

Secretary a view as to whether review is appropriate or inappropriate by submitting a brief statement addressing the party's petition within 10 days of the ALJ's receipt of the petition for interlocutory review. A copy of the statement must be served on all parties by certified mail, return receipt requested.

(e)(1) A party's response, if any, to a petition or certification for interlocutory review must be filed within seven days after service of the petition or certification, and may not exceed ten pages, double-spaced, in length. A copy of the response must be filed with the ALJ by hand delivery, by regular mail, or by facsimile transmission.

(2) A party shall serve a copy of its response on all parties on the filing date by hand-delivery or regular mail. If agreed upon by the parties, service of a copy of the response may be made upon the other parties by facsimile transmission.

(f) The filing of a request for interlocutory review does not automatically stay the proceedings. Rather, a stay during consideration of a petition for review may be granted by the ALJ if the ALJ has certified or stated to the Secretary that review of the ruling is appropriate. The Secretary may order a stay of proceedings at any time after the filing of a request for interlocutory review.

(g) The Secretary notifies the parties if a petition or certification for interlocutory review is accepted, and may provide the parties a reasonable time within which to submit written argument or other existing material in the administrative record with regard to the merit of the petition or certification.

(h) If the Secretary takes no action on a request for interlocutory review within 15 days of receipt of it, the request is deemed to be denied.

(i) The Secretary may affirm, modify, set aside, or remand the ALJ's ruling.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1234(f)(1))

[58 FR 43473, Aug. 16, 1993]

Subpart B—Hearings for Recovery of Funds

§ 81.30 Basis for recovery of funds.

(a) Subject to the provisions of § 81.31, an authorized Departmental official requires a recipient to return funds to the Department if—

(1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or

(2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental official may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

[54 FR 19512, May 5, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.31 Measure of recovery.

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that—

(a) Meets the standards for proportionality in § 81.32;

(b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in § 81.23; and

(c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under § 81.34.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234a(k), 1234b (a) and (b), and 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989. Redesignated and amended at 58 FR 43473, Aug. 16, 1993]

§ 81.32 Proportionality.

(a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

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(2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:

- (i) Serving only eligible beneficiaries.
- (ii) Providing only authorized services or benefits.
- (iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.
- (iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.
- (v) Maintaining accountability for the use of funds.

(b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e-3, 1234(f)(1), 1234b(a), and 3474(a))

[54 FR 19512, May 5, 1989. Redesignated at 58 FR 43473, Aug. 16, 1993]

§ 81.33 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;

(3) The recipient actually relied on the guidance as the basis for the con-

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duct that constituted the violation; and

(4) The recipient's reliance on the guidance was reasonable.

(c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;

(2) The request was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(3) The request—

(i) Accurately described the proposed expenditure or practice; and

(ii) Included the facts necessary for the Department's determination of its legality;

(4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer—

(i) Examined the proposed expenditure or practice; and

(ii) Believed it was permissible under State and Federal law applicable at the time of the certification;

(5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;

(6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and

(7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90-day period.

(d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient was legally bound by the decree;