Other State Educational Agency Responsibilities?

Comment: Several commenters were concerned that § 302.67 (e)(1)(iii), (e)(2) and (e)(3) regarding responsibilities of the committee of practitioners exceeds the statute and recommended that they be removed.

Discussion: These subsections do not exceed the statutory requirements enacted in the Augustus F. Hawkins—Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988. The requirements at § 302.67 (e)(1)(iii) and (e)(2) are taken directly from § 200.70 of the regulations for the Chapter 1—Local Educational Agency Program, and § 302.67(e)(3)(i) is taken directly from section 1451(b) of this Act. Therefore, the Secretary has determined that no change is needed.

Change: None.

Comment: Several commenters suggested that the requirement for a committee of practitioners under this part could be met either through use of the State advisory panel required under part B of the EHA at 34 CFR 300.570 or, alternatively, a joint committee including a State's advisory panel required under part B of the EHA and a State's interagency coordination council as required under part H of the EHA at 34 CFR 303.600.

Discussion: These regulations afford States the flexibility to satisfy the committee of practitioners requirement through use of existing advisory panels or interagency coordination councils. However, regardless of what resources States may elect to use to satisfy this requirement, the membership requirements of § 302.67(e)(3) must be fully met.

Change: None.

[FR Doc. 90-19953 Filed 8-23-90; 8:45 am]

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Friday
August 24, 1990

Part V

Department of Defense General Services Administration

National Aeronautics and Space Administration

48 CFR Part 3
Federal Acquisition Regulation (FAR);
Special Government Employees; Final
Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Part 3

[Federal Acquisition Circular 84-59]

Federal Acquisition Regulation (FAR);
Special Government Employees

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: Federal Acquisition Circular (FAC) 84-59 amends the Federal Acquisition Regulation (FAR) to implement changes to § 3.601 to clarify that special Government employees performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees under subpart 3.6 unless (a) the contract arises directly out of the individual's activity as a special Government employee; (b) in the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or (c) another conflict of interest exists.

EFFECTIVE DATE: September 24, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Edward C. Loeb, Office of Federal Acquisition Policy, GS Building, Washington, DC 20405, (202) 501-4547. Please cite FAC 84-59.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 3.601 states a general policy that contracting officers shall not knowingly award a contract to a Government employee, or to a business concern, or to other organization-owned, or substantially-owned, or controlled, by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

Included in the category of Government employees are special Government employees, as defined in 18 U.S.C. 202; that is, individuals who can work not more than 130 days during any period of 365 days and who are not required by law to receive compensation. Consequently,

individuals serving as special Government employees or organizations within their control may not be awarded contracts in accordance with current FAR 3.601.

This final rule eliminates the applicability of FAR 3.601 to special Government employees appointed committee, except where the contract would arise directly out of the activity of the special Government employee, the individual is in a position to influence award of the contract based upon the individual's capacity as a special Government employee, or another conflict of interest exists. The Councils believe that only in these cases is there the potential for an actual conflict or the appearance of a conflict of interest and, therefore, the need for a policy prohibition. Further, to assure that a conflict or appearance of a conflict does not exist, special Government employees are required, prior to assuming official responsibilities, to file a confidential or public financial disclosure form. Also, by virtue of an individual's position as a special Government employee, they are made subject to certain post-employment restrictions.

B. Regulatory Flexibility Act

This final rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because it merely clarifies the applicability of conflict of interest policies to certain types of special Government employees.

C. Public Comments

A proposed rule to modify the applicability of § 3.601 to special Government employees appointed as advisors or consultants, or serving as members of advisory committees, was published in the *Federal Register* on December 15, 1989 (54 FR 51730). Public comments were received and considered in drafting this final rule.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to § 3.601 do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Part 3

Government procurement.

Dated: August 21, 1990.

Albert A. Vicchiolla,

Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular

[Number 84-59]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-59 is effective September 24, 1990.

Eleanor Spector,

Deputy Assistant Secretary of Defense for Procurement.

Richard H. Hopf, III,

Associate Administrator for Acquisition Policy, GSA.

S. J. Evans,

Assistant Administrator for Procurement, NASA.

Federal Acquisition Circular (FAC) 84-59 amends the Federal Acquisition Regulation as specified below:

Item I—Special Government Employees

FAR 3.601 is amended to clarify that special Government employees performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees under subpart 3.6 unless (a) the contract arises directly out of the individual's activity as a special Government employee; (b) in the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or (c) another conflict of interest exists.

Therefore, 48 CFR part 3 is amended as set forth below:

PART 3—IMPROPER BUSINESS
PRACTICES AND PERSONAL
CONFLICTS OF INTEREST

1. The authority citation for 48 CFR part 3 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 3.601 is revised to read as follows:

3.601 Policy.

(a) Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or

preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees unless—

(1) The contract arises directly out of the individual's activity as a special Government employee;

(2) In the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or

(3) Another conflict of interest is determined to exist.

[FR Doc. 90-19985 Filed 8-23-90; 8:45 am]

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