

## §21.2

(2) Meet all other conditions of eligibility contained in this part.

(b) An eligible applicant, as described in paragraph (a) of this section, is entitled to receive an award unless—

(1) The adjudicative officer, the Civil Rights Reviewing Authority (CRRRA), or the Secretary on review, determines that—

(i) The Department's position was substantially justified; or

(ii) Special circumstances make an award unjust; or

(2) The adversary adjudication is under judicial review, in which case the applicant may receive an award only as described in §21.11.

(c) The determination under paragraph (b)(1)(i) of this section is based on the administrative record, as a whole, made during the adversary adjudication for which fees and other expenses are sought.

(Authority: 5 U.S.C. 504(a)(1) and (c)(1))

### §21.2 Time period when the Act applies.

The Act applies to any adversary adjudication covered under this part pending or commenced before the Department on or after August 5, 1985.

(Authority: 5 U.S.C. 504(note))

### §21.3 Definitions.

The following definitions apply to this part:

*Act* means the Equal Access to Justice Act.

*Adjudicative officer* means the Administrative Law Judge, hearing examiner, or other deciding official who presided at the underlying adversary adjudication.

(Authority: 5 U.S.C. 504(b)(1)(D))

*Adversary adjudication* means a proceeding—

(1) Conducted by the Department for the formulation of an order or decision arising from a hearing on the record under the Administrative Procedure Act (5 U.S.C. 554);

(2) Listed in §21.10; and

(3) In which the position of the Department was represented by counsel or other representative who entered an

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appearance and participated in the proceeding.

(Authority: 5 U.S.C. 504(b)(1)(C))

*Application subject to the jurisdiction of the CRRRA* means an application for fees and expenses based on an underlying proceeding conducted under 34 CFR parts 100, 101, 104, 106, or 110.

(Authority: 5 U.S.C. 504(b)(1)(C); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

*CRRRA* means the Civil Rights Reviewing Authority, the reviewing authority established by the Secretary to consider applications under 34 CFR parts 100, 101, 104, 106, and 110.

(Authority: 5 U.S.C. 504(b)(1)(C); 20 U.S.C. 1681; 29 U.S.C. 794; 42 U.S.C. 2000d–1 *et seq.* and 6101 *et seq.*)

*Department* means the U.S. Department of Education.

*Department's counsel* means counsel for the Department of Education or another Federal agency.

*Employee* means:

(1) A person who regularly performs services for an applicant—

(i) For remuneration; and

(ii) Under the applicant's direction and control.

(2) A part-time or seasonal employee who performs services for an applicant—

(i) For remuneration; and

(ii) Under the applicant's direction and control.

(Authority: 5 U.S.C. 504(c)(1))

*Fees and other expenses* means an eligible applicant's reasonable fees and expenses—

(1) Related to the issues on which it was the prevailing party in the adversary adjudication; and

(2) Further described in §§21.33 and 21.50.

(Authority: 5 U.S.C. 504 (a)(1), (b)(1)(A), and (c)(1))

*Party* means a "person" or a "party" as those terms are defined in the Administrative Procedure Act (5 U.S.C. 551(3)), including an individual, partnership, corporation, association, unit of local government, or public or private organization that meets the requirements in §21.20. The term does not

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include an agency of the Federal Government.

(Authority: 5 U.S.C. 504(b)(1)(B))

*Position of the Department* means, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based.

(Authority: 5 U.S.C. 504 (a)(1) and (b)(1)(E))

*Secretary* means the Secretary of the U.S. Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 5 U.S.C. 504 (b)(2) and (c)(1))

### Subpart B—Which Adversary Adjudications Are Covered?

#### § 21.10 Adversary adjudications covered by the Act.

The Act covers adversary adjudications under section 554 of title 5 of the United States Code. These include the following:

(a) Compliance proceedings under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(b) Compliance and enforcement proceedings under the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*).

(c) Compliance proceedings under title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*).

(d) Compliance proceedings under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(e) Withholding proceedings under section 1001 of Pub. L. 100–297 (Hawkins-Stafford) (20 U.S.C. 2833).

(f) Proceedings under any of the following:

(1) Section 5(g) of Pub. L. 81–874 (Financial Assistance for Local Educational Agencies in Areas Affected by Federal Activity) (20 U.S.C. 240(g)).

(2) Sections 6(c) or 11(a) of Pub. L. 81–815 (an act relating to the construction of school facilities in areas affected by Federal activities and for other purposes) (20 U.S.C. 636(c) or 641(a)).

(3) Section 6 of Pub. L. 95–563 (Contract Disputes Act of 1978) (41 U.S.C. 605).

(4) Part E of the General Education Provisions Act (20 U.S.C. 1234 *et seq.*).

(g) Other adversary adjudications that fall within the coverage of the Act.

(Authority: 5 U.S.C. 504(c) and 554; 20 U.S.C. 1234(f)(2))

#### § 21.11 Effect of judicial review of adversary adjudication.

If a court reviews the underlying decision of an adversary adjudication covered under this part, an award of fees and other expenses may be made only under 28 U.S.C. 2412 (awards in certain judicial proceedings).

(Authority: 5 U.S.C. 504(c)(1); 28 U.S.C. 2412(d)(3))

### Subpart C—How Is Eligibility Determined?

#### § 21.20 Types of eligible applicants.

The following types of parties that prevail in adversary adjudications are eligible to apply under the Act for an award of fees and other expenses:

(a) An individual who has a net worth of not more than \$2 million.

(b) Any owner of an unincorporated business who has—

(1) A net worth of not more than \$7 million, including both personal and business interests; and

(2) Not more than 500 employees.

(c) A charitable or other tax-exempt organization—

(1) As described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)); and

(2) Having not more than 500 employees.

(d) A cooperative association—

(1) As defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141(a)); and

(2) Having not more than 500 employees.

(e) Any other partnership, corporation, association, unit of local government, or organization that has—

(1) A net worth of not more than \$7 million; and

(2) Not more than 500 employees.

(Authority: 5 U.S.C. 504(b)(1)(B))

#### § 21.21 Determination of net worth and number of employees.

(a) The adjudicative officer shall determine an applicant's net worth and