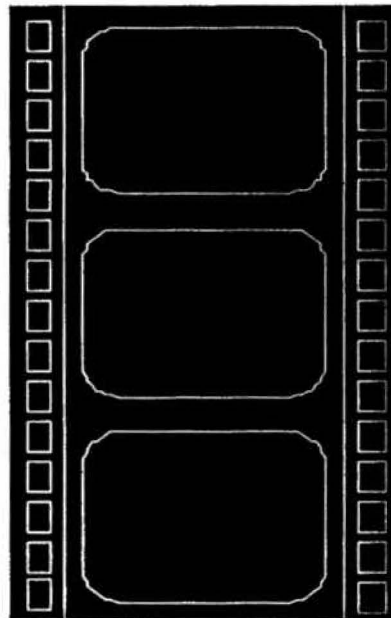
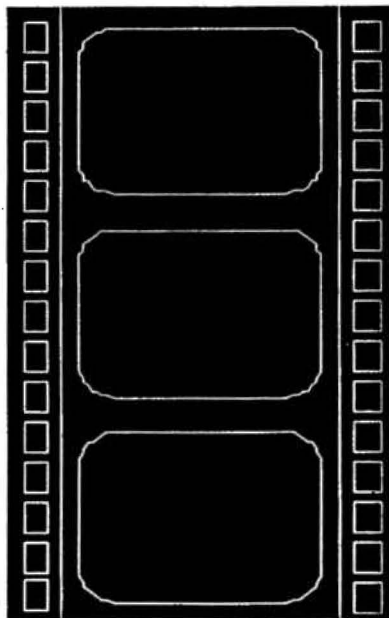
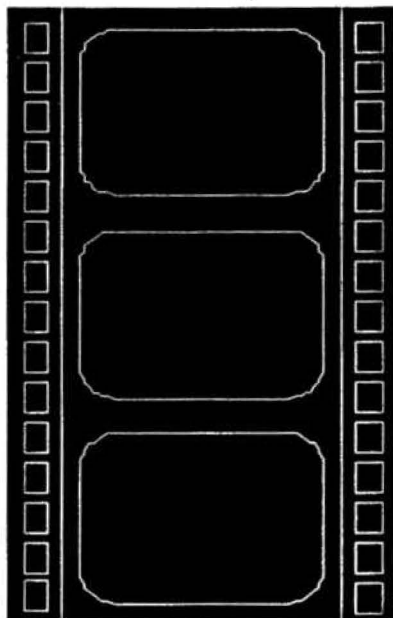
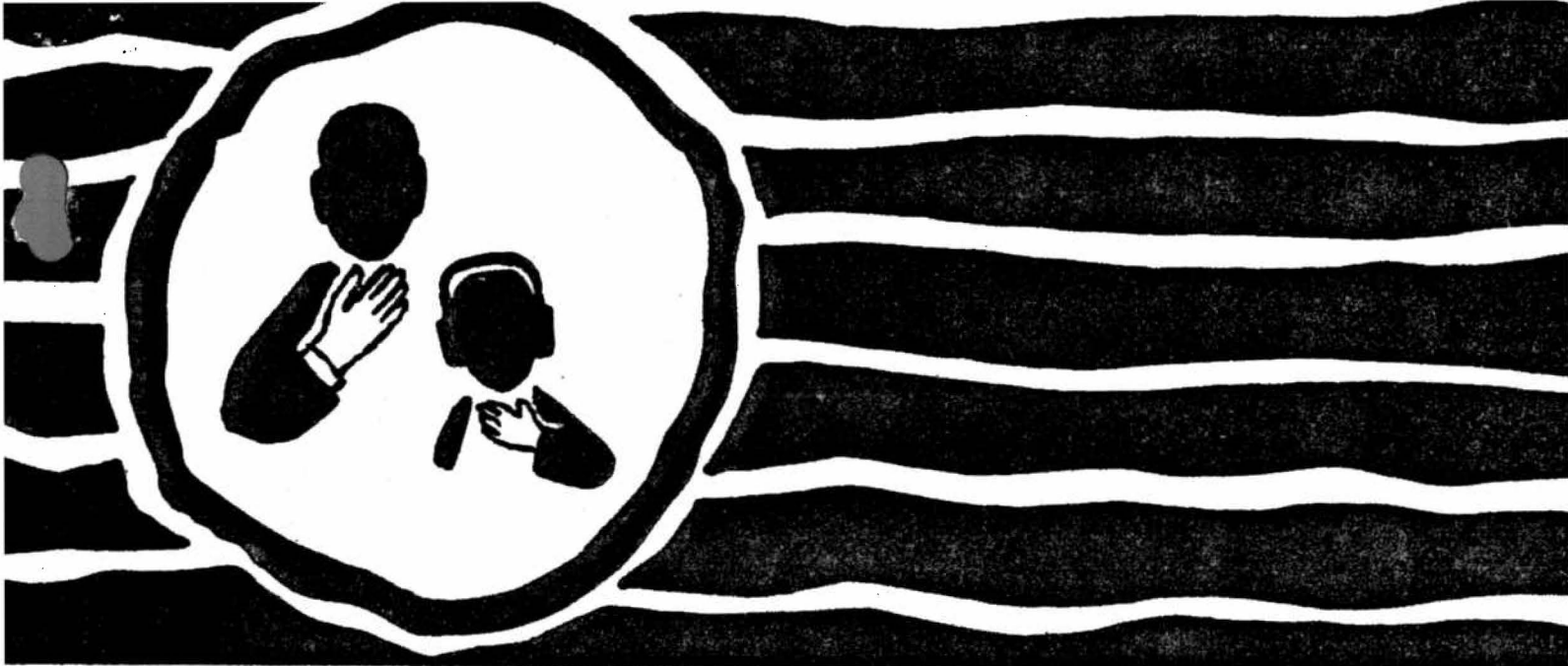


SUPPLEMENTAL MATERIAL

A.B. 346





"NATIONALLY RECOGNIZED INSTRUCTIONAL PROGRAMS"

Mr. Kirk L. Adams  
Principal

Miss Patricia Apodaca  
Coordinator, Deaf Program

*The Honorable John Vergiels, Chairman  
Assembly Education Committee  
Nevada State Assembly  
Carson City, Nevada 89701*

March 9, 1977

Dear Jack,

AB 346 offers unbelievable protection to educators (administrators and teachers) whose conduct is questionable.

Admonishment comes when an employee's conduct or performance repeatedly is questionable and of a serious nature. It provides that employee an opportunity to improve by defining the problem, providing help and assistance, and in carefully observing to see if improvement is indeed accomplished. If it is, a record indicates the employee's success in meeting reasonable standards of performance or conduct. The guarentees provided by the Nevada Professional Practice's Act indicate a most fair procedure to follow in this matter.

If all records of admonishment and the employee's efforts to satisfactorily overcome the serious concerns which brought on admonition are immediately erased, there is a strong possibility that concerns may again be identified within a reasonable period of time. I say this because admonishments are really not that common and are related to serious concerns of performance or conduct which are not characteristic of professionally dedicated educators. I would highly recommend that the admonishment record of a previous offense for which the employee overcame the areas of concern, not be removed from that employee's record for a period of at least 3 years. I support this recommendation by making the following observations:

1. If a teacher or an administrator had been late for school on say 23 observable occasions, was admonished and given 60 days to improve their record or face possible


RUBY S. THOMAS ELEMENTARY SCHOOL 1560 EAST CHEROKEE LANE LAS VEGAS, NEVADA 89109  
An equal opportunity employer

demotion, nonrenewal, or dismissal, it is very possible they will seek to overcome the problem which has been serious, if a 60 days period of improvement is granted. However, if the problem has been that serious and continual, it appears to be reasonable to assume there is a good chance it will reoccur sometime in the future. Under the provisions of AB 346 if the employee overcame the concerns indicated in the admonition, all record would be erased immediately. Under a 3 year provision of retaining the record on the initial admonition, the employee would have to prove their dedication and performance was satisfactory or the evidence would mount up and cause a rather strong case against them if repeated admonitions were experienced in the following 3 year period. If the latter is the case, I think this is most reasonable. I don't want marginal educators in my profession and I think the vast majority of professional and truly dedicated educators don't want marginal people in the profession they take pride in belonging to either. The example of continued lateness is only one example for which there needs to be a continual concern expressed and the record monitored for a three year period before it is removed. What about the teacher or administrator who puts forth a minimal effort on the job, improves just enough to get by the period of improvement once the admonition is made...has the record erased, and then falls back to the same type of behavior???

2. As a parent of 3 fine children, I want the best education possible for them. I highly respect the dedicated teacher and administrator whose performance is quality and who are really interested in helping children grow. Why should we offer through the provisions of AB 346 the kind of protection that encourages bad performance, retains substandard or marginal educators (not just teachers, but administrators as well), and does not demand a reasonable 3 year period for that person to prove their worth and improvement is sincere???
3. As a professional educator (teacher and administrator) I do not want the protection AB 346 offers. I have too much pride in the profession I belong to, too much effort to gain the training I have, and a great deal of satisfaction in watching children grow to feel that I will give anything less than my best effort at all times. If my performance is unsatisfactory and serious enough to merit an admonishment, then let me prove myself as being capable of staying in the profession. We already have enough strong machinery in the Nevada Professional Practice's Act to guarantee due process. If I am substandard in my performance, I do not belong in education where I will influence children's lives.
4. The vast majority of teachers and administrators can be commended on their professional dedication. These are not people whose conduct and performance are in need of admonishments. Admonishments are rare, but given again when serious concerns are evidenced. Dismissals, nonrenewals, or demotions are equally rare...let's not make it even harder when valid concerns are evidenced and possible for the future. Quality performing employees will not object to a 3 year retention of a record of admonishment before it is stricken from the records.

I do believe that other provisions not mentioned to this point in AB 346 are unnecessary. There is an overt amount of protection for educators (teachers and administrators) already in our existing laws. I am saddened by the fact that there are those among us who wish to provide undue protection to marginal performance in education. Let's take pride in Nevada education and work to retain the best teachers and administrators we have.

Respectfully,

  
Kirk L. Adams, Principal

*Suppl. Mat  
Book*

To: Chairman Vergiels, Assembly Committee on Education

Statement by James M. Rathbun

April 5, 1977

I. Modification of NRS 391.314 - Addition of

"An admonition issued to a certificated employee who, within the time granted for improvement, has met the standards set forth for him by the administrator who issued the admonition shall be removed from the records of the employee, together with all notations and indications of its having been issued."

As a teacher who has suffered loss of job, pay, social standing and credibility with peers, I speak in strong support of the suggested amendments as set forth in AB 346 on a number of grounds.

1. If an admonition is as set forth in the statute, a means by which a supervisor serves notice on an employee that he has reasons to allege that the present conduct of the employee is grounds for demotion, dismissal or cause the certificated employee to not to be reemployed under the provisions of NRS 391.312. It would seem reasonable to support the position, that once the admonition has given written notice to the employee, a reasonable effort has been provided to assist the individual and within three months the conduct has been corrected, the admonition has served its purpose and should then be removed from the current personnel record of the teacher.

If it has been found that the conduct has not been corrected, then the supervisor has the responsibility to move for dismissal, demotion or cause the non-reemployment of said individual.

The reasons that this is a logical and correct position to assume can be supported by my instant case.

- (1) November, 1974 I received notice from my principal relative to alleged conduct using verbal and written language. After a conference, finding the lack of severity of the issue and writing a response to explain my position - the issue was left resolved.
- (2) On April, 1975 a different principal wrote me a series of memos indicating possible recommendation for termination utilizing the prior principal's notice as a basis for judging my present conduct and alleging it to be grounds for dismissal.
- (3) Since the prior notice had been resolved, and in fact, I had henceforth received a superior performance evaluation, the resolved notice (admonition) carried very little weight in the review by the court. It did not carry much weight due to a number of facts:
  - (1) It had been resolved;
  - (2) A later performance evaluation - took no notice of it and
  - (3) the subsequent principal could not make direct application of his notice (admonition) since it had a completely different context.

## II. Modification of NRS 391.312 -Addition of

A suspended employee is entitled to full pay and other benefits during the term of a suspension imposed under this section, except a disciplinary suspension imposed under Subsection 4 and payment benefits shall cease upon dismissal or conviction.

This is a very needed and appropriate modification of NRS 391 for the following reasons:

1. The suspension of an employee accomplishes the following:
  - (a) Separates the employee from school children and job conditions, thereby providing elimination of any threat of harm to either.

(b) Provides an opportunity for both parties to analyze the alleged conduct without imposing a strain on the relationship which might alter the normal conduct of affairs.

2. The suspended employee is under NRS 391, still an employee of the school district under contract and thus, in possible conflict to gain other employment.
3. The suspended employee, as in my case, when completing an application for employment, is always requested to state the reason for leaving last position and the appropriate response, due to a pending decision of termination, is a guarantee of not being hired.
4. In my case, in order to survive financially, I borrowed \$1,080 from the National Education Association, which I am presently repaying. I also was able to receive 39 weeks of unemployment compensation, since Las Vegas was eligible to receive Special Unemployment Assistance due to the high unemployment rate. This was a federal funded program providing assistance to people not working whose prior employers had not paid any money into Unemployment. At the time of my final award of back pay, I was notified that I must pay the \$3,315 received back to the State Unemployment fund.
5. Due to the lump payment of the court award at the end of my last salary year, I was required to pay federal taxes on two incomes, thus resulting in a much larger tax bill for the money above what it would have been had I received it during the year earned. This amount is approximately \$1,000 to \$1,500.
6. Because of the appeals and extended time involved, my legal costs amounted to approximately \$10,000 which will never be received. In my case, the majority of these costs were paid by my teacher association, but as an individual I would have been in no position to fight the legal battle and survive also without having income, thus, I would have received double punishment for a charge of which I was totally innocent.

7. The act of suspension is a very traumatic one as it relates to uncertainty, the question of an individual's worth is compounded with the realization that the individual must also survive without any income while the lengthy termination proceedings are occurring. In my opinion, one of the other positive aspects of receiving pay and other benefits during this time, is that the proceeding time will become shorter due to the possible increased cost to the school district.
8. In my case, the court also awarded me an interest payment which was an additional cost to the district. This would not have been necessary if they had been paying the salary and benefits.
9. As an individual who had gone through the process, I firmly believe suspension without pay prevents a number of individuals from pursuing their rights under the termination procedures.

PROPOSED AMENDMENTS TO A.B. 346

Page 1, line 18: Add an additional sentence:

"The admonition shall be removed from the employee's personnel file one (1) year from the date that the admonition was issued."

3 yr  
- 5 yr

Page 2, lines 9-13: Add the underlined language:

" A suspended employee is entitled to full pay and other benefits during the term of a suspension imposed under this section, except a disciplinary suspension imposed under subsection 4 or proceedings pursuant to the provisions of NRS 391.312 Section 1, subsections b, f, and h; and pay and benefits shall cease upon dismissal or conviction."

7/20

Page 2, lines 42-46: Delete indicated language:

"The decision of the hearing officer or hearing commission is subject to judicial review. ~~After final determination by the court, or after the expiration of 30 days if no application is made for judicial review,~~ The board shall act according to the decision of the court or of the hearing officer or hearing commission."

Proposed  
Amendment

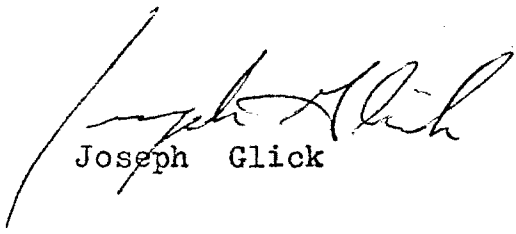


AB 346

To whom it may concern,

Last year I was not offered a contract with my school district and proceeded to go through a hearing to regain my position as a teacher. This was a miserable situation for any teacher to find himself in. I was scheduled for a hearing the first week of June and found it would take a period of two days to complete. After one of the scheduled two days, various people involved in the hearing decided to take their summer vacations. This delayed the completion of my hearing until early September. After the second day, a decision was quickly reached. However, I had to wait until early December for the final official copy of the hearing to reach the school district.

This lengthy period of waiting ( 7 months) caused great hardships on me. I tried to get work, but could not since I was in limbo - neither hired or officially fired. I could not leave the city since I had to be on call to finish the situation. I simply existed and waited. I had to rely upon my family and friends for financial aid to get me through. The effects upon my life were devastating - mainly because of the great length of time involved. It was and still is very difficult for me to understand why 7 months?

  
Joseph Glick

*in Joseph Met...*

# Eureka County School District

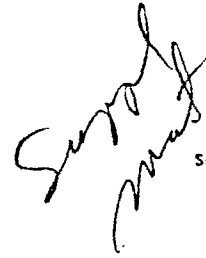
## BOARD OF TRUSTEES

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BOX 249

EUREKA, NEVADA 89316

April 13, 1977



Carl L. Shaff  
Superintendent

Re: S. B. 376

Mr. Chairman and Members of the Committee:

I would like to bring to your attention the many ramifications of S. B. 376 as it relates to the overall effect on the small School Districts of this State. Each County School District has a set of policies which they follow in the day to day operations of the District. Many of the policies have to be changed and updated on a regular basis in order to meet the needs of: pupils, staff, community and State and Federal regulations. It is my opinion, and that of our elected trustee's, if this freedom is removed, there is no need to continue under the assumption that we have local control. If S. B. 376 is allowed to surface, then you may as well change all other laws relating to School Districts, and make this a part of legislative control, and appoint a Commission to operate the seventeen districts of this State.

It is our opinion that the time has come for everyone to realize that there are fifteen other counties in Nevada and not just the two larger ones. It is very difficult for us in rural Nevada to understand how intelligent people can be misled by a small segment of so call professional people to introduce legislation which has broad implication of taking away the only item which remains under local control, and that being our schools.

I sincerely urge you to give serious thought and, you might even search your souls, as to why S. B. 376 was ever introduced, before you approve such a bill and make it a part of the Statutes.

Carl Shaff  
Superintendent  
Eureka County School District

# **federal register**

**THURSDAY, DECEMBER 30, 1976**

**PART IV**



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**DEPARTMENT OF  
HEALTH,  
EDUCATION, AND  
WELFARE**

**Office of Education**

**EDUCATION OF  
HANDICAPPED CHILDREN  
AND INCENTIVE  
GRANTS PROGRAM**

**Assistance to States**

## DEPARTMENT OF HEALTH, AND WELFARE

### Office of Education

[ 45 CFR Parts 100b, 121a, and 121m ]

### EDUCATION OF HANDICAPPED CHILDREN AND INCENTIVE GRANTS PROGRAM

#### Assistance to States

The Commissioner of Education, with the approval of the Secretary of Health, Education, and Welfare proposes (1) to amend Part 121a of Title 45 of the Code of Federal Regulations (Assistance to States for Education of Handicapped Children), and (2) to add a new Part 121m (Incentive Grants Program for handicapped children ages three through five), and (3) to make certain conforming amendments to Part 100b (General provisions for State-administered programs), to read as set forth below.

The authority for these regulations is contained in Part B of the Education of the Handicapped Act (EHA), as amended by Pub. L. 94-142 (20 U.S.C. 1401, 1402, and 1411 through 1420). Part B of the Act provides formula grant funds to State and local educational agencies to assist them in the education of handicapped children.

Pub. L. 94-142, enacted on November 29, 1975, contains extensive amendments to Part B, including provisions which are designed to assure that all handicapped children have available to them a free appropriate public education, to assure that the rights of handicapped children and their parents are protected, to assist States and localities to provide for the education of handicapped children, and to assess and assure the effectiveness of efforts to educate such children.

Most of the Pub. L. 94-142 amendments to Part B become effective on October 1, 1977. Therefore, the existing regulations in Part 121a, which will remain effective through Fiscal Year 1977, will be completely replaced by the new Part 121a set forth below.

As an incentive to educating handicapped children in the three, four, or five year old range, the Congress established an incentive grant authority, in which funds would be given to States on the basis of the number of children in these age ranges receiving special education and related services. Regulations for this program are proposed as a new Part 121m.

Pub. L. 94-142 also added other requirements that are being dealt with separately from these proposed regulations:

1. Requirements in section 5(b) that the Commissioner develop regulations relating to specific learning disabilities are included in proposed regulations published November 29, 1976 (41 FR 52403). The specific learning disabilities regulations will eventually be included in Part 121a.

2. A new section 607 of the EHA establishes a grant program to assist State and local educational agencies with elimination of architectural barriers. Proposed regulations will be published shortly.

3. A new section 606 of the EHA relating to nondiscrimination in employment of handicapped individuals by recipients of assistance under the EHA is being administered by the Office for Civil Rights. The Conference Report indicates:

It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the Act are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973. The conferees expect that the Department of Health, Education, and Welfare regulations implementing section 504 will cover employees of such recipients of Federal assistance under this Act. The language of the amendment is designed to underscore the responsibility of the Secretary to pursue vigorously the enforcement of section 504 especially as it relates to the employment of administrators and teachers in programs for the education of handicapped children.

(H.R. Rep. 94-664 at page 54)

4. Revisions to section 653 of the FHA (Centers on Educational Media and Materials for the Handicapped) will be included in revisions to Part 121i to be published in the future.

#### PUBLIC PARTICIPATION

Because of the potential impact that Pub. L. 94-142 will have on the education of all handicapped children throughout the Nation, and on the agencies that serve them, the Office of Education has been vitally concerned about the need for intensive public participation in the development of implementing regulations.

Therefore, at the time Pub. L. 94-142 was enacted, a decision was made (1) to "take the law to the field" before any writing was done, in order to seek comments and suggestions from parties interested in the education of handicapped children, and (2) to convene a large outside writing group called RIT (regulations input team), to develop concept papers for use in writing the regulations.

The major steps and activities involved in carrying out these public participation objectives are set forth below:

(1) In January, 1976, the Office of Education contracted with the Council for Exceptional Children to develop three mediated tape-slide presentations for use in describing the significance and implication of Pub. L. 94-142 (one was geared to parents, one for general audiences, and one for administrators). Five hundred copies of these packets have been disseminated to State education agencies and major national parent organizations and advocate groups.

(2) In January, 1976, over 1,000 letters were sent to consumer/advocate agencies (a) to provide them with copies of the law and the Congressional Conference Report, and (b) to inform them about proposed public conferences on the law.

(3) During January and February, the Office of Education prepared a discussion guide and input sheets to be used at the various public meetings.

(4) From March through August, the Office of Education conducted or participated in approximately 20 public

meetings about the law on both a geographic and special interest basis. Approximately 2,200 people participated in these meetings, and several hundred responses were received. An overview of these meetings is included below.

The first six conferences were regional meetings (conducted in Washington, San Francisco, Denver, Chicago, Boston, and Atlanta) attended by State and local educational agency personnel and representatives of parent coalitions.

In July, pilot meetings were conducted in four regions of the country (Tampa, Durham, New Hampshire, Minneapolis, and San Diego) for key policy makers in the States, including representatives from the Governors' offices, State legislators, and State educational agency personnel.

A series of other public meetings were conducted for (a) representatives from all colleges and universities who receive training grants in special education, (b) nonspecial education personnel in local school districts, (c) school board representatives, and (d) parent-advocate organizations.

In addition, Office of Education staff were principal speakers at a number of major national conferences (including meetings of the Council for Exceptional Children and the American Psychological Association). These conferences involved thousands of people who have a direct interest in the education of handicapped children.

During the month of May, the Office of Education staff reviewed, analyzed and prepared the written comments received during the first eleven input meetings, and subsequently divided the comments into twelve broad topical areas in the law (e.g., individualized education program, least restrictive environment, and free appropriate public education).

(6) On June 7-9, the Office of Education convened a large national writing group of approximately 170 people, composed of parents, advocates, handicapped persons, representatives of special interest groups (e.g., APT, NFA, private schools), and administrators of State and local programs. The group was divided into twelve writing teams to develop concept papers on the major topics in the law. Each writing team was provided copies of the comments and questions received during the input meetings, together with the legislative history for each topic. The twelve completed products developed by the RIT, served as the basis for these regulations.

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

#### MINIMUM REGULATIONS

A basic issue relating to the entire regulations package is concerned with the amount of detail and degree of specificity that is best suited to these regulations. During the input meetings a few commenters expressed the need for a great

degree of specificity and direction from the Federal level in order to insure effective implementation of the Statute. A larger number of commenters, however, expressed concern that the Department may tend to over-regulate, which could result in all State and local educational agencies being in non-compliance from the outset.

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

Because the Statute is very comprehensive and specific on many points, the Department has elected (1) to incorporate the basic wording or substance of the Statute directly into the regulations, and (2) to expand on the statutory provisions only where additional interpretation seem to be necessary. In the summary of each of the subparts that follows, an attempt has been made to indicate (whenever possible) which requirements are statutory and which ones are regulations that attempt to interpret, clarify, or implement a specific requirement in the Act.

CONSISTENCY WITH SECTION 504 REGULATIONS

An issue with which the Department is deeply concerned is maintaining consistency between Part B of the Education of the Handicapped Act and regulations being developed under section 504 of the Rehabilitation Act of 1973 (proposed 45 CFR Part 84 was published July 17, 1976 (41 FR 19548) and final regulations are scheduled to be published in January). To maintain consistency with the timetables for making available a free appropriate public education under section 612 (2)(B) of the EHA and the priorities under section 612(3) of the EHA, the Department intends to provide in final regulations for Part 84 that between the effective date of Part 84 and September 1, 1978, a recipient will be in compliance with the elementary and secondary section of Part 84 if it has provided services to all qualified handicapped persons according to the Part B priorities and is in compliance with Part B and regulations adopted under Part B.

As the regulations being developed under section 504 of the Rehabilitation Act of 1973 are in the process of being finalized at the same time these proposed regulations for Part B of the Education of the Handicapped Act are being published, every effort will be made to have the final regulations for Part B be consistent in concept, policy, and, wherever possible, consistent with the language of the final 504 regulations.

PART 121a—ORGANIZATION

Part 121a is organized into the following seven subparts: (A) General, (B) State annual program plans and local applications, (C) Services, (D) Private Schools, (E) Procedural Safeguards, (F) State Administration, and (G) Allocations of Funds and Reports. A summary of each of these subparts, together with a discussion of some specific issues that have been raised, is included in the remaining sections of this part of the preamble.

SUBPART A: GENERAL

Subpart A (1) sets forth the purposes of Part 121a and the scope of these new provisions (e.g., that they apply to all public educational agencies in a State that have direct or delegated authority for the education of handicapped children); and (2) includes definitions of statutory terms (e.g., free appropriate public education, special education, and related services) and other definitions related to these terms.

*Discussion of Specific Issues.* (1) There are two interrelated questions which have been raised with respect to the implementation of Part B of the Act, as amended by Pub. L. 94-142: (a) Is Part B basically a civil rights law, and (b) does a State have to meet the requirements of the Act if the State elects not to receive a grant under Part B? In responding to these questions, it is essential to show the linkage between Part B and Section 504 of the Rehabilitation Act of 1973, which is administered by the Office for Civil Rights:

Part B is a formula grant program which provides financial assistance to States for the education of handicapped children. As a condition for receiving a grant under Part B in any fiscal year, a State must demonstrate to the Commissioner that it has established procedures to insure that handicapped children are guaranteed certain basic rights and protections (e.g., right to free appropriate public education, due process, least restrictive environment, and non-discriminatory testing).

Many of the provisions under Part B are regarded as basic rights of handicapped children which (1) are guaranteed under the U.S. Constitution, (2) have been reiterated in a series of court rulings over the past six years, and (3) are specifically included in the regulations on section 504 of the Rehabilitation Act of 1973. Section 504 is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. The "504" regulations will apply (a) to each recipient of Federal financial assistance, and (b) to each program or activity that receives or benefits from such assistance.

Since Part B is a formula grant program, the requirements and conditions under the program apply to States which apply for and receive a grant. Thus, a State which elects not to receive a grant under Part B is not subject to its provisions. However, if the State receives any Federal financial assistance, it still

would have to meet the basic rights provisions under section 504.

(2) Another related question was raised with respect to a situation in which a State receives a Part B grant, but one of the local educational agencies in that State elects not to participate under Part B. The response is similar to that given above:

If a local educational agency elected not to receive a Part B grant, that agency would not have to comply with the requirements of Part B. However, the State, as a recipient of Part B funds, would be required to insure that handicapped children residing in the jurisdiction served by the local educational agency would be afforded all of the rights and protections set out in the Statute and regulations. Moreover, if the local educational agency received any other Federal funds, it would have to meet the basic rights provisions under section 504.

(3) An additional question was raised with respect to whether the provisions of Part B apply to other public agencies that serve handicapped children within a State (e.g., State departments of mental health and welfare), since these agencies are not eligible to receive a Part B the affirmative, based on the following:

First, under the provisions of section 612 of the Act, each State, as a condition for receiving a Part B grant in any fiscal year, must assure that the rights and protections of the Statute are extended to all handicapped children in the State. In order to insure that these provisions would be carried out, the Congress required that—

The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. (Sec. 612(6))

Second, since the basic rights provisions under Part B are also included in the regulations for section 504, any recipient of HEW funds would have to be in compliance with these provisions. The extent to which these provisions apply is clearly set out in the "504" definition of recipient:

"Recipient" means any State or political subdivision thereof, any instrumentality of a State or political subdivision thereof, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. (Sec. 84.3(f))

SUBPART B: STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

*State annual program plans—General.* Any State which desires to receive funds under Part B of the Act must submit an annual program plan to the Commissioner through its State educational

agency. Sections 121a.10-121a.14 of Subpart B are concerned with the submission, approval, publication, and effective dates of the annual program plan.

The requirement for submitting an annual program plan is set out in section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380. This provision requires each State to submit (1) a general application containing five basic assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies, through, or under the supervision of, the State educational agency. Under section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b19).

*Discussion of specific issues.* Several commenters expressed a concern about requiring State educational agencies to submit annually an entire annual program plan when parts of the plan would not be changed from year to year. The Office of Education feels that this is a valid concern, and has adopted the following policy:

The fiscal year 1978 annual program plan, as the first plan under the provisions of Pub. L. 94-142, is to be a complete, intact document, which includes (1) all provisions previously required under Pub. L. 93-380 that were continued under Pub. L. 94-142, and (2) any new provisions in the Statute. In cases where no changes are required in procedures previously submitted under Pub. L. 93-380 (such as procedures on confidentiality), those procedures may be incorporated verbatim into the FY 1978 annual program plan.

Beginning with the FY 1979 annual program plan, and for each year thereafter, State educational agencies may incorporate by reference the basic procedural sections which do not require change. For most States, this would include procedural safeguards, least restrictive environment, non-discriminatory testing, confidentiality, procedures with respect to private school handicapped children, and child identification procedures.

#### ANNUAL PROGRAM PLANS—CONTENTS

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.20-121a.49 of these regulations. They include (1) the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act, and (2) a provision under section 434(b) (1) (B) (ii) of the GEPA, which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted".

#### LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

Section 614(a) of the Act requires that a local educational agency which desires to receive payments under Part B for any fiscal year shall submit an application to its State educational agency. Sec-

tions 121a.80-121a.87 of these regulations set out the requirements for submission of applications, responsibilities of State educational agencies, excess costs, requirements for consolidated applications, conditions for State educational agency approval or disapproval of a local application, and requirements relating to withholding of funds. These requirements are almost wholly statutory (See sections 614(b) and (c) of the Act).

*Discussion of specific issues.* The excess cost provision in the statute is designed to assure that all handicapped children receiving a free appropriate public education are guaranteed the basic funding provided all children in the local school district. The formula included in § 121a.82 of the regulations is related to the procedures set forth in the statute to identify the nature and extent of the basic per pupil allocation provided.

The Department has received numerous comments which have suggested that (a) the formula is unnecessary if one can accept the assumption that every child provided an education in the public schools automatically is provided the basic per pupil fiscal allocation, and (b) this provision would present enforcement difficulties given the relative lack of pupil based accounting systems in local educational agencies.

The basic intent of the excess cost provision is to insure that State and local educational agencies provide the same support for handicapped children as they do for all other children, and that the Part B funds are used to supplement the State and local commitment. In keeping with this intent, the regulations add that neither a State or local educational agency may use funds provided under Part B to pay all of the special education and related services given to a handicapped child.

The Department solicits further comment on the requirements regarding excess costs.

#### LOCAL EDUCATIONAL AGENCY APPLICATIONS CONTENTS

Sections 121a.100-121a.117 set forth the contents of the local applications. These provisions are taken directly from section 614(a) of the Statute; and, no substantive change is made, except to add an additional requirement that each local educational agency shall include a statement describing how the funds under Part B will be expended during the fiscal year for which the application is submitted.

*Discussion of specific issues.* Section 614(a) (2) (C) of the Statute sets forth the following requirement with respect to "comparability": The local application must provide satisfactory assurance that

State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part.

The regulations repeat the statutory requirement without elaboration. Comments are sought on how to interpret this

requirement, which is identical to the comparability requirement under Title I of the Elementary and Secondary Education Act, except that it uses the term "program areas" rather than "project areas".

The issues which must be resolved are (1) what does "program area" mean, and (2) what is to be compared—e.g., equitable availability of services in geographic areas; whether all programs for handicapped children with a particular disability are comparable; or whether programs for one disability are comparable to those for another disability.

#### APPLICATION FROM SECRETARY OF INTERIOR

Sections 121a.124-121a.129 set forth the requirements for participation by the Secretary of Interior on behalf of handicapped children in schools on reservations operated by the Bureau of Indian Affairs. These regulations follow the Statutory requirement in section 611(f) with respect to payments and the submission of a local educational agency application by the Secretary of Interior to the Commissioner. However, the regulations (1) add certain additional requirements (e.g., monitoring procedures that are required in the State annual program plans and "other material as agreed to by the Commissioner and the Secretary of Interior"); and (2) authorize the Bureau of Indian Affairs to utilize the same amount of its allotment for "State administration" that is provided by the Statute for State educational agencies. These additions are necessary because of the fact that BIA, in effect, is both a State and a local educational agency.

#### PUBLIC PARTICIPATION

Section 612(7) (B) of the Act requires each State to assure that there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to the adoption of the policies, programs, and procedures required under sections 612 and 613 of the Statute. Sections 121a.130-121a.132 of these regulations set out the specific requirements for State educational agencies to follow in implementing this statutory provision with respect to their annual program plans.

#### SUBPART C: SERVICES

##### GENERAL

Section 121a.200 requires each State to insure that free appropriate public education is available to all handicapped children ages 3-18 by September 1, 1978, and to all such children ages 3-21 by September 1, 1980. This is a statutory provision, as is the exception that the provision does not apply to handicapped children ages 3-5 and 18-21 if it is inconsistent with State law or practice, or the order of any court.

Section 121a.201 deals with the methods, costs, and payments involved in providing free appropriate public education.

Section 121a.202 (1) interprets the statutory requirement that each State

and local educational agency adopt a goal of providing full educational opportunities to all handicapped children, and (2) requires those agencies to take steps to insure that handicapped children have available to them the variety of programs and services (including non-academic and extra curricular services) that are available to non-handicapped children.

Section 121a.203 specifically requires that physical education services be available to every handicapped child receiving a free appropriate public education.

*Discussion of specific issues.* (1) A question has been raised concerning the meaning of "free appropriate public education" and "full educational opportunity goal", since both terms are used in the Statute and are included in this subpart. There is an obvious interrelatedness between these two terms; but there are some clear differences, as set forth in the following paragraphs:

"Full educational opportunity goal" is a very broad, all encompassing term, which (a) covers all handicapped children, ages birth through twenty-one, (b) includes a basic planning dimension, including making projections of the estimated numbers of handicapped children, and (c) does not set specific timelines for service, but, rather, requires each State to set its own timetable. The term "goal" implies an intent or direction to follow and is future oriented. Based on these characteristics, a State could be totally committed to implementing this provision, and could be in compliance with the Act, but may never achieve its goal in the absolute sense.

"Free appropriate public education" refers to a part of the goal of providing full educational opportunities to all handicapped children, but it is more narrow in scope and specific in purpose. This provision (a) focuses on known handicapped children within specific age ranges, (b) sets out mandated timelines for service, and (c) is present oriented. As set forth in the Statute, the right to free appropriate public education, in effect, is regarded as a basic right; and each State must carry out this provision within the specified time limits in order to be in compliance with this Act:

(2) A number of commenters have asked for clarification (a) of the general provision on free appropriate public education in Section 612(2) (B) of the Statute, and (b) of the exception clause in that provision for handicapped children ages 3-5 and 18-21. These regulations interpret the Statute as follows:

*First*, with respect to the general provision—

Free appropriate public education must be available to all handicapped children within the State mandated age ranges by the dates set forth in the statute.

If a State has no mandatory law, the State must make a free appropriate public education available within the statutory timelines to all handicapped children ages six through seventeen.

*Second*, with respect to serving handicapped children ages three through five and eighteen through twenty-one—

If a State does in fact make available public education to all non-handicapped children in any of these age groups (e.g., kindergarten for five year olds), free appropriate public education must be available to all handicapped children in that age group by the dates set forth in the Statute.

If a State does in fact make available public education to a majority of handicapped children in any of these age groups, a free appropriate public education must be made available to all handicapped children in that age group within the timelines.

In any case in which the provision of services to handicapped children ages 3-5 and 18-21 is inconsistent with State law or practice, or the order of any court, the State educational agency must, in its annual program plan, (a) provide a detailed description of the extent to which the exception applies, and (b) include a copy of each State law, court order, or other document which provides a basis for the exception.

Comments are specifically requested on the Department's interpretation of this statutory provision.

(3) Several questions arose concerning the meaning of the term "available" in the requirement that free appropriate public education must be available to all handicapped children. As used in these rules, the term "available" is intended to protect the individual rights of parents and children to decide whether or not to participate in programs which provide free appropriate public education. If the parents or child elect to avail themselves of these programs, it is the responsibility of the State or local educational agency to provide such programs in conformance with the provisions of this Act. This requirement applies to (1) both instructional and evaluational services, and (2) requires the timely delivery of such services.

(4) Several commenters have asked if free appropriate public education includes room and board. The proposed regulations state, in effect, that—

Each State may utilize whatever placement alternatives and methods of providing services that are necessary to assure that a free appropriate public education is available to all handicapped children.

Whenever placement in a public or private residential program is necessary to provide free appropriate public education to a handicapped child, the cost of the program, including room and board, must be at no cost to the parents of that child.

In carrying out these provisions, each State must determine the methods and sources of payment, and may utilize various State, local, Federal, and private sources of support that are available in the State.

(5) A number of commenters questioned why physical education services are given special attention in these rules. This position was taken to conform with Congressional intent as stated in the House of Representatives Report No. 94-332:

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specifically designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

#### PRIORITIES IN THE USE OF PART B FUNDS

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations), and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State Administration funds, each State and local educational agency must use its full entitlement under Part B "in accordance with the priorities established under section 612(3)."

Sections 121a.210-121a.214 of these regulations interpret the statute with respect to implementing these priority requirements.

*Discussion of specific issues.* (1) A number of questions were raised concerning the scope and extent of the priority requirement to the first priority children—e.g., (a) if a State's mandate is 3-18, would all of the Part B funds have to be expended for the first priority children in these age ranges before the funds could be spent on second priority children, and (b) are there any age aspect to implementing these priority requirement?

The proposed regulations specify that all Part B funds must be utilized to provide direct special education and related services to first priority children ages 3-21, to the extent that State mandate applies to children in this age range. For example, if a State's mandatory law is 4-17, the Part B funds must be expended to provide a free appropriate public education to all first priority children in this age range, and may not be used for second priority children until this requirement is met.

The proposed regulations do not impose any age priorities. Thus, if a State's mandate is 3-18, the State may utilize its funds to provide special education and related services to any first priority child in that age range.

(2) A related question was raised concerning States which either do not have any mandate or their laws do not include all handicapped children covered by Part B. The wording of the Statute is such that it requires all States to make a free appropriate public education available to all handicapped children ages six through seventeen, who are defined in the Act, even if the State does not have a mandatory law in this age range.

(3) Many commenters asked for clarification of when a local educational agency may proceed to use its Part B funds for the second priority. The proposed regulations specify that before the Part B funds can be used for any other purpose, the local educational agency must provide assurance satisfactory to the State educational agency (a) that all first priority children have a free appropriate public education available to them, (b) that it has a system for the identification, location, and evaluation of handicapped children, and (c) that whenever a first priority child is identified, located, and evaluated, the agency will make a free appropriate public education available to the child in accordance with an individualized education program.

(4) A question posed by a number of commenters is: If a State or local educational agency has met the first priority requirement under State mandate (e.g. 5-17), must that agency move to the second priority or can the Part B funds be targeted on first priority children below the mandated age range? Under the proposed rules, a State or local educational agency would have the option to spend its Part B funds (a) on other unserved handicapped children not covered by the mandate, including children ages 0-2, (b) to meet the second priority, or (c) to do both.

(5) Several commenters have asked if a State educational agency can utilize its portion of the Part B funds for inservice training if the training is related to the priorities. In accordance with the Statute and with Congressional intent, the first priority must be met before Part B funds could be used for any other purpose. Thus, if there are known first priority children in a State, the State educational agency would have to assure that a free appropriate public education is available to such children within the State mandated age range. Once that priority is met, the State may utilize its funds (a) for direct services to second priority children, (b) for inservice training under either priority, or (c) for other services under either priority, as authorized under § 121a.250 of Subpart C ("Use of State educational agency allocation for direct and support services.").

(6) A number of commenters have asked what the term "inadequate education" means in the second priority (e.g. handicapped children within each disability, with the most severe handicaps who are receiving an inadequate education).

Under the proposed regulations "inadequate education" means receiving some but not all of the special education and related services specified for a handicapped child in his or her individualized education program (IEP).

During school year 1977-78, it is expected that all second priority children will receive a basic education, but some of these children may not receive all of the services required by their IEPs. However, under the Statute, all services in a child's IEP must be provided by September 1, 1978.

Comments are invited on whether the regulations should require a local educational agency to provide all of the IEP services in school year 1977-78.

#### INDIVIDUALIZED EDUCATION PROGRAMS

Sections 121a.220-121a.226 of the regulations interpret the statutory requirement that free appropriate public education includes an individualized education program for every handicapped child so served.

The individualized education program (IEP) is a written statement developed in a meeting with a representative of the local educational agency, the teacher, the parent, and the child, where appropriate. The written statement on each child includes documentation of decisions reached about the objectives, content, implementation and evaluation of the child's educational program.

An IEP must be developed for any handicapped child who is placed in a private school by a State or local educational agency.

*Discussion of specific issues.* (1) Many commenters raised the issue of whether the IEP is a legally binding document.

The interpretation of these rules reflects the intent of Congress as stated in the Congressional Record of the House by Mr. Quie,

It is important to point out that (the individualized educational program) is an educational program developed jointly, but it is not intended as a binding contract by the schools, children, and parents.

Therefore, while the State or local educational agency is responsible for providing the services delineated in the IEP, such agency does not violate these regulations if the child does not achieve the growth projected in the annual goals and objectives.

(2) Questions were asked concerning the participation in the planning conference of parents who have a communication barrier such as deafness or whose native language is other than English. The rules for this Subpart assure the active participation of such parents. The local educational agency must provide an interpreter or take whatever action is necessary in order that the parent may understand the proceedings.

(3) Several commenters requested an interpretation of the requirements for participants at the individual planning conference, specifically, the representative of the local educational agency. Questions were raised to determine whether (a) the representative of the local educational agency may be the child's teacher, and (b) what qualifications that representative must have. Under the statute, the representative of the local educational agency must be someone other than the child's teacher. The regulations repeat the statutory language regarding the local educational agency representative.

(4) Several commenters raised concerns regarding whether or not the agency may proceed to develop the individualized education program if the parents are unwilling or unable to at-

tend the individual planning conference. The proposed rules specify that the agency shall make every attempt to assure parental participation, including convening the participants at a mutually agreed-upon time and place. However, if these efforts are unsuccessful, the agency must document these attempts and may proceed without parental participation.

(5) The statute mandates that an IEP for each child must be established or revised, as appropriate, at the beginning of each school year. Questions were raised concerning the timing of the individualized planning conferences in order to insure that this requirement would be met. These regulations specify that for a handicapped child already receiving special education and related services, the planning conferences must be conducted early enough to insure that the child's IEP is developed (or revised) by the beginning of the next school year. To meet this provision, a local educational agency could conduct the meeting for the child at the end of the school year or during the summer.

(6) A point was made by many commenters that a local educational agency may develop an IEP on a child based only on existing (limited) resources available in the school district. Under the proposed rules, each child's IEP must include specific services needed by that child (determined without regard to local availability of such services).

Part B funds may be used to provide these services for a first priority child. After the first priority is met, Part B funds may be used to provide services for a second priority child if that child was not previously receiving all of the services required under his or her IEP.

See the discussion under "PRIORITIES IN THE USE OF PART B FUNDS" (issue number (6)), which relates to whether all of these services must be provided.

#### DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

Section 614(d) of the Act provides that whenever a State educational agency determines that a local educational agency is either unable or unwilling to submit a consolidated application or to serve handicapped children, or has a handicapped child who can best be served in a regional or State center, the State must use the local educational agency's Part B entitlement to provide special education and related services directly to the handicapped children residing in the area served by that agency. Section 121a.240 of Subpart C incorporates the statutory requirement verbatim.

Sections 121a.250 and 121a.251 set out statutory requirements regarding the use of the State educational agencies' entitlement for direct and support services.

*Discussion of specific issues.* With respect to the State educational agency's use of a local educational agency's entitlement to provide direct services to handicapped children in the local agency, several questions have been raised: (1) Can a local educational agency refuse "to establish and maintain



programs of free appropriate public education for handicapped children?"

Under Section 504 of the Rehabilitation Act of 1973, "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Thus, a local educational agency would not be in compliance with the basic provisions of section 504 if the agency did not make available a free appropriate public education for its handicapped children.

(2) Since every local educational agency could potentially have a handicapped child who could best be served in a regional or State center, how is the requirement in section 614(d) of the Act (§ 121a.240 of this regulation) to be implemented?

Comments are requested regarding (a) the extent to which the Department should regulate on this provision, and (b) whether or not each State should be permitted to implement the requirement in accordance with its own State procedures (e.g., each State determines the conditions under which it will become directly involved in placing a handicapped child outside of the local educational agency and whether Part B entitlements will be used for such purposes).

#### COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

Sections 121a.260-121a.268 implement the statutory requirement in section 613(a)(3) that a State develop and implement a comprehensive system of personnel development including (a) inservice training of general and special educational instructional and support personnel, and (b) procedures to insure that all personnel necessary to carry out the purposes of the Act are appropriately and adequately prepared and trained. The statute also requires procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting promising educational practices and materials developed through those projects.

#### SUBPART D: PRIVATE SCHOOLS

##### PARTICIPATION OF PRIVATE SCHOOL CHILDREN

Section 613(a)(4)(A) of the Act requires States and local educational agencies to establish policies and procedures to insure that, to the extent consistent with the number and location of handicapped children enrolled in regular and special private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services. This basic statutory requirement, and the implementing regulations, have been in effect since 1966, when the original State grant program for the education of handi-

capped children was enacted. (Pub. L. 89-750).

Sections 121a.300-121a.306 of these proposed programmed regulations incorporate the existing rules regarding participation of private school handicapped children.

Section 121a.301 requires that determinations of the special educational needs of handicapped children enrolled in private elementary and secondary schools must be made on a basis comparable to that used for handicapped children who are enrolled in public, elementary and secondary schools.

Section 121a.302 specifies that programs assisted under Part B of this Act must be designed to provide services to handicapped children enrolled in private schools within the geographical area served by the program or project.

Section 121a.303 requires that the services of public school personnel must be made available to handicapped children enrolled in private schools provided that (1) the services required by such children are not normally provided by the private school, and (2) the administrative control and direction of these services is maintained by the State educational agency or local educational agency.

Section 121a.304 includes requirements regarding equipment purchased with Part B funds. The public agency shall retain the title and administrative control over such equipment which is placed for a limited time on private school premises.

Section 121a.305 speaks to the issue of prohibition of segregation of children who participate at a public school facility from a private school or another public school. Such children may not be placed in classes that are separated on the basis of the child's school enrollment or religious affiliation.

Section 121a.306 requires that funds provided under Part B or properly derived from those funds shall not be used to the benefit of a private school.

#### PLACEMENT OF HANDICAPPED CHILDREN IN PRIVATE SCHOOLS

Section 613(a)(4)(B) of the Act requires States to insure that handicapped children placed in or referred to a private school or facility by a State or local educational agency must be provided special education and related services:

(1) in conformance with an individualized education program, and (2) at no cost to the parents. The Statute further requires that the State educational agency must assure that the private facilities meet State standards and that children placed in such facilities have the same rights they would if served by a public educational agency.

Sections 121a.320-121a.323 of these regulations interpret this statutory requirement. These rules (1) set out the implementation requirements for State educational agencies to follow, (2) specify that if the parents of a handicapped child decide not to take the opportunity for a free appropriate public education, neither the State nor local educational agency is required to pay for the child's education; and (3) point out that dis-

agreements between the parent and the public educational agency regarding the availability of an appropriate education may be the subject of a due process hearing.

#### SUBPART E: PROCEDURAL SAFEGUARDS

##### DUE PROCESS PROCEDURES

Sections 121a.400 through 121a.414 of Subpart E set forth requirements to insure that handicapped children and their parents are guaranteed procedural safeguards in matters relating to the provision of a free appropriate public education. Because of the specificity of the due process procedures in section 615 of the Statute, the Department has elected to incorporate these procedures substantially verbatim into the proposed regulations and to expand the statutory provisions only where additional interpretation seemed to be necessary. The additional items added by the proposed regulation are as follows:

(1) The Statute specifies that parents of a handicapped child must be afforded the opportunity to obtain an independent evaluation of the child. The proposed regulations address the issue of who pays for the evaluation and under what circumstances. (See § 121a.403)

(2) The Statute requires written prior notice in the native language of the parents in matters relating to the identification, evaluation, and educational placement of a handicapped child. The proposed regulations specify (a) what the content of the notice must be, (b) that the notice must be in language understandable to the general public, and (c) that when the native language is not written, steps must be followed by the agency to insure that the parents understand the notice. (See § 121a.404)

(3) The Statute specifies that a hearing may not be conducted by an employee of the agency in which the handicapped child receives education or care. The proposed regulations add: (a) That the person serving as hearing officer may not have a personal or professional interest which would conflict with his or her objectivity in the hearings, and (b) that a person meeting the conditions of impartiality who is paid by an agency to serve as a hearing officer would not be considered to be an employee of the agency. (See § 121a.407)

(4) The proposed regulations require agencies to take steps to insure that all hearings and reviews (a) will be commenced and completed as quickly as possible and (b) will be conducted at times and places which are reasonably convenient to the parents of the child involved. (See § 121a.412)

(5) The statute requires an agency to appoint a surrogate parent (not an employee of the agency) to protect the rights of a handicapped child whenever the child's parents are unknown, unavailable, or the child is a ward of the State. The proposed regulations (a) require agencies to have a method for determining when a child needs a surrogate and for assigning a surrogate to the child, (b) set out criteria for selecting surrogates, and (c) specify that a person

paid by an agency to serve as a surrogate would not be considered to be an employee of that agency. (See § 121a.415)

*Discussion of specific issues.* (1) Many commenters have expressed concerns (a) that local educational agencies are totally vulnerable in any due process hearing and (b) that the entire process works only to the advantage of the individual handicapped child or his parents regardless of what the subject or purpose of the hearing may be. The Department's view with respect to this concern is as follows:

A basic tenet of the American system of government, as provided by the United States Constitution, is that any individual who is threatened or becomes subject to serious or adverse action by public authorities must be provided with full rights of due process of law. Such procedures provide to the individual the opportunity to contest the proposed action within a series of proceedings which insure that fairness and good judgment govern the entire decision-making process.

The implementation of these procedures, however, must not be misunderstood by public educators, handicapped children, their families or advocates. They are not intended to give an advantage to any "side" in the decision-making process. Rather they are to produce a setting in which the interested parties effectiveness and finally, their rights understand the nature of a child, his needs, the procedures and process used to obtain that information, the proposed plan to meet the needs of the child, the review procedures to determine program effectiveness and finally, their rights under the law. Invoking due process procedures does not inherently create adversary settings. The goal of the process is better programming for children, with better understanding of all parties—parents, children, educators and advocates, of their responsibilities, and a forum for continuous review.

(2) A question has been raised regarding whether the superintendent of a public institution for the handicapped (such as a State residential school for the deaf) can serve as the surrogate parent for a child in that institution. Section 615(b)(1)(B) of the Statute provides that a surrogate parent may not be an employee of the State educational agency or local educational agency in which the child receives education or care. However, section 612 of the Act insures that the rights and benefits of the Statute (including due process rights) apply to all handicapped children in the State regardless of what agency is providing them with special education and related services. Therefore, the department's view is that it would be inconsistent with the Statute for the superintendent or any other employee of an institution to serve as a surrogate parent for a child in that institution.

#### PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory testing procedures for use in the evaluation

and placement of handicapped children. The requirements for States to follow in carrying out this provision are set out in §§ 121a.430–121a.433 of Subpart E. These requirements are designed to insure that children are not misclassified or unnecessarily labeled as being handicapped because of inappropriate selection, administration, or interpretation of evaluation materials.

While the term "nondiscriminatory testing" is generally used with respect to this provision, the provision clearly applies to evaluation materials and procedures used with all handicapped children. Thus, the title "Protection in Evaluation Procedures", as used in these proposed regulations, is considered to be more appropriate than "Nondiscriminatory Testing".

A decision was made by the Office of Education to adopt the evaluation procedures in the proposed regulations under section 504 of the Rehabilitation Act of 1973. This decision was made (1) in order to insure consistency between the two sets of regulations and (2) because the "504" provisions cover the basic points on evaluation in which there is general professional agreement (e.g., that evaluation procedures be multi-factored, multi-sourced, and carried out by qualified personnel).

#### LEAST RESTRICTIVE ENVIRONMENT

Section 612(5)(B) of the Act requires States to establish procedures to insure that to the maximum extent appropriate, handicapped children are educated with children who are not handicapped, and that removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The minimum requirements for States to follow in carrying out this provision are set out in §§ 121a.440–121a.445 of Subpart E.

These proposed regulations (1) require each State educational agency to inform public educational agencies about the least restrictive alternative provision, to assist them with its implementation, and to monitor their progress, and (2) set forth additional requirements designed to insure effective implementation of this provision for each handicapped child.

*Discussion of specific issues.* (1) A number of comments expressed concerns (a) that in carrying out the least restrictive environment provision too much emphasis would be focused on having handicapped children educated with children who are not handicapped, and (b) that there may be an overzealous implementation of this provision without regard to the needs of individual handicapped children.

These concerns were dealt with directly in the June 6, 1975 Report of the House of Representatives on HR 7217 (H. Rept. No. 94-332, p. 9):

The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school, or

institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place on instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

With respect to the above concerns, this proposed regulation sets out three points:

(a) That each handicapped child's educational placement must be determined at least annually and be based on his or her individualized education program.

(b) That steps be taken to assure that implementation of this provision will not produce a harmful effect on the child or reduce the quality of services which he or she requires.

(c) When there is evidence to suggest that a local educational agency is placing its handicapped children in an environment without regard to their specific, individual needs, the State educational agency must assist in planning and implementing any necessary corrective action.

(2) In drafting this proposed regulation, the issue was raised about the desirability of setting out a specific continuum of educational placements or program options which every State must follow. The decision was made to permit each State to develop its own continuum provided that the continuum includes the various alternative placements set forth in the Statute.

#### CONFIDENTIALITY

The regulations on confidentiality, as set out in §§ 121a.450–121a.466, were previously published in final form on February 27, 1976 (41 FR 8603–8610) to comply with the requirement under Pub. L. 93-380 and an additional provision under Pub. L. 94-142. These regulations are being republished and renumbered in this package of proposed rules for the convenience of the reviewers. Certain portions of the final (existing) regulations have been moved to other sections of these proposed rules, but the rules are substantially the same:

Section 121a.10 of the existing (February 27, 1976) regulations is incorporated in Subpart B of these proposed rules.

The definitions of "consent" and "formal evaluation" in § 121a.15 of the existing regulations have been moved to a definition section for Subpart E. The word "formal" has been deleted from "Formal evaluation" and the definition has been expanded.

The definition of "parent" has been moved to subpart A and has been revised to apply more generally to all parents covered under Part B of the Act.

The requirement that parental consent must be obtained before an evaluation is conducted (as set out in § 121a.15 of existing regulations) has been moved to the due process procedure in § 121a.404 of this subpart.

## OFFICE OF EDUCATION HEARING PROCEDURES

Sections 121a.480 through 121a.483 set out the hearing procedures which the Office of Education will use whenever a State educational agency has the right to a hearing under Part B of the Act, including (1) disapproval of the State's annual program plan, (2) a decision by the Commissioner to withhold funds for non-compliance with Part B, and (3) a request by a State for a waiver of the supplanting requirement under section 613(a)(9) of the Statute. These hearing procedures are based on other procedures used within the Department (e.g., the grant appeals board, 45 CFR Part 16).

Additional procedures to be used in withholding funds from a State educational agency when the State is in substantial noncompliance with Part B of the Act are set out in §§ 121a.490-121a.493 of this subpart. These procedures are elaborated on in section 616 of the Act.

## SUBPART F: STATE ADMINISTRATION

Sections 121a.500 through 121a.502 of Subpart F set forth the responsibilities of the State educational agency for the use of funds for all educational programs for handicapped children within the State. These proposed regulations (1) set forth the percentage of the State allotment for administration, (2) delineate the allowable administrative expenditure, and (3) provide for the reallocation of local educational agency funds.

## ADVISORY PANEL

Sections 121a.550 through 121a.552 set forth requirements for a State advisory panel on the education of handicapped children. The membership of such panel is composed of persons who are involved in or concerned with the education of handicapped children.

The advisory panel is responsible for (1) advising the State educational agency of Statewide unmet needs in the education of handicapped children, (2) commenting on the rules for issuance by the State and the procedures for distributing funds under this Part, and (3) assisting the State in developing and reporting of data and evaluations to assist the Commissioner in performing his responsibilities under section 618.

*Discussion of specific issues.* Several persons have asked whether the State requirement for consultation with individuals concerned with the Education of the Handicapped Act as stated in section 612(7)(A) requires each State to assure that in carrying out the eligibility requirements in the Statute, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children. Comments are invited on the issue of whether these requirements can be effectively met through the use of the State advisory panel.

SUBPART G: ALLOCATION OF FUNDS;  
REPORTS

## ALLOCATIONS

Sections 121a.600 through 121a.607 set forth the conditions under which States receive and distribute funds under this part.

These proposed regulations (a) delineate the State entitlement and formula for each fiscal year from 1978 to 1982 and thereafter and (b) specify the limitations and exclusions related to this formula as set forth by the requirements for child count.

The procedures are defined for the ratable reduction of funds; (a) the dates for local educational agencies to report to the State, and (b) the reallocations of such monies and the amount of funds available.

Section 121a.603 of the proposed regulations repeats the hold harmless provision which ensures a funding level at least equal to that in fiscal year 1977, and the distribution of funds to the State educational agency and the local educational agencies for fiscal years 1978, 1979, and thereafter.

Sections 121a.604 and 121a.605 set forth the requirements for the distribution of funds to the State educational agency and local educational agencies for fiscal year 1978, 1979, and thereafter.

Section 121a.606 sets forth the formula and entitlements for local educational agencies and § 121a.607 specifies the provisions for entitlements to Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

## REPORTS

Sections 121a.650 through 121a.654 set forth the requirements for the annual report of children who have been served during that year. The proposed regulations specify (1) the report requirement, (2) information required in the report, (3) certification of the accuracy of the report, (4) the criteria used for counting children. Section 121a.654 sets forth additional responsibilities of the State educational agency to coordinate a Statewide effort to assure an accurate and unduplicated count to meet the requirements of section 611(a)(3) and section 617(a)(1)(D) of the Statute.

The preamble and regulations for Child Count were published in proposed form in the FEDERAL REGISTER on September 8, 1976. The comment period for these regulations has ended; however, they are being reprinted here for the convenience of the reader.

*Discussion of specific issues.* (1) One issue raised by the commenters on the proposed "child count" regulations is the eligibility of certain classes of children to be counted under Pub. L. 94-142: (e.g., Children who receive an education, provided at the expense of the military or the local educational agency, on a United States military base).

Further comments are invited as to the eligibility of those children to be counted under Pub. L. 94-142 and the effects that this count would have on the continued eligibility of those children to be counted (or even served) under other federal pro-

grams providing assistance to the military based school.

(2) A number of questions were raised with respect to counting handicapped children enrolled in regular private elementary and secondary schools under the provisions of section 613(a)(4)(A) of the Act §§ 121a.300-121a.306 of Subpart D of these regulations).

A private school handicapped child may be counted provided that the child (a) is a "handicapped child", as defined in § 121a.4 of Subpart A, and (b) is receiving special education and related services through State, local or Federal funds. It should be noted that private school handicapped children must receive special education and related services in conformance with an individualized education program.

(3) A question was raised as to whether (a) "deaf-blind" should be added as a category in the child count provisions, or (b) whether the Department should utilize only the specific types of handicaps defined in the Statute and have the children reported separately as "deaf" or "visually handicapped". The issue involved is that there are many other categories which could also be added; but in doing so, it would reduce the chances of receiving an unduplicated count of children. Comments are requested regarding this question.

(4) Another issue is whether funds available to a State under EHA Part B can be used in part to support educational programs for children in State operated or State supported schools. The present section 613(a)(9) of EHA (effective until 10/1/77) requires that a State Plan provide assurance that EHA Part B funds "shall not be made available for handicapped children eligible for assistance under section (121) of the Elementary and Secondary Education Act of 1965."

The Office of Education has interpreted this provision to preclude use of Part B funds on children who either were eligible to be counted or actually counted under section 121. For FY '78 and thereafter the present section 613(a)(9) will be dropped. New section 611(a)(5)(A)(iii) (effective 10/1/77) may only prohibit the Commissioner for purposes of Part B from counting handicapped children who are counted under section 121 of ESEA. This provision, once in effect, may not preclude Part B funding of those children who have not been counted under that section. Comments are invited on this issue.

## PART 121m: INCENTIVE GRANTS

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

*Discussion of specific issues.* (1) A question arose as to (a) whether States

could use the incentive grant funds to provide services only to those children who were counted to generate those monies, or (b) whether the State educational agency may determine if additional, previously unserved children are to be served with these funds. These regulations reflect the intent of the legislation by allowing the State educational agency to determine the optimal use of these funds for children ages three through five who are counted as receiving special education and related services or children who were previously unserved.

(2) A related issue was raised regarding the expenditure of equal dollars for each child. It was felt that for optimal implementation of the legislation the States should have flexibility in determining the amount spent on individual children so long as each child served is provided a free appropriate public education.

(3) An issue was raised concerning the possible use of incentive grant funds for children from birth through two years of age. Section 619 and the legislative history specify that the use of incentive grant funds is limited to children ages three through five years. However, the State's entitlement under section 611 of the Act may be used for children from birth through age twenty-one.

(4) Another issue was whether a State must be serving all handicapped children ages three through five in order to qualify for the funds. The proposed rules interpret the statute to regard as eligible those States which offer programs to any of the handicapped children in this age range. Therefore, any State which serves any portion of the three, four, or five year old handicapped population may apply.

#### PUBLIC HEARINGS

The Office of Education will hold public hearings on these proposed regulations at the following times and locations:

City	Date/time	Address
Washington, D.C.	Feb. 3, 1977, 9:30 a.m. to 3 p.m.	Regional Office Bldg. No. 3, Auditorium No. 3, 7th and D Sts., SW., Washington, D.C. 20202.
San Francisco	Feb. 8, 1977, 9:30 a.m. to 3 p.m.	Federal Office Bldg., 450 Golden Gate, Room 2007, San Francisco, Calif. 94102.
Denver	Feb. 9, 1977, 9:30 a.m. to 3 p.m.	Post Office Bldg., Room 269, 18th and Stout Sts., Denver, Colo. 80202.
Chicago	Feb. 10, 1977, 9:30 a.m. to 3 p.m.	Rebecca Crown Center/Hardin Hall, 633 Clark, Evanston, Ill. 60201.
Boston	Feb. 15, 1977, 9:30 a.m. to 3 p.m.	Post Office and Court House Bldg., Room 208, Boston, Mass. 02109.
Atlanta	Feb. 18, 1977, 9:30 a.m. to 3 p.m.	Board of Education, City of Atlanta, Board Room, 159 Garnett, SW., Atlanta, Ga. 30323.

The purpose of these hearings is to receive comments and suggestions on the proposed rules for consideration by the Office of Education in preparing final

regulations for Part 121a. (Assistance to States for the Education of Handicapped Children) and Part 121m. (Incentive Grants program for Handicapped children ages three through five.)

In order to insure that all interested parties will have an opportunity to make comments at the hearings, the Office of Education recommends the following procedure:

(1) Each person planning to make an oral presentation should: (a) prepare a written statement of his/her comments in advance of the hearings; (b) make the presentation as concise as possible; and (c) submit a copy of the prepared statement to the Bureau of Education for the Handicapped, Office of Education, Regional Office Building No. 3, 7th and D Streets, SW, Washington, D.C. 20202.

NOTE.—If a person has extensive comments to make, it is recommended that the person's oral presentation include only a summary of the comments and that the full, written statement be sent to the above address.

(2) In presenting both oral and written statements, each commenter should (a) indicate his/her name, title, and address, (b) identify each specific subpart and section of the regulations on which comments are being made, (c) describe the concern with respect to that subpart and section, and (d) specify the recommended action to be taken.

#### NOTICE OF PUBLIC HEARINGS ON SPECIFIC LEARNING DISABILITIES REGULATIONS

In accordance with proposed rules on Specific Learning Disabilities, published in the FEDERAL REGISTER on November 29, 1976 (41 FR 52403), notice is hereby given that The Office of Education will hold six public hearings on these regulations. These hearings will be conducted in conjunction with the hearings on Parts 121a. and Parts 121m. to enable interested parties opportunity to comment on each of these proposed rules. The recommended procedures for making oral presentations on Specific Learning Disabilities are the same as those specified in the preceding paragraphs for Parts 121a and Parts 121m. Following are the times and locations for the hearings on Specific Learning Disabilities:

City	Date/time	Address
Washington, D.C.	Feb. 4, 1977, 9:30 a.m. to 3 p.m.	Regional Office Bldg., No. 3, 7th and D Sts., S.W., Washington, D.C. 20202.
San Francisco	Feb. 7, 1977, 9:30 a.m. to 3 p.m.	Federal Office Bldg., 450 Golden Gate, Room 2007, San Francisco, Calif. 94102.
Denver	Feb. 8, 1977, 9:30 a.m. to 3 p.m.	Post Office Bldg., Room 269, 18th and Stout Sts., Denver, Colo. 80202.
Chicago	Feb. 9, 1977, 9:30 a.m. to 3 p.m.	Rebecca Crown Center/Hardin Hall, Northwestern University, 633 Clark, Evanston, Ill. 60201.
Boston	Feb. 16, 1977, 9:30 a.m. to 3 p.m.	Post Office and Court House Bldg., Room 208, Boston, Mass. 02109.
Atlanta	Feb. 17, 1977, 9:30 a.m. to 3 p.m.	Board of Education, City of Atlanta, 159 Garnett, S.W., Atlanta, Ga. 30323.

#### WRITTEN COMMENTS

The Office of Education invites written comments and recommendations on these proposed regulations. All written materials should be sent to: Bureau of Education for the Handicapped, Office of Education, Room 2015 Regional Office Building No. 3, 7th and D Streets, SW, Washington, D.C. 20202.

The written comments should (1) include the name, title, address, and telephone number of the commenter, (2) identify each specific subpart and section of the regulations on which comments are being made, (3) describe the concern with respect to that subpart/section, and (4) specify the recommended action to be taken.

Comments received in response to the notice will be available for public inspection at the above office Monday through Friday between 8 a.m. and 4 p.m. All relevant material must be received on or before March 1, 1977.

All comments written and oral will be reviewed by the Office of Education and considered in preparation of final regulations.

Questions about these proposed regulations may be addressed to Mr. Thomas B. Irvin, at the above address, or by phone (202) 245-9405.

The United States Office of Education has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 1182 and OMB circular A-107.

(Catalog of Federal Domestic Assistance Number 13.449, Handicapped Preschool and School Programs.)

Dated: December 16, 1976.

EDWARD AGUIRRE,  
U.S. Commissioner of Education.

Approved: December 22, 1976.

MARJORIE LYNCH,  
Acting Secretary of Health,  
Education, and Welfare.

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

#### PART 100b—STATE ADMINSTRATED PROGRAMS

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

##### § 100b.17 General applications.

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

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

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

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

(2) Subject to paragraph (d) of this section, if the Commissioner has approved a State's general application, the State does not have to submit the provi-

sions required under the following statutes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) A State plan, general application, annual program plan, or amendment to any of them, is effective on the date the

State submits it to the Federal Government in substantially approvable form. However, the effective date cannot be earlier than the first day of the fiscal period for which it is submitted.

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

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

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

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

§ 100b.55 Obligation by recipients.

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

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

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

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

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

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

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

**Subpart A—General**

Sec.	
121a.1	Purpose.
121a.2	Applicability to State, local, and private agencies.
121a.3	General provisions regulations.
121a.4	Definitions.

**Subpart B—State Annual Program Plans and Local Applications**

**ANNUAL PROGRAM PLANS—GENERAL**

Sec.	
121a.10	Condition of assistance.
121a.11	Contents of plan.
121a.12	Certification by the State educational agency and attorney general.
121a.13	Approval; disapproval.
121a.14	Effective period of annual program plan.

**ANNUAL PROGRAM PLANS—CONTENTS**

121a.20	Public participation.
121a.21	Right to a free appropriate public education.
121a.22	Timelines and ages for free appropriate public education.
121a.23	Full educational opportunity goal.
121a.24	Full educational opportunity goal—data requirement.
121a.25	Full educational opportunity goal—timetable.
121a.26	Full educational opportunity goal—facilities, personnel, and services.
121a.27	Priorities.
121a.28	Identification, location, and evaluation of handicapped children.
121a.29	Confidentiality of personally identifiable information.
121a.30	Individualized education programs.
121a.31	Procedural safeguards.
121a.32	Least restrictive environment.
121a.33	Protection in evaluation procedures.
121a.34	Responsibility of State educational agency for all educational programs.
121a.35	Monitoring procedures.
121a.36	Implementation procedures—State educational agency.
121a.37	Procedures for consultation.
121a.38	Compliance with Part B of the Act.
121a.39	Other Federal programs.
121a.40	Comprehensive system of personnel development.
121a.41	Private schools.
121a.42	Recovery of funds for misclassified children.
121a.43	Control of funds and property.
121a.44	Records.
121a.45	Hearing on application.
121a.46	Prohibition of commingling.
121a.47	Annual evaluation.
121a.48	State advisory panel.
121a.49	Description of use of Part B funds.

**LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL**

121a.80	Submission of application.
121a.81	Responsibilities of State educational agency.
121a.82	Excess costs.
121a.83	Consolidated applications.
121a.84	Payments under consolidated applications.
121a.85	State regulation of consolidated applications.
121a.86	State educational agency approval; disapproval.
121a.87	Withholding.

**LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS**

121a.100	Child identification.
121a.101	Confidentiality of personally identifiable information.
121a.102	Full educational opportunity goal; timetable.
121a.103	Facilities, personnel, and services.
121a.104	Personnel development.
121a.105	Priorities.
121a.106	Parent involvement.

## PROPOSED RULES

- Sec.  
121a.107 Participation in regular education programs.  
121a.108 Public control of funds.  
121a.109 Excess cost and non-supplanting.  
121a.110 Comparable services.  
121a.111 Information—reports.  
121a.112 Records.  
121a.113 Public participation.  
121a.114 Individualized education program.  
121a.115 Local policies consistent with statute.  
121a.116 Procedural safeguards.  
121a.117 Use of Part B funds.

## APPLICATION FROM SECRETARY OF INTERIOR

- 121a.124 Authority to participate; payments.  
121a.126 Submission of annual application; approval.  
121a.127 Public participation.  
121a.128 Use of Part B funds.  
121a.129 Applicable regulations.

## PUBLIC PARTICIPATION

- 121a.130 Public hearings before adopting an annual program plan.  
121a.131 Review of public comments before adopting plan.  
121a.132 Publication and availability of approved plan.

## Subpart C—Services

## GENERAL

- 121a.200 Timelines for free appropriate public education.  
121a.201 Free appropriate public education—methods and costs.  
121a.202 Full educational opportunity goal.  
121a.203 Physical education.  
121a.204 Incidental use of property

## PRIORITIES IN THE USE OF PART B FUNDS

- 121a.210 Definitions of "first priority children" and "second priority children".  
121a.211 Priorities.  
121a.212 First priority—age groups covered.  
121a.213 Services to other children.  
121a.214 Application of local educational agency to use funds for the second priority.

## INDIVIDUALIZED EDUCATION PROGRAMS

- 121a.220 Scope.  
121a.221 State educational agency responsibility.  
121a.222 Local educational agency responsibility.  
121a.223 Participants in meetings.  
121a.224 Parent participation.  
121a.225 Content of individualized education program.  
121a.226 Private school placements.

## DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

- 121a.240 Use of local educational agency allocation for direct services.  
121a.241 Nature and location of services.  
121a.250 Use of State educational agency allocation for direct and support services.  
121a.251 State matching.

## COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

- 121a.260 Scope of system.  
121a.261 Definition of "appropriately and adequately prepared and trained".  
121a.262 Participation of other agencies and institutions.  
121a.263 Inservice training.  
121a.264 Personnel development plan.  
121a.265 Dissemination.

## Sec.

- 121a.266 Adoption of educational practices.  
121a.267 Evaluation.  
121a.268 Technical assistance to local educational agencies.

## Subpart D—Private Schools

## PARTICIPATION OF PRIVATE SCHOOL CHILDREN

- 121a.300 General.  
121a.301 Determinations.  
121a.302 Services.  
121a.303 Personnel.  
121a.304 Equipment.  
121a.305 Prohibition of segregation.  
121a.306 Use of Federal funds.

## PLACEMENT OF HANDICAPPED CHILDREN IN PRIVATE SCHOOLS

- 121a.320 Responsibility of State educational agency.  
121a.321 Implementation by State educational agency.  
121a.322 Placement of children by parents.  
121a.323 Placement in another State.

## Subpart E—Procedural Safeguards

## DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

- 121a.400 Definitions of "consent," "evaluation," and "personally identifiable".  
121a.401 General responsibility of State and local educational agencies.  
121a.402 Opportunity to examine records.  
121a.403 Independent educational evaluation.  
121a.404 Prior notice; parent consent.  
121a.405 Content of notice.  
121a.406 Impartial due process hearing.  
121a.407 Impartial hearing officer.  
121a.408 Hearing rights.  
121a.409 Hearing decision; appeal.  
121a.410 Administrative appeal; impartial review.  
121a.411 Civil action.  
121a.412 Timeliness and convenience of hearings and reviews.  
121a.413 Child's status during proceedings.  
121a.414 Surrogate parents.

## PROTECTION IN EVALUATION PROCEDURES

- 121a.430 General.  
121a.431 Evaluation; change in placement.  
121a.432 Evaluation procedures.  
121a.433 Reevaluation.

## LEAST RESTRICTIVE ENVIRONMENT

- 121a.440 General.  
121a.441 Continuum of alternative placements.  
121a.442 Placements.  
121a.443 Technical assistance and training activities.  
121a.444 Children in public or private institutions.  
121a.445 Monitoring activities.

## CONFIDENTIALITY OF INFORMATION

- 121a.450 Definitions.  
121a.451 Notice to parents.  
121a.452 Access rights.  
121a.453 Record of access.  
121a.454 Records on more than one child.  
121a.455 List of types and locations of information.  
121a.456 Fees.  
121a.457 Amendment of records at parent's request.  
121a.458 Opportunity for a hearing.  
121a.459 Result of hearing.  
121a.460 Hearing procedures.  
121a.461 Consent.  
121a.462 Safeguards.  
121a.463 Destruction of information.  
121a.464 Children's rights.  
121a.465 Enforcement.  
121a.466 Office of Education.

## OFFICE OF EDUCATION PROCEDURES

## Sec.

- 121a.480 Opportunity for a hearing.  
121a.481 Hearing panel.  
121a.482 Hearing procedures.  
121a.483 Initial decision; final decision.  
121a.489 Waiver of requirement regarding supplementing and supplanting with Part B funds.  
121a.490 Withholding payments.  
121a.491 Reinstating payments.  
121a.492 Public notice by State and local educational agencies.  
121a.493 Judicial review of Commissioner's final action on annual program plan.

## Subpart F—State Administration

## GENERAL

- 121a.500 Federal funds for State administration.  
121a.501 Allowable costs.  
121a.502 Reallocation of local educational agency funds.

## STATE ADVISORY PANEL

- 121a.550 Establishment.  
121a.551 Membership.  
121a.552 Advisory functions and procedures.

## Subpart G—Allocation of Funds; Reports

## ALLOCATIONS

- 121a.600 State entitlement; formula.  
121a.601 Limitations and exclusions.  
121a.602 Ratable reductions.  
121a.603 Hold harmless provision.  
121a.604 Within—State distribution: fiscal year 1978.  
121a.605 Within—State distribution: fiscal year 1979 and after.  
121a.606 Local educational agency entitlements; formula.  
121a.607 Entitlements to jurisdictions.

## REPORTS

- 121a.650 Annual report of children served—report requirement.  
121a.651 Annual report of children served—information required in report.  
121a.652 Annual report of children served—  
121a.653 Annual report of children served—criteria for counting children.  
121a.654 Annual report of children served—other responsibilities of the State educational agency.

AUTHORITY: Part B of the Education of the Handicapped Act, Pub. L. 91-230, Title VI, as amended, 89 Stat. 773 (20 U.S.C. 1401-1420), unless otherwise noted.

## Subpart A—General

## § 121a.1 Purpose.

The purpose of this part is:  
(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,  
(b) To insure that the rights of handicapped children and their parents are protected,  
(c) To assist States and localities to provide for the education of all handicapped children, and  
(d) To assess and insure the effectiveness of efforts to educate those children.

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

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

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

(b) Localities. This part applies to each locality which receives payments under Part B of the Education of the Handicapped Act.

(c) Private agencies. This part applies to each private agency which receives payments under Part B of the Education of the Handicapped Act.

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

(c) *Private schools.* The State educational agency, local educational agencies, and intermediate educational units are responsible for insuring that the rights and protection under this part are given to children referred or placed in private schools by a State or local educational agency.

(20 U.S.C. 1412(1); 1413(a)(1))

§ 121a.3 General provisions regulations.

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

(20 U.S.C. 1401-1418)

§ 121a.4 Definitions.

As used in this part:

"Free appropriate public education" means special education and related services which:

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

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

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

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.220-121a.227 of Subpart C.

(20 U.S.C. 1402(18))

"Handicapped children" means those children evaluated in accordance with §§ 121a.430-121a.433 of Subpart E as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, or as having specific learning disabilities, who because of those impairments need special education and related services. The terms used in this definition are defined as follows:

(a) "Deaf" means a hearing impairment which is so severe that the child's hearing is non-functional for the purposes of educational performance.

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

(c) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with

deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

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

(e) "Other health impaired" means limited strength, vitality, or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes.

(f) "Seriously emotionally disturbed" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree: an inability to learn which cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms, or fears associated with personal or school problems. The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted but not emotionally disturbed.

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

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

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

(20 U.S.C. 1402(1), (15))

"Include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1401-1418)

"Local educational agency," as defined in § 121.2 of this chapter, includes an intermediate educational unit.

(20 U.S.C. 1402(8), (22))

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

(20 U.S.C. 880b-1(a)(2); 1402(21))

"Parent" includes a parent, a guardian, a surrogate parent appointed under Subpart E, or a person acting as a parent of a child in the absence of a parent or guardian.

(20 U.S.C. 1401-1418)

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

"Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school social work services, parent counseling and training, providing parents with information about child development, and assisting parents in understanding the special needs of their child. The terms used in this definition are defined as follows:

(a) "Audiology" means:

(1) Identification of children with hearing loss;

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

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

(4) Creation and administration of programs of hearing conservation; and

(5) Counseling and guidance of pupils, parents, and teachers.

(b) "Counseling services" means activities conducted by a certified counselor.

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

(d) "Medical services" means procedures performed by a licensed physician to determine a child's need for special education and related services.

(e) "Occupational therapy" means services provided by a licensed occupational therapist.

(f) "Physical therapy," means activities for restoring damaged or atrophied muscles to improve use.

(g) "Psychological services" means:

(1) Administering psychological and educational tests;

(2) Interpreting the results;

(3) Gathering and interpreting information about child behavior;

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

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

(h) "Recreation" includes leisure education.

(i) "Speech pathology" means:

(1) The identification of children with speech or language disorders;

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

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

(4) Provision of speech and language habilitation; and

(5) Counseling and guidance of parents, children, and teachers

(j) "Transportation" includes:

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

(2) Travel in and around school buildings, and

(3) Specialized equipment if required.

"Special education" means specially designed instruction, at no cost to the parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. The term includes speech pathology, audiology, occupational therapy, and physical therapy, if the service is considered "special education" rather than a "related service" under State standards. The terms in this definition are defined as follows:

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

(b) "Physical education", includes special physical education, adapted physical education and motor development, and means the development of physical and motor fitness, fundamental motor skills and patterns, body mechanics, individual and group games and sports, skills to include intramural and lifetime sports, and dance and movement education.

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

(20 U.S.C. 1402(16))

## Subpart B—State Annual Program Plans and Local Applications

### ANNUAL PROGRAM PLANS—GENERAL

#### § 121a.10 Condition of assistance.

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

(b) For the purposes of this subpart, the term "State" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1232c(b), 1402(6), 1412, 1413)

*Comment.* Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19). Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977-1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.20-121a.49 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act) and section 434(b) (1) (B) (ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted").

#### § 121a.11 Contents of plan.

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

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

#### § 121a.12 Certification by the State educational agency and attorney general.

Each annual program plan must include:

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

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

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

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

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

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

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

#### § 121a.13 Approval; disapproval.

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

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

(c) The Commissioner shall use the procedures set forth in §§ 121a.480-121a.483 of Subpart E for a hearing under this section.

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

#### § 121a.14 Effective period of annual program plan.

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

(b) The Commissioner may extend the effective period of an annual program plan on the request of a State.

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

*Comment.* The Office of Education is proposing to use the period July 1-June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months. (This period includes the 12-month carry-over provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1, 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds, are located in 45 CFR Part 100b, Subpart B. (Also, see the comment following § 121a.132 of this subpart.)

### ANNUAL PROGRAM PLANS—CONTENTS

#### § 121a.20 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements §§ 121a.130-121a.132 are met.

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



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

- (i) A copy of each news release and advertisement used to provide notice,
- (ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and
- (iii) The dates on which the notice was announced or published.

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

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

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b) (1) of this section. (20 U.S.C. 1412(7))

**§ 121a.21 Right to a free appropriate public education.**

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.22.

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

(c) The information must show that the policy:

- (1) Applies to all public agencies in the State which provide special education and related services to handicapped children;
- (2) Applies to all handicapped children;
- (3) Implements the priorities established under § 121a.27(a) (1) of this subpart; and
- (4) Establishes timelines for implementing the policy, in accordance with § 121a.22.

(20 U.S.C. 1412(1))

**§ 121a.22 Timelines and ages for free appropriate public education.**

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

(b) *Documents relating to timelines.* Each annual program plan must include a copy of each statute, court order, at-

torney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

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

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

- (1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and
- (2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

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

**§ 121a.23 Full educational opportunity goal.**

Each annual program plan must provide that the State has a goal of providing full educational opportunity to all handicapped children ages birth through twenty-one.

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

**§ 121a.24 Full educational opportunity goal—data requirement.**

(a) *Annual program plan for school year 1977-1978.* (1) The annual program plan for school year 1977-1978 must include the following information:

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

(ii) The number of handicapped children ages 18 through 21 who are receiving special education and related services during school year 1976-1977.

(iii) The estimated number of handicapped children who will receive special education and related services during school year 1977-1978.

(2) The data under paragraph (a) (1) of this section must be provided:

- (i) For each of the following age ranges (except under paragraph (a) (1) (ii) of this section): birth through two, three through five, six through seventeen, and eighteen through twenty-one, and
- (ii) For each disability category (except for children ages birth through two).

(3) The annual program plan must include a description of the basis used to determine the data required under this paragraph.

(b) *Annual program plans for school years after 1977-1978.* Beginning with school year 1978-1979, each annual program plan must contain the following information:

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

(2) For the current school year:

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

(ii) The number of handicapped children:

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

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

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

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

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

(4) A description of the basis used to determine the data required under this paragraph.

(5) The data required by paragraph (b) (1), (2), and (3) of this section must be provided:

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

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

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

*Comment.* In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.4, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

The data requirements for school year 1977-78 under paragraph (a) (1) (ii) of this section are written to avoid duplication with the "child count" requirements for school year 1976-77 as set forth in Subpart G. The count requirements in subpart G were published in proposed form in the FEDERAL REGISTER on September 8, 1976.

Most of the data required for school year 1978-79 parallel the evaluation requirements in section 618(d) (1) of Part B, and are included in the annual program plan for the following reasons:

(1) There is a close relationship between: (a) the requirement in section 618 (which calls for an annual report on the progress made toward the provision of a free appropriate public education for all handicapped children), and (b) the goal of full educational opportunity under section 612(2) (A).

(2) The inclusion of the data is also consistent with the practice of requiring States to incorporate both evaluation and planning components into their annual program plans (e.g., by indicating the extent to which the previous year's objectives were achieved and setting forth new objectives for the coming year). This practice has proven to be sufficiently effective over the six years before the enactment of Pub. L. 94-142 to justify continuing it.

The data on free appropriate public education in Section 618 will be provided for the first time in the annual program plan for fiscal year 1978-79. However, the requirement is included in the regulations at this time in order to enable States to begin developing the capacity to collect the data well in advance of the submission date.

§ 121a.25 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children ages birth through twenty-one, within each disability category.

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

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

§ 121a.26 Full educational opportunity goal—facilities, personnel, and services.

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

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

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

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

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

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

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

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

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

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

(3) Estimates for the next school year.

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

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

§ 121a.27 Priorities.

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

(1) The State has established priorities which meet the requirements under §§ 121a.210–121a.212 of Subpart C,

(2) The State priorities meet the timelines under § 121a.22 of this subpart, and

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

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in § 121a.210(a) of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 121a.24(a) (2) (i) of this subpart.

(2) The annual program plan for school year 1977–1978 must include a description of the procedures the State educational agency has used in determining the number of handicapped children in the second priority group under § 121a.210(a) of Subpart C.

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

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

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

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

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

§ 121a.28 Identification, location, and evaluation of handicapped children.

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

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

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

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

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

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

(3) Describe the extent to which:

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

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

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

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

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

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

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

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

*Comment.* The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State.

§ 121a.29 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.450–121a.465 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2) (D); 1417(c))

*Comment.* The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603–8610), and meet the requirements of Pub. L. 94–142. Those regulations are incorporated in §§ 121a.450–121a.465 of Subpart E.

§ 121a.30 Individualized education programs.

(a) Each annual program plan must include information which shows that each local educational agency in the

State maintains records of the individualized education program for each handicapped child, and each local educational agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4))

**§ 121a.31 Procedural safeguards.**

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.00-121a.414 of Subpart E are met.

(20 U.S.C. 1412(5) (A))

**§ 121a.32 Least restrictive environment.**

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.440-121a.445 of Subpart E are met.

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

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 121a.440-121a.445 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5) (B))

**§ 121a.33 Protection in evaluation procedures.**

Each annual program plan must include procedures which insure that the requirements in §§ 121a.430-121a.433 of Subpart E are met.

(10 U.S.C. 1412(5) (C))

**§ 121a.34 Responsibility of State educational agency for all educational programs.**

Each annual program plan must include information which shows:

(a) That the State educational agency is responsible for insuring that the requirements of this part are carried out; and

(b) That each educational program for handicapped children administered within the State, including each program administered by any other State or local agency:

(1) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(2) Meet education standards of the State educational agency (including the requirements in this part).

(c) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective

agency officials, and other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6).)

**§ 121a.35 Monitoring procedures.**

Each annual program plan must include monitoring procedures which the State educational agency follows in insuring that State and local agencies:

(a) Are effectively implementing the procedural safeguards under Subpart E; and

(b) Are using Part B funds properly and efficiently.

(20 U.S.C. 1412(6).)

**§ 121a.36 Implementation procedures—State educational agency.**

Each annual program plan must describe the procedures the State educational agency follows to inform each State and local agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that State or local agency.

(20 U.S.C. 1412(6).)

**§ 121a.37 Procedures for consultation.**

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children.

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

**§ 121a.38 Compliance with Part B of the act.**

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611 (c) and 611(d) of the Act.

(20 U.S.C. 1413(a) (1).)

**§ 121a.39 Other Federal programs.**

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-2), section 305 (b) (8) of that Act (20 U.S.C. 844a(b) (8)) or Title IV-C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, is used by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a) (2).)

**§ 121a.40 Comprehensive system of personnel development.**

Each annual program plan must include the material required under §§ 121a.260-121a.268 of Subpart C.

(20 U.S.C. 1413(a) (3).)

**§ 121a.41 Private schools.**

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a) (4).)

**§ 121a.42 Recovery of funds for misclassified children.**

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a) (5).)

**§ 121a.43 Control of funds and property.**

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a) (6).)

**§ 121a.44 Records.**

Each annual program plan must provide for keeping records and affording access to those records, as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a) (7) (B).)

**§ 121a.45 Hearing on application.**

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a) (8).)

**§ 121a.46 Prohibition of commingling.**

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a) (9) (A).)

*Comment.* This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories).)

**§ 121a.47 Annual evaluation.**

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11).)

**§ 121a.48 State advisory panel.**

Each annual program plan must provide that the requirements of §§ 121a.550-121a.552 of Subpart F are met.

(20 U.S.C. 1413(a)(12).)

**§ 121a.49 Description of use of Part B funds.**

(a) *State allocation.* Each annual program "plan" must include the following information about the State's use of funds under § 121a.250 of Subpart C and § 121a.500 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application,

(4) A description of direct services the State educational agency will provide under § 121a.240 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii).)

**LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL****§ 121a.30 Submission of application.**

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a).)

**§ 121a.31 Responsibilities of State educational agency.**

Each State educational agency shall establish the procedures and format

which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a).)

**§ 121a.32 Excess costs.**

(a) Each local educational agency shall maintain records which show that the agency uses funds provided under Part B of the Act only for the excess costs of special education and related services for handicapped children.

(b) For the purposes of this part, "excess costs" means costs:

(1) Which are for special education and related services, and

(2) Which are above the costs of regular education for an elementary or secondary school student in the local educational agency.

(c) The cost of regular education is computed as follows:

(1) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(i) For elementary school students, if the handicapped child is an elementary school student, or

(ii) For secondary school students, if the handicapped child is a secondary school student.

(2) From this amount, subtract the total of the following amounts:

(i) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(ii) Amounts from other sources which the agency spent in the preceding school year for:

(A) Programs for handicapped children,

(B) Programs to meet the special educational needs of educationally deprived children, and

(C) Programs of bilingual education for children with limited English speaking ability.

(3) Divide the result under paragraph (d)(2) of this section by the average number of students enrolled in the agency in the preceding school year:

(i) In its elementary schools, if the handicapped child is an elementary school student, or

(ii) In its secondary schools, if the handicapped child is a secondary school student.

(d) The cost of regular education under a consolidated application of two or more local educational agencies is the average of the combined cost of regular education in those agencies for elementary or secondary school students, as the case may be.

(e) Neither a State educational agency or a local educational agency may use funds provided under Part B of the Act to pay for all of the special education and related services given to a handicapped child.

(20 U.S.C. 1401(20); 1414(a)(1).)

**§ 121a.33 Consolidated applications.**

(a) *Voluntary applications.* Local educational agencies may submit a consoli-

dated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the \$7,500 minimum required by section 611(c)(4)(A)(i) of the Act, or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1).)

**§ 121a.34 Payments under consolidated applications.**

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A).)

**§ 121a.35 State regulation of consolidated applications.**

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612(1)-(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B).)

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C).)

**§ 121a.36 State educational agency approval; disapproval.**

(a) *Approval.* A State educational agency shall approve any application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.100-121a.117. However, the State educational agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.100-121a.117.

(20 U.S.C. 1414(b) (1).)

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.400-121a.414 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b) (3).)

§ 121a.87 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.86;

(3) Or both.

(b) The public notice provision in § 121a.492 of Subpart E applies to any local educational agency receiving any notice from a State educational agency under paragraph (a) of this section.

(20 U.S.C. 1414(b) (2).)

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

§ 121a.100 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a) (1) (A).)

*Comment.* The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction.

§ 121a.101 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.450-121a.464 of Subpart E are met.

(20 U.S.C. 1414(a) (1) (B).)

§ 121a.102 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, and (b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a) (1) (C).)

§ 121a.103 Facilities, personnel and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.102.

(20 U.S.C. 1414(a) (1) (E).)

§ 121a.104 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.40.

(20 U.S.C. 1414(a) (1) (C) (i).)

§ 121a.105 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.210-121a.212.

(20 U.S.C. 1414(a) (1) (C) (ii).)

§ 121a.106 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.102, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a) (1) (C) (iii).)

§ 121a.107 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.440-121a.445, of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a) (1) (C) (iv).)

§ 121a.108 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a) (2) (A).)

§ 121a.109 Excess cost and nonsupplanting.

Each application must provide assurance satisfactory to the State educational

agency that the local educational agency uses funds provided under Part B of the Act:

(a) Only for the excess costs of special education and related services for handicapped children, and

(b) To supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(20 U.S.C. 1414(a) (2) (B).)

*Comment.* Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not "supplant" funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

§ 121a.110 Comparable services.

Each application must provide assurance satisfactory to the State educational agency that State and local funds are used in the jurisdiction of the local educational agency to provide services in program areas which, taken, as a whole, are at least comparable to services being provided in areas of the local educational agency which are not receiving funds under this part.

(20 U.S.C. 1414(a) (2) (C).)

§ 121a.111 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a) (3) (A).)

§ 121a.112 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.111.

(20 U.S.C. 1414(a) (3) (B).)

§ 121a.113 Public participation.

Each application must:

(a) Include procedures for making the application and all documents related to the application available to parents and the general public, and

(b) Provide that all evaluations and reports required under § 121a.111 are public information.

(20 U.S.C. 1414(a) (4))

**§ 121a.114 Individualized education program.**

Each application must include procedures to assure that the local educational agency complies with §§ 121a.220-121a.226 of Subpart C.

(20 U.S.C. 1414(a) (5))

**§ 121a.115 Local policies consistent with statute.**

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612(1)-(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a) (6))

**§ 121a.116 Procedural safeguards.**

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.400-121a.414 of Subpart E.

(20 U.S.C. 1414(a) (7))

**§ 121a.117 Use of Part B funds.**

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a))

**APPLICATION FROM SECRETARY OF INTERIOR**

**§ 121a.125 Authority to participate; payments.**

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f) (1))

**§ 121a.126 Submission of annual application; approval.**

In order to receive payments under this, the Secretary of Interior shall submit an annual application which:

(a) Meets the substance of the requirements under section 614(a) (1)-(7) of the Act;

(b) Includes monitoring procedures which the Secretary of Interior follows to insure that all elementary and secondary schools operated by the Department of Interior are:

(1) Effectively implementing the procedural safeguards under Subpart E, and

(2) Are using Part B funds properly and effectively; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f))

**§ 121a.127 Public participation.**

The Secretary of Interior shall provide for public participation in the development of its application.

(20 U.S.C. 1411(f))

**§ 121a.128 Use of Part B funds.**

(a) The Secretary of Interior may use five percent of its payments in any fiscal year, or \$200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.210-121a.212 of Subpart C.

(20 U.S.C. 1411(f))

**§ 121a.129 Applicable regulations.**

The Secretary of Interior shall comply with the substance of the requirements under Subparts C, E, and F.

(20 U.S.C. 1414(a))

**PUBLIC PARTICIPATION**

**§ 121a.130 Public hearings before adopting an annual program plan.**

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(b) *Notice.* (1) The State educational agency shall provide notice to the general public of the public hearings.

(2) The notice shall be in sufficient detail to inform the public about:

(i) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(ii) The availability of the annual program plan,

(iii) The date, time, and location of each public hearing, and

(iv) The procedures for submitting written comments about the plan.

(2) The notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, enough in advance of the date of the public hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(c) Each State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

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

**§ 121a.131 Review of public comments before adopting plan.**

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

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

**§ 121a.132 Publication and availability of approved plan.**

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

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

*Comment.* A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.35.)

*EXAMPLE:* A State educational agency's proposed plan for school year 1977-1978 is received by the Bureau of Education for the Handicapped on June 1, 1977. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, 1977 as the earliest date of obligation under the 1977-1978 plan.

**Subpart C—Services**

**GENERAL**

**§ 121a.200 Timeliness for free appropriate public education.**

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children ages three through eighteen within the State not later than September 1, 1978, and to all handicapped children ages three through twenty-one within the State not later than September 1, 1980.

(b) Paragraph (a) of this section does not apply to a State with respect to handicapped children ages three, four, five, eighteen, nineteen, twenty, or twenty-one, if the application of the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education within those age groups in the State.

(c) As used in paragraph (b) of this section, the term "practice" means that the State:

(1) Does not in fact make public education available to all non-handicapped children in one or more of those age groups, and

(2) Does not in fact make public education available to a majority of handicapped children in the age groups to which paragraph (c) (1) of this section applies.

(20 U.S.C. 1412 (2) (B); Sen. Rept. No. 94-168, p. 19 (1975))

**§ 121a.201 Free appropriate public education—methods and costs.**

(a) Each State may use whatever placement alternatives and methods of

providing services to handicapped children which are necessary to carry out the requirement in § 121a.200 of this subpart, subject to the requirements in §§ 121a.440-121a.445 of Subpart E.

(b) If placement in a public or private residential program is necessary to provide free appropriate public education to a handicapped child, the cost of the program, including room and board, must be at no cost to the parents of that child.

(c) In carrying out this section, each State:

(1) Shall determine the methods and source of payment, and

(2) May use whatever State, local, Federal, and private sources of support are available in the State.

(20 U.S.C. 1402(18); 1412(2)(8))

**§ 121a.202 Full educational opportunity goal.**

(a) *Program options.* In meeting the full educational opportunity goal under §§ 121a.23 and 121a.102 of Subpart B, each State and local educational agency shall take steps to insure that handicapped children have available to them the variety of programs and services available to nonhandicapped children, including art, music, industrial arts, home economics and vocational education.

(b) *Non-academic services.* (1) Each State and local educational agency shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(2) Non-academic and extracurricular services and activities include athletics, health services, recreational activities, special interest groups or clubs sponsored by the State or local educational agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the State or local educational agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

*Comment.* The terms "full educational opportunity goal" and "free appropriate public education" are distinguished in this regulation as follows. "Full educational opportunity goal" is an all encompassing term, which: (a) Covers all handicapped children, ages birth through twenty-one, (b) includes a basic planning dimension, including making projections of the estimated numbers of handicapped children, and (c) does not include specific statutory timelines for service, but rather, requires each State to set its own timetable. The term "goal" implies an intent or direction to follow and is future-oriented. Based on these characteristics, a State could be totally committed to implementing this provision, and could be in compliance with the Act, but may never fully achieve its goal in the absolute sense. On the other hand, "free appropriate public education" refers to a part of the goal of providing full educational opportunity to all handicapped children, but it is more narrow in scope and specific in purpose. This latter provision: (a) focuses on handicapped children within specific age ranges, and (b) includes the timelines required by statute.

**§ 121a.203 Physical education.**

(a) Physical education must be made available to every handicapped child receiving a free appropriate public education.

(b) Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children, unless:

(1) The child is enrolled full time in a separate facility;

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program;

(3) The parents and the public educational agency agree that the child should not participate in the regular program.

(d) If specially designed physical education are prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(e) The public agency responsible for the education of a handicapped child enrolled who is full time in a separate facility, or who is not able to participate in the regular physical education program, shall take steps to insure that physical education provided to that child is comparable to services provided to non-handicapped children.

(20 U.S.C. 1402(16))

**§ 121a.204 Incidental use of property.**

Property may be used for purposes other than those provided in Part B of the Act only for related educational purposes on public premises, and only as long as that use does not interfere with the use of the property in a program carried out under Part B of the Act.

(20 U.S.C. 1413(a)(1))

**PRIORITIES IN THE USE OF PART B FUNDS**

**§ 121a.210 Definitions of "first priority children" and "second priority children."**

For the purposes of §§ 121a.211-121a.214, the term:

(a) "First priority children" means handicapped children who are not receiving any education; and

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving some but not all of the special education and related services specified in the individualized education programs of those children.

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

**§ 121a.211 Priorities.**

Except for funds which the State uses for administration under § 121a.500 of Subpart F, each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(a) To provide free appropriate public education to first priority children, in-

cluding the identification, location, and evaluation of first priority children.

(b) To provide free appropriate public education to second priority children.

(c) To meet the other requirements in this part.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).)

**§ 121a.212 First priority—age groups covered.**

The priority in § 121a.211(a) of this subpart applies to handicapped children in the age groups for which the State must make available free appropriate public education under § 121a.200 of this subpart.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii); 1412(2)(B))

**§ 121a.213 Services to other children.**

If a State or local educational agency has fully met the priority under § 121a.-211(a), that agency may use funds provided under Part B of the Act:

(a) To provide a free appropriate public education to first priority children in the age groups not covered under § 121a.-200(a) in that State; or

(b) To meet the priority in § 121a.211 (b); or

(c) Both.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii).)

**§ 121a.214 Application of local educational agency to use funds for the second priority.**

A local educational agency may use funds provided under Part B of the Act for the priority in § 121a.211(b) if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(B), (c)(1)(B); 1414 (a)(1)(C)(ii).)

**INDIVIDUALIZED EDUCATION PROGRAMS**

**§ 121a.220 Scope.**

Each State and local educational agency shall insure that an individualized education program is provided for each handicapped child who is receiving or will receive special education, regardless of what institution or agency provides or will provide special education to the child.

(20 U.S.C. 1401(18); 1412(2)(B); 1414(a)(6), (a)(6).)

**§ 121a.221 State educational agency responsibility.**

(a) The State educational agency shall insure that each local educational agency

establishes and implements an individualized education program for each handicapped child.

(b) The State educational agency shall require each public agency which provides special education or related services to a handicapped child to establish policies and procedures for developing, implementing, reviewing, maintaining, and evaluating an individualized education program for that child.

(20 U.S.C. 1412(4), (6).)

**§ 121a.222 Local educational agency responsibility.**

(a) Each local educational agency shall develop, or revise, whichever is appropriate, an individualized education program for every handicapped child at the beginning of the school year, and review and if appropriate revise its provisions periodically, but not less than annually.

(b) Each local educational agency is responsible for initiating and conducting meetings for developing, reviewing, and revising a child's individualized education program.

(c) For a handicapped child who is receiving special education, a meeting must be held early enough so that the individualized education program is developed (or revised, as appropriate) by the beginning of the next school year.

(d) For a handicapped child who is not receiving special education, a meeting must be held within thirty days of a determination that the child is handicapped, or that the child will receive special education.

(20 U.S.C. 1414(a)(5).)

*Comment.* The Conference report for Public Law 94-142 states:

The conference substitute also requires each local educational agency to provide assurances that it will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, the provisions of such program periodically, but not less than annually. In the initial year of a handicapped child's participation in a program of free appropriate public education the individualized education program shall be established at the beginning of the school year and reviewed at least once during that year. Thereafter, the Conferees intend that this provision requires at least one annual review of the child's individualized education program.

(H. Rept. No. 94-664, P. 39 (1975).)

**§ 121a.223 Participants in meetings.**

The local educational agency shall insure that each meeting includes the following participants:

(a) A representative of the local educational agency, other than the child's teachers, who is qualified to provide, or supervise the provision of, special education.

(b) The child's teacher or teachers, special or regular, or both, who have a direct responsibility for implementing the child's individualized education program.

(c) One or both of the child's parents, subject to § 121a.225.

(d) Where appropriate, the child.

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

(20 U.S.C. 1414(a)(5).)

**§ 121a.224 Parent participation.**

(a) Each local educational agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including scheduling the meeting at a mutually agreed on time and place.

(b) If neither parent can attend, the local educational agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(c) A meeting may be conducted without a parent in attendance if the local educational agency is unable to convince the parents that they should attend. In this case the local educational agency must have a record of its attempts to arrange a mutually agreed on time and place, such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls,

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(d) The local educational agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(20 U.S.C. 1414(a)(5).)

**§ 121a.225 Content of individualized education program.**

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance, including academic achievement, social adaptation, prevocational and vocational skills, psychomotor skills, and self-help skills.

(b) A statement of annual goals which describes the educational performance to be achieved by the end of the school year under the child's individualized education program;

(c) A statement of short term instructional objectives, which must be measurable intermediate steps between the present level of educational performance and the annual goals;

(d) A statement of specific educational services needed by the child, (determined without regard to the availability of those services) including a description of:

(1) All special education and related services which are needed to meet the unique needs of the child, including the type of physical education program in which the child will participate, and

(2) Any special instructional media and materials which are needed;

(e) The date when those services will begin and length of time the services will be given;

(f) A description of the extent to which the child will participate in regular education programs;

(g) A justification for the type of educational placement which the child will have;

(h) A list of the individuals who are responsible for implementation of the individualized education program; and

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

(20 U.S.C. 1414(a)(5).)

**§ 121a.226 Private school placements.**

(a) The State educational agency shall insure that an individualized education program is developed, maintained, and evaluated for each child placed in a private school by the State educational agency or a local educational agency.

(b) The agency which places or refers a child shall insure that provision is made for a representative from the private school (which may be the child's teacher) to participate in each meeting. If the private school representative cannot attend a meeting, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(2)(4)(B).)

**DIRECT SERVICE BY THE STATE  
EDUCATIONAL AGENCY**

**§ 121a.240 Use of local educational agency allocation for direct services.**

(a) A State educational agency shall use the payments which would have been available to a local educational agency and provide special education and related services directly to handicapped children residing in the area served by the local educational agency, if the State educational agency determines that the local educational agency:

(1) Is unable or unwilling to establish and maintain programs of free appropriate public education;

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

(3) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(20 U.S.C. 1414(d).)

(b) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, in any fiscal year, if:

(1) The local educational agency is entitled to less than \$7500 for that fiscal year, or



(2) The local educational agency does not submit an application that meets the requirements of §§ 121a.100-121a.117 of Subpart B.

(20 U.S.C. 1411(c) (4).)

**§ 121a.241 Nature and location of services.**

The State educational agency may provide special education and related services under § 121a.240(a) in such manner, and at such locations as it considers appropriate. The manner in which the education and services are provided must be consistent with the requirements of this part, but §§ 121a.440-121a.445 of Subpart E do not apply.

(20 U.S.C. 1414(d).)

**§ 121a.250 Use of State educational agency allocation for direct and support services.**

(a) The State shall use the remainder of its allocation under § 121a.600 of Subpart G above the amount used for administration under § 121a.500 of Subpart F, to provide support services and direct services in accordance with the priorities under §§ 121a.210-121a.214.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided directly to a handicapped child by the State or by contract.

(20 U.S.C. 1411(b) (2); 1411(c) (2).)

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.260-121a.268 recruitment and training of hearing officers and surrogate parents, and public information activities relating to a free appropriate public education for handicapped children.

(c) The requirement in section 613 (a) (9) of the Act, which relates to commingling, supplementing, and supplanting with Federal funds, does not apply to funds that the State uses under paragraph (a) of this section.

(20 U.S.C. 1411(c) (3).)

**§ 121a.251 State matching.**

Beginning in the period July 1, 1978-June 30, 1979, and for each following year, the funds that a State uses under § 121a.250 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.240(b).

(20 U.S.C. 1411(c) (2) (B), (c) (4) (B).)

**COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT**

**§ 121a.2660 Scope of system.**

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional and support personnel;

(b) Detailed procedures to insure that all personnel necessary to carry out the purposes of the Act are appropriately and

adequately prepared and trained, and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a) (3).)

**§ 121a.261 Definition of "appropriately and adequately prepared and trained."**

As used in §§ 121a.260-121a.268, "appropriately and adequately prepared and trained" means that the State has completed the following steps:

(a) Certification of all special education instructional personnel who qualify under State standards.

(b) Temporary certification, where allowable under State standards, of those personnel who do not qualify for certification.

(c) Certification, under State standards, of all regular education personnel who serve handicapped children, and participation by those personnel in inservice education programs designed to develop skills, attitudes, and the acquisition of information specific to the needs of handicapped children.

(d) State certification, registration, or licensing of all support personnel who provide direct services to handicapped children, including therapeutic recreation personnel, occupational therapists, itinerant resource personnel, physical therapists, diagnosticians, psychologists, counselors, and aides.

(e) Ongoing participation by all of the personnel named in paragraphs (a)-(d) of this section in training activities, based on the State's needs assessment under § 121a.263(b) (1), to update their skills and attitudes as necessary to educate handicapped children and to acquire information regarding new instructional practices and procedures.

(20 U.S.C. 1413(a) (3).)

**§ 121a.262 Participation of other agencies and institutions.**

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including parent and other advocacy organizations) in the State which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.264.

(20 U.S.C. 1412(7) (A); 1413(a) (3).)

**§ 121a.263 Inservice training.**

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of adequately and appropriately prepared and trained personnel are available in the State; and

(2) Initiates innovative and experimental inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b) (1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education or other agencies, institutions, or organizations (which may include parent or other advocacy organizations), to carry out experimental or innovative personnel development programs, development or modification of instructional materials, and dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environments, procedural safeguards, and use of parent surrogates in due process hearings);

(3) Specify: (i) The groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers and parent surrogates), and

(ii) The estimated number in each group;

(4) Describe the content and nature of training for each area under paragraph (f) (2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used,

(ii) The cost of the training, and

(iii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(g) Each annual program plan must include a description of changes the State educational agency expects to make in the provision under paragraph (f) of this section during the three years after the annual program plan takes effect.

(20 U.S.C. 1413(a) (3).)

#### § 121.264 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.263(b) (1) with respect to identifying needed areas of training, and assigning priorities to those areas;

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, parent surrogates, and volunteers);

(d) Identify programs of preservice and inservice training in the areas identified under § 121a.263(f) (2);

(e) Describe the instructional skills, attitudes, information, and interdisciplinary procedures identified at the local or State level as essential to meeting the purposes of the Act;

(f) Provide for the use of local resources in personnel development activities;

(g) Provide for the identification of all personnel in need of training and provide that programs are available and provision is made for participation; and

(h) Describe the training of special education instructional and support personnel and regular education personnel during the current school year and the next school year, including steps that must be taken to insure that all personnel needed to meet the full educational opportunity goal under §§ 121a.23 and 121a.102 of Subpart B will be appropriately and adequately prepared and trained.

(20 U.S.C. 1413(a) (3).)

*Comment.* The data required in §§ 121a.24 and 121a.26 of Subpart B on the numbers of handicapped children and the kind and

number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.264 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

#### § 121f.9 State personnel needs.

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434.)

#### § 121a.265 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a) (3).)

#### § 121a.266 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to cause the widespread adoption of educational practices proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a) (3).)

#### § 121a.267 Evaluation.

(a) The annual program plan must include procedures for evaluating the extent to which the State's comprehensive system of personnel development is meeting the needs for personnel in the State.

(b) These procedures must include:

(1) A plan for evaluating the overall organization and effectiveness of the comprehensive system and the State educational agency's procedures for administration of the system; and

(2) The use of accountability measures to insure the adequate delivery of the training and services outlined in the system.

(20 U.S.C. 1413(a) (3).)

#### § 121a.268 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a) (3).)

#### Subpart D—Private Schools

##### PARTICIPATION OF PRIVATE SCHOOL CHILDREN

#### § 121a.300 General.

Each State and local educational agency shall insure that to the extent consistent with the number and location of handicapped children in the State who are enrolled in regular or special private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for those children special education and related services.

(20 U.S.C. 1413(a) (4) (A); 1414(a) (6) .)

#### § 121a.301 Determinations.

Determinations with respect to the special education and related services needs of handicapped children enrolled in private elementary and secondary schools, the number and types of children who will participate under this part, and the types of services which will be provided for them may be made only after consultation with persons knowledgeable as to the needs of those children, and on a basis comparable to that used in providing for the participation under this part, of handicapped children enrolled in public elementary and secondary schools.

(20 U.S.C. 1413(a) (4) (A).)

#### § 121a.302 Services.

Programs and projects assisted or carried out under Part B of the Act must be designed to provide, to the extent consistent with the number of handicapped children enrolled in private elementary and secondary schools in the geographical area served by the program or project, services which aid in meeting the special education and related services needs of those children. Services may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile equipment, and may include professional and paraprofessional services.

(20 U.S.C. 1413(a) (4) (A).)

#### § 121a.303 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs

those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include the payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control, nor may the services include the use of equipment purchased with Part B funds, other than mobile or portable equipment, on private school premises, or the construction of private school facilities.

(20 U.S.C. 1413(a)(4)(A).)

**§ 121a.304 Equipment.**

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(c) Mobile or portable equipment may be used on private school premises only for such period of time within the life of the current program or project for which the equipment is intended to be used, as is necessary for the successful participation in that program or project by eligible handicapped children enrolled in private schools.

(2 U.S.C. 1413(a)(4)(A).)

**§ 121a.305 Prohibition of segregation.**

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a)(4)(A).)

**PLACEMENT OF HANDICAPPED CHILDREN IN PRIVATE SCHOOLS**

**§ 121a.320 Responsibility of State educational agency.**

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by the State educational agency or a local educational agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.220-121a.227 of Subpart C;

(2) At no cost to the parents or guardians; and

(3) Which meet education standards of that State educational agency (including the requirements in this part) which apply to public agencies under § 121a.34 of Subpart B; and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B).)

**§ 121a.321 Implementation by State educational agency.**

In implementing § 121a.320, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of the State standards to each private school to which the State educational agency or a local educational agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools to participate in the development and revision of the State standards.

(20 U.S.C. 1413(a)(4)(B).)

**§ 121a.322 Placement of children by parents.**

(a) If a handicapped child has available a free appropriate public education in a local educational agency that is in or readily accessible from the child's home community and the parents choose to place the child in a private school, neither the State or the local educational agency is required by this part to pay for the child's education.

(b) Disagreements between a parent and a State or local educational agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.400-121a.415 of Subpart E.

(20 U.S.C. 1413(a)(4)(B).)

**§ 121a.323 Placement in another State.**

In addition to the requirements under § 121a.320, if a State or local educational agency refers or places a child in a private school in another State, the State educational agency of the State where the private school is located shall insure that the school meets its education standards.

(20 U.S.C. 1413(a)(4)(B).)

**Subpart E—Procedural Safeguards**

**DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN**

**§ 121a.400 Definitions of "consent", "evaluation", and "personally identifiable".**

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode

of communication unless it clearly is not feasible to do so;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent.

"Evaluation" means procedures used to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

(20 U.S.C. 1415.)

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417 (c).)

**§ 121a.401 General responsibility of State and local educational agencies.**

(a) Each State and local educational agency shall provide procedural safeguards to handicapped children and their parents with respect to the provision of a free appropriate public education.

(b) The State educational agency shall insure that each public agency in the State adopts and implements procedural safeguards which meet the requirements of this subpart.

(20 U.S.C. 1415(a).)

**§ 121a.402 Opportunity to examine records.**

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.452-121a.459 an opportunity to examine all relevant records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A).)

**§ 121a.403 Independent educational evaluation.**

(a) *General.* (1) The local educational agency shall inform the parents of a handicapped child that they have a right to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) For the purposes of this section, "independent educational evaluation" means an evaluation conducted by a fully certified or licensed professional examiner who is not employed by and

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does not routinely provide evaluations for, the State or local educational agency responsible for the education of the child in question.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the local educational agency. However, the local educational agency may initiate a hearing under § 121a.406 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at his or her own expense, the results of the evaluation:

(1) Must be considered by the State and local educational agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented by either party as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever the State or local educational agency pays for an independent educational evaluation, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the State or local educational agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A))

#### § 121a.404 Prior notice; parent consent.

(a) Written notice which meets the requirements under § 121a.405 must be given to the parents of a handicapped child a reasonable time before the State or local educational agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the free appropriate public education provided to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the free appropriate public education provided to the child.

(b) Parental consent must be obtained before an evaluation is conducted.

(20 U.S.C. 1415(b)(1)(C), (D))

#### § 121a.405 Content of notice.

(a) The notice under § 121a.404 must include:

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

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency con-

sidered and the reasons why those options were rejected;

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

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

(b) The notice must be:

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

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

#### § 121a.406 Impartial due process hearing.

(a) A parent or a local educational agency may initiate a hearing on any of the matters described in § 121a.404(a) (1) and (2).

(b) The hearing must be conducted by the State or local educational agency, as determined under State statute, State regulation, or a written policy of the State educational agency.

(20 U.S.C. 1415(b)(2))

#### § 121a.407 Impartial hearing officer.

(a) A hearing must not be conducted:

(1) By an employee of the State or local educational agency who is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(20 U.S.C. 1414(b)(2))

#### § 121a.408 Hearing rights.

Any party to a hearing has the right to:

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

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

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

(d) Obtain written findings of fact and decisions. (The State or local educational agency shall transmit those findings and

decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(20 U.S.C. 1415(d); 1417(c))

#### § 121a.409 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party in the hearing appeals the decision under § 121a.411 or § 121a.412.

(20 U.S.C. 1415(c))

#### § 121a.410 Administrative appeal; impartial review.

(a) If the hearing is conducted by a local educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record.

(2) Insure that the procedures at the hearing were consistent with the requirements of due process,

(3) Afford the parties an opportunity for oral argument, and

(4) Make an independent decision on completion of the review.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.412.

(20 U.S.C. 1415(c))

#### § 121a.411 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 121a.409 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.410, has the right to bring a civil action under section 615(e) (2) of the Act.

(20 U.S.C. 1415)

#### § 121a.412 Timeliness and convenience of hearings and reviews.

State and local educational agencies shall take steps to insure that each hearing and review conducted under this subpart:

(a) Is commenced and completed as quickly as possible, consistent with fair consideration of the issues involved, but not later than 45 days after receipt of a complaint, unless the parties agree to an extension, and

(b) Is conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415)

#### § 121a.413 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the State or local educational agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public

school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3))

§ 121a.414 Surrogate parents.

(a) *General.* The State educational agency shall insure that the rights of a child are protected when the parents of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(b) *Criteria for selection of surrogates.*

(1) The State or local educational agency may select a surrogate parent in any way permitted under State law.

(2) State and local educational agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interests of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(c) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate must not be an employee of the State or local educational agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (b) and (c) (1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(d) *Responsibilities.* The surrogate may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B))

PROTECTION IN EVALUATION PROCEDURES

§ 121a.430 General.

Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C))

§ 121a.431 Evaluation; change in placement.

(a) An evaluation must be conducted before any action is taken with respect to:

(1) The initial placement or denial of placement of a handicapped child in a special education program, or

(2) The transfer or denial of transfer of a child from a special education program to full-time regular class placement.

(b) Subject to paragraph (a) of this section, and the requirement for reevaluation in § 121a.433, any change in a child's special education placement (such

as changing from a self contained special class to a resource room) must be based on:

(1) The child's current individualized education program, and

(2) Any other information relating to the child's current educational performance.

(20 U.S.C. 1412(5)(C))

§ 121a.432 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used;

(3) Are recommended by their producer for the specific purpose for which they are used; and

(4) Are administered by personnel who meet applicable certification or licensure requirements under State law;

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

(c) In test selection and administration, if a test is administered to a child with impaired sensory, manual or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No one test or type of test or other means of evaluation is used as the sole criterion for placement;

(e) Information from sources other than ability or achievement tests, including information concerning physical condition, sociocultural background, and adaptive behavior in home and school, is gathered and considered and the weight given to each of these sources is documented;

(f) The interpretation of the evaluation data and the subsequent determination of the child's educational placement are made by a team or group of persons knowledgeable about the child, the meaning of the evaluation results, the placement options, and the personnel available to provide special education and related services; and

(g) If the information derived either from ability and achievement tests or from other sources results in a showing that the child does not, because of a disability, need instruction in a special setting, the child is not placed outside the regular instructional setting.

(20 U.S.C. 1412(5)(C))

§ 121a.433 Reevaluation.

Each State and local educational agency shall insure:

(a) That an accordance with Subpart C, each handicapped child's individual-

ized education program is revised periodically, but not less than annually, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.432, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(C))

LEAST RESTRICTIVE ENVIRONMENT

§ 121a.440 General.

(a) Each State educational agency shall insure:

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

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

(b) For the purposes of this subpart, "applicable agency" includes:

(1) Each State and local educational agency,

(2) Each public agency in the State which is involved in the education of handicapped children, and

(3) Each private school in which a State or local educational agency places or refers a handicapped child.

(20 U.S.C. 1412(5)(B))

§ 121a.441 Continuum of alternative placements.

(a) Each State and local educational agency shall insure that a continuum of alternative placements are available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.4 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B))

§ 121a.442 Placements.

Each State and local educational agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually, and

(2) Is based on his or her individualized education program;

(b) To the extent necessary to implement an individualized education program for each handicapped child, the applicable agency must provide, or arrange for the provision of, all of the

various alternative placements included under § 121a.441 of this subpart;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5) (B).)

**§ 121a.443 Technical assistance and training activities.**

Each State educational agency shall carry out activities to insure that teachers and administrators in all applicable agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.440, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5) (B).)

**§ 121a.444 Children in public or private institutions.**

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.440 is effectively implemented.

(20 U.S.C. 1412(5) (B).)

**§ 121a.445 Monitoring activities.**

(a) The State educational agency shall carry out activities to insure that § 121a.440 is implemented by each applicable agency.

(b) If there is evidence that a local educational agency makes placements that are inconsistent with § 121a.440 of this subpart, the State educational agency:

(1) Shall review the local educational agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5) (B).)

**CONFIDENTIALITY OF INFORMATION**

**§ 121a.450 Definitions.**

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Participating agency" means any agency or institution which collects, maintains, or uses information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.451 Notice to parents.**

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.28 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.452 Access rights.**

(a) Each participating agency shall permit parents to inspect and review any personally identifiable information relating to their children which is collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the information; and

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the information.

(c) An agency may presume that the parent has authority to inspect and review information relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.453 Record of access.**

Each participating agency shall keep a record of parties obtaining access to information collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and

the purpose for which the party is authorized to use the information.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.454 Records on more than one child.**

If any record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.455 List of types and locations of information.**

Each participating agency shall provide parents on request a list of the types and locations of information collected, maintained, or used by the agency.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.456 Fees.**

(a) A participating agency may charge a fee for copies of records which are made for parents under this subpart if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this subpart.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.457 Amendment of records at parent's request.**

(a) A parent who believes that information collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.458.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.458 Opportunity for a hearing.**

The agency shall, on request, provide an opportunity for a hearing to challenge information to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.459 Result of hearing.**

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of

the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.460 Hearing procedures.**

A hearing held under § 121a.458 of this subpart must be considered according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.461 Consent.**

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.462 Safeguards.**

(a) Each participating agency shall protect the confidentiality of information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.29 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.463 Destruction of information.**

(a) All personally identifiable information collected, maintained, or used under this part must be destroyed within five years after the information is no

longer needed to provide educational services to the child. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(b) Before destruction of data, reasonable efforts must be made to notify parents that they have the right to a copy of any information which has been collected, maintained, or used under this part.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.464 Children's rights.**

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.465 Enforcement.**

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2) (D); 1417(c).)

**§ 121a.466 Office of Education.**

If the Office of Education or its authorized representatives collect any personally identifiable information which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a(b) (1)-(2), (4)-(11); (c); (d); (e) (1), (2), (3) (A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2) (D); 1417(c).)

**OFFICE OF EDUCATIONAL PROCEDURES**

**§ 121a.480 Opportunity for a hearing.**

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.13 of Subpart B.

(b) Withholding payments from a State under § 121a.490 or under section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.489 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a) (9) (B); 1413(c); 1416.)

**§ 121a.481 Hearing panel.**

The Commissioner appoints a Hearing Panel consisting of not less than

three persons to conduct any hearing under § 121a.480 of this subpart.

(20 U.S.C. 1232c(c); 1413(a) (9) (B); 1413(c); 1416.)

**§ 121a.482 Hearing procedures.**

(a) (1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

(i) In whole or in part in writing, or

(ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

(i) Notice of the issues to be considered (if this notice has not already been given); and

(ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a) (2) of this section:

(1) An opportunity to obtain a record of the proceedings;

(2) An opportunity to present witnesses on the party's behalf; and

(3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232c(c); 1413(a) (9) (B); 1413(c); 1416.)

**§ 121a.483 Initial decision; final decision.**

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each party (or to the party's counsel) and to the Commissioner, with a notice that each party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232c(c); 1413(a) (9) (b); 1413(c); 1416.)

**§ 121a.489 Waiver of requirement regarding supplementing and supplanting with Part B funds.**

(a) Under section 613(a) (9) (B) of the Act, the State educational agency must insure that Federal funds provided under Part B of the Act are used to supplement

and increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under section 613(a)(9)(B) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.480-121a.483 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1413(A)(9)(B).)

#### § 121a.490 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a hearing under §§ 121a.480-121a.483 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of section 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.39 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a).)

#### § 121a.491 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.490(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a).)

#### § 121a.492 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.490(a) shall, by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 141(a).)

#### § 121a.493 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect

to its annual program plan submitted under Subpart B, the State may under section 616(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b).)

### Subpart F—State Administration

#### GENERAL

#### § 121a.500 Federal funds for State administration.

A State may use five per cent of the total State allotment in any fiscal year under Part B of the Act, or \$200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a.604(a) or § 121a.605(a), as the case may be.

(20 U.S.C. 611(b), (c).)

#### § 121a.501 Allowable costs.

(a) The State educational agency may use funds under § 121a.500 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Dissemination and use of the results of educational research and demonstrations and dissemination of information, relating to Statewide special education activities for handicapped children and projects assisted under Part B of the Act;

(5) Leadership services for the program supervision and management of special education activities for the handicapped, and

(6) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.500 in accordance with § 121a.250 of Subpart C.

(20 U.S.C. 1411(b), (c).)

#### § 121a.502 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.606 of Subpart G, to other local educational agencies within the State which are not-adequately pro-



viding special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e).)

STATE ADVISORY PANEL

§ 121a.550 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.552, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12).)

§ 121a.551 Membership.

The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

- (a) Handicapped individuals.
- (b) Teachers of handicapped children.
- (c) Parents of handicapped children.
- (d) State and local educational officials.

(e) Special education program administrators.

(20 U.S.C. 1413(a)(12).)

§ 121a.552 Advisory functions and procedures.

(a) The State advisory panel shall:

(1) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(2) Comment publicly on the rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(3) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(b) The advisory panel shall meet as often as necessary to conduct its business.

(c) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(d) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(e) All advisory panel meetings and agenda items must be publicly announced

prior to the meeting, and meetings must be open to the public.

(f) When reviewing the findings and decisions from the hearings, submitted in accordance with § 121a.409(d) of Subpart E, the advisory panel must be considered to be a participating agency under §§ 121a.450-121a.465 of Subpart E.

(g) The advisory panel shall serve without compensation but may be reimbursed from funds under § 121a.500 for reasonable and necessary expenses for attending meetings and performing duties.

(20 U.S.C. 1413(a)(12).)

Subpart G—Allocation of Funds; Reports  
ALLOCATIONS

§ 121a.600 State entitlement: formula.

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

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

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

(20 U.S.C. 1411(a)(1).)

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4).)

§ 121a.601 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.600 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those chil-

dren is greater than 12 percent of the number of all children ages five through 17 in the State;

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children ages five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5).)

§ 121a.602 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1).)

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it which it estimates it will expend under this part.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2).)

§ 121a.603 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1).)

§ 121a.604 Within-State distribution:  
fiscal year 1978.

Of the funds received under § 121a.600 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.500 of Subpart F and § 121a.250 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.606.

(20 U.S.C. 1411(b) (1).)

**§ 121a.605 Within-State distribution: fiscal year 1979 and after.**

Of the funds received under § 121a.600 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.500 of Subpart F and § 121a.250 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.606.

(20 U.S.C. 1411(c) (1).)

**§ 121a.606 Local educational agency entitlements; formula.**

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d).)

**§ 121a.607 Entitlements to jurisdictions.**

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601 (c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than \$150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or \$35,000, whichever is greater.

(20 U.S.C. 1411(e).)

**REPORTS**

**§ 121a.650 Annual report of children served—report requirement.**

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children residing in the State who

are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a) (3); 1417(b).)

**§ 121a.651 Annual report of children served—information required in the report.**

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.4 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

- (i) Birth through two;
- (ii) Three through five;
- (iii) Six through seventeen; and
- (iv) Eighteen through twenty-one.

(b) The State educational agency may not report a multi-handicapped child under more than one disability category.

(20 U.S.C. 1411(a) (3); 1411(a) (5) (A) (ii); 1418(b); 1417(b).)

**§ 121a.652 Annual report of children served—certification.**

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a) (3); 1417(b).)

**§ 121a.653 Annual report of children served—criteria for counting children.**

(a) The State educational agency may include handicapped children in its report who:

(1) Are enrolled in a school or program which provides them with both special education and related services; or

(2) Are enrolled in a school or program which provides them only with special education, if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program which provides them with special education;

(2) Are not provided with a related service that they need to assist them in benefitting from special education; or

(3) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1956, as amended.

(20 U.S.C. 1411(a) (3); 1417(b).)

**§ 121a.654 Annual report of children served—other responsibilities of the State educational agency.**

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.650 (a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Assure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a) (3); 1417(b).)

5. A new Part 121m is added, to read as follows:

**PART 121m—INCENTIVE GRANTS**

Sec.	
121m. 1	Scope; purpose.
121m. 2	General provisions regulations.
121m. 3	Eligibility.
121m. 4	Application.
121m. 5	Application contents.
121m. 6	Amount of grant.
121m. 7	Participation by children not counted under Part B of the Act.
121m. 8	Excess costs.
121m. 9	Administration.
121m. 10	Annual evaluation report.

**AUTHORITY:** Sec. 619 of Pub. L. 91-230, as amended, 89 Stat. 793 (20 U.S.C. 1419), unless otherwise noted.

**§ 121m.1 Scope; purpose.**

(a) This part applies to assistance under section 619 of the Act.

(b) The Commissioner awards a grant to each State which provides special education and related services to handicapped children ages three, four, or five.

(c) The State shall use funds provided under this part to give special education and related services to handicapped children in the age groups named in paragraph (b) of this section.

(d) The terms "special education" and "related services" have the meanings defined in § 121a.4 of this chapter.

(20 U.S.C. 1419(c).)

**Comment.** The terms "related services" and "special education" are defined in § 121a.4 as follows:

"Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of dis-

abilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school social work services, parent counseling and training, providing parents with information about child development, and assisting parents in understanding the special needs of their child.

The terms used in this definition are defined as follows:

(a) "Audiology" means:

(1) Identification of children with hearing loss;

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

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

(4) Creation and administration of programs of hearing conservation; and

(5) Counseling and guidance of pupils, parents, and teachers.

(b) "Counseling services" means activities conducted by a certified counselor.

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

(d) "Medical services" means procedures performed by a licensed physician to determine a child's need for special education and related services.

(e) "Occupational therapy" means services provided by a licensed occupational therapist.

(f) "Physical therapy", means activities for restoring damaged or atrophied muscles to improved use.

(g) "Psychological services" means:

(1) Administering psychological and educational tests;

(2) Interpreting the results;

(3) Gathering and interpreting information about child behavior;

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

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

(h) "Recreation" includes leisure education.

(i) "Speech pathology" means:

(1) The identification of children with speech or language disorders;

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

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

(4) Provision of speech and language habilitation; and

(5) Counseling and guidance of parents, children, and teachers.

(j) "Transportation" includes:

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

(2) Travel in and around school buildings, and

(3) Specialized equipment if required.

(20 U.S.C. 1402(17))

"Special education" means specially designed instruction, at no cost to the parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. The term includes speech pathology, audiology, occupational therapy, and physical therapy, if the service is considered "special education" rather than a "related service" under State standards. The terms in this definition are defined as follows:

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

(b) "Physical education", includes special physical education, adapted physical education and motor development, and means the development of physical and motor fitness, fundamental motor skills and patterns, body mechanics, individual and group games and sports, skills to include intramural and lifetime sports, dance and movement education.

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

(20 U.S.C. 1402(16).)

**§ 121m.2 General provisions regulations.**

Assistance under this part is subject to the requirements in Parts 100, 100b, 100c, and 121 of this chapter (including definitions and fiscal, administrative, property management, and other matters).

(20 U.S.C. 1419.)

**§ 121m.3 Eligibility.**

A State is eligible to receive a grant if the Commissioner has approved its annual program plan under Part 121a of this chapter.

(20 U.S.C. 1419(a).)

**§ 121m.4 Application.**

(a) To receive funds under this part, a State must submit an application to the Commissioner through its State educational agency.

(b) The application must be submitted as an attachment to the State's annual program plan submitted under Part 121a of this chapter. The Commissioner does not accept an application submitted after the date of that submission.

(20 U.S.C. 1419(b).)

**§ 121m.5 Application contents.**

An application must include the following material:

(a) A description of the State's goals and objectives for meeting the educational needs of handicapped children ages three through five. These goals and objectives must be consistent with the State's full educational opportunity goal under § 121a.23 of this chapter.

(b) A description of the objectives to be supported by the grant in sufficient detail to determine what will be achieved with the grant.

(c) A description of the activities to be supported by the grant. The activities must be related to the objectives under paragraph (b) of this section and must be described in sufficient detail to determine how the grant will be used.

(d) A description of the impact the proposed activities will have on handicapped children ages three through five. This description must include evidence that the proposed activities are of sufficient size, scope, and quality to warrant the amount of the expenditure. The application must indicate the number of children to be served and the number of handicapped children who will be benefited indirectly. If children are to be benefited indirectly, there must be a rationale that demonstrates the benefit.

(e) The number of local educational agencies or intermediate educational units, and the number and names of other agencies which will provide contractual services under the grant, the activities they will carry out, and the reasons for selecting these agencies.

(f) The dollar amounts that will be spent for each major activity described.

(g) A description of the procedures the State will use to evaluate the extent to which the activities met the objectives described under paragraph (b) of this section.

(20 U.S.C. 1419(b).)

**§ 121m.6 Amount of grant.**

(a) The amount of a grant is \$300 multiplied by the average number of children ages three through five counted during the current school year under §§ 121a.650-121a.654 of this chapter.

(b) If appropriated funds are less than enough to pay in full the grants under this part, the amount of each grant is ratably reduced.

(20 U.S.C. 1419(a), (d).)

**§ 121m.7 Allowable expenditures.**

The State educational agency may use funds under this part to give special education and related services to handicapped children ages three through five who are not counted under §§ 121a.650-121a.654 of this chapter if the State educational agency assures that if those children have all of the rights afforded under part 121a of this chapter.

(20 U.S.C. 1419(c).)

*Comment.* In carrying out the provisions of this part some activities are considered particularly appropriate for the use of these funds: (1) Providing parents with child development information; (2) assisting parents in the understanding of the special needs of their handicapped child; (3) providing parent counseling and parent training, where

## PROPOSED RULES

appropriate, to enable parents to work more effectively with their needs; (4) providing essential diagnosis and assessment; (5) providing transportation essential to the delivery of services; (6) providing speech therapy, occupational therapy, or physical therapy.

§ 121a.8 Excess costs.

(a) If local or State funds are available to pay for the education of non-handicapped children of the same age as the handicapped children served with funds under this part, funds equal to that amount must also be made available for these handicapped children, and the State may only use the funds under this part to supplement the local and State funds.

(b) If no local or State funds are available for non-handicapped children of the same age, funds under this part may be used to pay for all of the special education and related services for the handicapped children.

(20 U.S.C. 1419(c).)

§ 121m.9 Administration.

(a) The State educational agency shall administer the funds provided under this part.

(b) The State educational agency may use the funds itself, or may contract with local educational agencies, intermediate educational units, or other agencies.

(20 U.S.C. 1419(a).)

§ 121m.10 Annual evaluation report.

(a) Within 90 days after the end of the grant period, the State educational agency shall submit a report to the Commissioner on the activities carried out under this part during that period.

(b) The report must contain:

(1) The results of the evaluation under § 121m.5(g), and

(2) In brief narrative form, the impact that these funds have had on the State's educational services to handicapped children ages three through five.

(20 U.S.C. 1419(c).)

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