

Education Appeal Board

Thursday
April 3, 1980

Part III

Department of
Health, Education,
and Welfare

Office of Education

Education Appeal Board

**DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE****Office of Education****45 CFR Part 100d****Education Appeal Board****AGENCY:** Office of Education, HEW.**ACTION:** Final regulations.

SUMMARY: These regulations establish rules for the conduct of proceedings before the Education Appeal Board (the Board). The Board conducts (1) audit appeal hearings, (2) withholding, termination, and cease and desist hearings initiated by the U.S. Commissioner of Education (the Commissioner), and (3) any other proceedings designated by the Commissioner as being within the jurisdiction of the Board.

EFFECTIVE DATES: These regulations are expected to take effect 45 days after they are transmitted to Congress. Regulations are usually transmitted to Congress several days before they are published in the Federal Register; the effective date is changed by statute if Congress disapproves the regulations or takes certain adjournments. For information concerning the effective date of these regulations, call or write the OE contact person named in this preamble.

When these regulations take effect they will supersede the interim final regulations published in the Federal Register on May 25, 1979, which established the Education Appeal Board and interim final rules for the conduct of proceedings before the Board (44 FR 30528). Future proceedings in all cases pending before the Education Appeal Board will be governed by these regulations.

FOR FURTHER INFORMATION CONTACT: Dr. David S. Pollen, Chairman, Education Appeal Board, U.S. Office of Education, 400 Maryland Ave. S.W., Room 4051 (FOB-6), Washington, D.C. 20202. Telephone (202) 245-7835.

SUPPLEMENTARY INFORMATION:**A. Background**

In 1972 the Commissioner established the Title I Audit Hearing Board through the publication of a notice in the Federal Register. The function of this board was to give State agencies an impartial administrative forum in which to appeal adverse audit determinations resulting from Federal audits of programs administered under Title I of the Elementary and Secondary Education Act of 1965, as amended (Title I, ESEA).

In subsequent years it became apparent that grantees under OE State-administered programs other than Title I,

ESEA were in need of a similar forum to hear their appeals from adverse audit determinations. Recognizing this need, Congress, in the Education Amendments, of 1978, added Sections 451 through 456 to the General Education Provisions Act. These sections directed the Commissioner to establish an Education Appeal Board, the function of which is conduct audit appeal hearings involving (1) certain State-administered programs (see appendix A to Part 100d), (2) programs conducted under the Bilingual Education Act, and (3) programs conducted under the Emergency School Aid Act. Congress also gave the Board authority to conduct withholding and termination hearings, cease and desist hearings, and other proceedings designated by the Commissioner.

The Commissioner, with the approval of the Secretary of Health, Education, and Welfare, designated the existing Title I Audit Hearing Board as the new Education Appeal Board. Interim final regulations establishing the Title I Audit Hearing Board as the new Board were published in the Federal Register on May 25, 1979 (44 FR 30528) and became effective June 29, 1979. On that date, the Education Appeal Board assumed jurisdiction over the cases previously accepted for review by the Title I Audit Hearing Board. Those cases were listed in a notice of jurisdiction published in the Federal Register on July 26, 1979 (44 FR 43807).

B. Jurisdiction

Under Sections 451 through 456 of the General Education Provisions Act, the Education Appeal Board has authority to hear audit appeals for (1) State-administered programs listed in appendix A to the regulations, (2) programs conducted under the Bilingual Education Act, and (3) programs conducted under the Emergency School Aid Act. Since sections 451 through 456 of the statute became effective on March 1, 1979, the jurisdiction of the Board extends to appeals from final audit determinations issued by authorized OE officials on or after March 1, 1979.

The Board also has jurisdiction over appeals from final audit determination letters issued by authorized OE officials prior to March 1, 1979, in Title I ESEA programs. The Board, under limited circumstances may also assume jurisdiction over appeals from final audit determination letters issued by authorized officials prior to March 1, 1979, in State-administered programs other than the Title I ESEA, for which no prior right of appeal existed. In deciding whether to review an appeal in a State-administered program other than Title I,

ESEA, the Board will consider such factors as (1) the dollar amount involved in the audit appeal, (2) the precedential value of the case, and (3) the workload of the Board.

The Board also has jurisdiction over withholding, termination, and cease and desist actions initiated by authorized OE officials on or after March 1, 1979. The Board also hears appeals from State educational agencies that have received notice that the Commissioner intends to disapprove their applications for Title I, ESEA funds. These appeals will be heard by the Board under specific statutory authority found in section 182 of Title I, ESEA, and will be conducted as withholding hearings.

For the purpose of defining the Board's jurisdiction in the interim final regulations, Section 453 of the General Education Provisions Act authorizing the Board to conduct withholding hearings was interpreted as authorizing the Board to conduct termination hearings. This interpretation was based on former Section 434 of the General Education Provisions Act, which authorized termination proceedings and was superseded by the additions of sections 451 through 456 to the Act in 1978.

Two commenters on the interim final regulations questioned that interpretation. To remove any question, the Commissioner, through the publication of these regulations, specifically designates termination proceedings initiated by authorized OE officials as being within the jurisdiction of the Education Appeal Board. Termination hearings in OE discretionary grant programs are transferred from the jurisdiction of the Departmental Grant Appeals Board to the jurisdiction of the Education Appeal Board by these regulations, and will no longer be conducted by the Departmental Grant Appeals Board.

However, some determinations that affect OE programs remain within the jurisdiction of the Departmental Grant Appeals Board. For example, cost disallowances in OE discretionary grant programs—other than discretionary grant programs conducted under the Bilingual Education Act or the Emergency School Aid Act—are within the jurisdiction of the Departmental Grant Appeals Board. Disputes involving indirect cost rates or fringe benefits are also within the jurisdiction of the Departmental Grant Appeals Board rather than the Education Appeal Board (see 45 CFR 16.5(a)(5)).

In addition, other proceedings involving OE programs may fall outside the Board's jurisdiction. For example, bypass actions under Titles I and IV,

ESEA, and limitation-suspension-termination hearings involving student financial assistance programs under the Higher Education Act are not conducted by the Board, but are based on special OE procedures provided for by statute (see 20 U.S.C. 2740, 20 U.S.C. 3086, and 20 U.S.C. 1086f-1).

It is possible that with the creation of the new Department of Education in 1980, certain proceedings may be phased into the Board's jurisdiction under the Commissioner's statutory authority to designate additional programs as being within the Board's jurisdiction. For example, those proceedings discussed above involving OE programs currently within the jurisdiction of the Departmental Grant Appeals Board may be transferred to the Education Appeal Board when OE is transferred to the new Department. Other proceedings that may eventually be designated as Board proceedings include appeals from the disapprovals of State plans for programs other than Title I, ESEA; appeals from State educational agency actions brought by local educational agencies; and equalization proceedings for school assistance in federally affected areas. Notice of any action taken with regard to these proceedings will be published in the *Federal Register*. As of the date of publication of these regulations, the Board's jurisdiction is limited to the proceedings described in the regulations.

C. Comments

OE received a number of comments from the public on the interim final regulations for the Board. In response to those comments, some changes in the regulations have been made. A summary of the public comments and responses appears in appendix B to these regulations.

D. Citation of Legal Authority

As required by Section 431(a) of the General Education Provisions Act, as amended (20 U.S.C. 1232(a)), a citation of statutory authority for each substantive provision has been placed in parentheses immediately following the text of the provision. If all the provisions of a subpart are supported by the same citation, the citation is given at the end of the subpart.

(Catalog of Federal Domestic Assistance Number not applicable)

Dated: February 26, 1980.

William L. Smith,

U.S. Commissioner of Education.

45 CFR is amended by deleting the interim Education Appeal Board rules appearing at 44 FR 30528, which are superseded by the following:

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- Appendix A to Part 100d—Audit Appeal Jurisdiction.
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Authority: Section 1232 of the Education Amendments of 1978, Pub. L. 95-561; 92 Stat. 2347-2351 (20 U.S.C. 1234).

Subpart A—General

§ 100d.1 Purpose.

These regulations establish the Education Appeal Board in the Office of Education (OE) in accordance with Section 451 of the General Education Provisions Act, and set forth rules for the conduct of proceedings before the Board.

(20 U.S.C. 1234(a), (e))

§ 100d.2 Jurisdiction.

- (a) The Board has jurisdiction to—
 - (1) Review final audit determinations concerning programs that are—
 - (i) State-administered programs listed in appendix A (see appendix A to Part 100d);
 - (ii) Conducted under the Bilingual Education Act; or
 - (iii) Conducted under the Emergency School Aid Act;
 - (2) Conduct withholding or termination hearings initiated by authorized OE officials in connection with applicable programs (see § 100d.3 (*Definitions*) for the definition of applicable program);

(3) Conduct cease and desist proceedings initiated by authorized OE officials in connection with applicable programs (see § 100d.3 (*Definitions*) for the definition of applicable program); and

(4) Conduct other proceedings as designated by the Commissioner of Education (the Commissioner) in the *Federal Register*.

(b) The Board also has jurisdiction under Section 182 of Title I of the Elementary and Secondary Education Act of 1965, as amended, to hear an appeal from each State educational agency (SEA) that has received written notice that the Commissioner intends to disapprove the SEA's application for Title I funds. An appeal under section 182 shall be conducted as a withholding hearing.

(20 U.S.C. 1234(a), 20 U.S.C. 2832(b))

§ 100d.3 Definitions.

"Appellant" means an SEA or other recipient that requests—

(a) A review of a final audit determination; or

(b) A withholding or termination hearing.

"Applicable program" means any program administered by an authorized OE official. This definition—

(a) Applies only in the context of withholding or termination hearings and cease and desist hearings;

(b) Includes programs that have been delegated to OE, such as the Emergency School Aid Act;

(c) Does not include the following student assistance programs authorized by Title IV and governed by Section 497A of the Higher Education Act of 1965:

(1) National Direct Student Loan Programs.

(2) College Work-Study Programs.

(3) Supplemental Educational Opportunity Grant Programs.

(4) Guaranteed Student Loan Programs.

(5) Basic Educational Opportunity Grant Programs.

"Authorized OE official" means—

(a) The Commissioner; or

(b) A person employed by OE who has been designated to act under the Commissioner's authority.

"Board" means the Education Appeal Board of OE.

"Board Chairperson" means the Board member designated by the Secretary of the Department of Health, Education, and Welfare to serve as administrative officer of the Board.

"Cease and desist" means to discontinue a prohibited practice or initiate a required practice.

"Final audit determination" means a written notice issued by an authorized OE official disallowing expenditures made by a recipient.

"Hearing" means any review proceeding conducted by the Board. A hearing may include a conference, a review of written submissions, an oral argument, or a full evidentiary hearing.

"Panel" means an Education Appeal Board Panel (see § 100d.5 (*Panels*)).

"Panel Chairperson" means the person designated by the Board Chairperson to serve as the presiding officer of a Panel.

"Party" means—

(a) The recipient requesting or appearing at a hearing under these regulations;

(b) The authorized OE official who issued the final audit determination being appealed, the notice of an intent to withhold or terminate funds, or the cease and desist complaint; and

(c) Any person, group, or agency that files an acceptable application to intervene (see § 100d.43 (*Intervention*)).

"Recipient" means the named party or entity that initially receives Federal funds under an OE grant or cooperative agreement. For example, for a State-administered program conducted under Title I of the Elementary and Secondary Education Act of 1965, as amended, the SEA is the recipient. This definition does not extend to procurement contracts.

"Suspension" means temporarily stopping payment of Federal funds to a recipient and stopping the recipient's authority to charge costs to a program, pending the outcome of a withholding or termination hearing.

"Termination" means ending the payment of Federal funds to a recipient and ending the recipient's authority to charge costs to a program before the recipient's authority to charge costs to a program expires.

"Withholding" means stopping payment of Federal funds to a recipient and stopping the recipient's authority to charge costs to a program, for the period of time the recipient is in violation of a requirement.

(20 U.S.C. 1234(e))

§ 100d.4 Board membership.

The Board consists of 15 to 30 members. Not more than one-third of the Board members may be employees of the Department of Health, Education, and Welfare.

(20 U.S.C. 1234(c))

§ 100d.5 Panels.

(a)(1) For each proceeding before the Board, the Board Chairperson selects a

Panel, consisting of at least three members of the Board, and designates one of the Panel members as Panel Chairperson.

(2) The Board Chairperson may designate the entire Board to sit as a Panel for any case or class of cases.

(b) A majority of the members of a Panel must be members of the Board who are not full-time employees of the Federal Government.

(c) No Board member who is a party to, or has or has had any responsibility for the particular matter assigned to a Panel, may serve on that Panel.

(20 U.S.C. 1234(d))

§ 100d.6 Eligibility for review.

(a) Review under these regulations is open to a recipient that receives a written notice from an authorized OE official of—

(1) A final audit determination;

(2) An intent to withhold or terminate funds;

(3) A cease and desist complaint; or

(4) Any other proceeding designated by the Commissioner.

(b) Review under these regulations is also open to an SEA that has received written notice that the Commissioner intend to disapprove the SEA's application for funds under Title I of the Elementary and Secondary Education Act of 1965, as amended. The review shall be conducted as a withholding hearing.

(20 U.S.C. 1234(a), 20 U.S.C. 2832(b))

§ 100d.7 Exhaustion of remedies.

(a) If a recipient receives a written notice referred to in § 100d.6 (*Eligibility for review*) and brings a lawsuit to challenge that notice the recipient has failed to exhaust administrative remedies and the Commissioner may move for dismissal of the lawsuit on that basis.

(b) If the Panel assigned to hear an appeal finds that there are no issues in the appeal within the Board's jurisdiction, the Panel may, at the request of a party or Panel member, issue a decision or order to that effect (see subpart F (*Decisions and Orders*)).

(20 U.S.C. 1234, 1234d)

§§ 100d.8—100d.10 [Reserved]

Subpart B—Final Audit Determinations Written Notice

§ 100d.11 Written notice of a final audit determination.

(a) An authorized OE official may issue written notice of a final audit determination to a recipient in connection with the following:

(1) State-administered programs listed in Appendix A (see appendix A to Part 100d).

(2) Programs administered under the Bilingual Education Act.

(3) Programs administered under the Emergency School Aid Act.

(b) In the written notice, the authorized OE official—

(1) Lists the disallowed expenditures made by the recipient;

(2) Indicates the reasons for the final audit determination in sufficient detail to allow the recipient to respond—for example, by referring to the relevant parts of a separate document, such as an audit report; and

(3) Advises the recipient that it must repay the disallowed expenditures to OE or, within 30 calendar days of its receipt of the written notice, request a review by the Board of the final audit determination.

(c) The authorized OE official sends the written notice to the recipient by certified mail with return receipt requested.

(20 U.S.C. 1234a(a))

§ 100d.12 Review of the written notice.

(a) The Board Chairperson reviews the written notice of the final audit determination after an application for review is received (see § 100d.13 (*Filing an application for review*)) to insure that the written notice meets the requirements of § 100d.11(b) (*Written notice of a final audit determination*).

(b) If the Board Chairperson decides that the written notice does not meet the requirements of § 100d.11(b) (*Written notice of a final audit determination*), the Board Chairperson returns the determination to the official who issued it so that the determination may be properly modified.

(c) If the official makes the appropriate modification and the recipient wishes to pursue its appeal to the Board, the recipient shall amend its application for review within 30 calendar days of the date it receives the modification.

(20 U.S.C. 1234a(b))

Application for Review

§ 100d.13 Filing an application for review.

(a) An appellant seeking review of a final audit determination by the Board shall file a written application for review with the Board Chairperson.

(b) The appellant shall attach a copy of the written notice of a final audit determination to the application for review, and shall, to the satisfaction of the Board Chairperson—

(1) Identify the issues and facts in dispute; and

(2) State the appellant's position, together with the pertinent facts and reasons supporting that position.

(c) The appellant shall file the application for review within 30 calendar days after the date it receives the written notice of the final audit determination, unless the Board Chairperson grants an extension of time for a good reason.

(20 U.S.C. 1234a(b))

§ 100d.14 Acceptance of the application for review.

(a) If the Board Chairperson decides that an application for review satisfies the requirements of § 100d.13 (*Filing an application for review*), the Board Chairperson issues a notice of the acceptance of the application to the appellant and the authorized OE official who issued the final audit determination.

(b) The Board Chairperson publishes a notice of acceptance of the application in the *Federal Register* prior to the scheduling of initial proceedings.

(c) If an acceptable application is filed, the Board Chairperson refers the appeal to a Panel, arranges for the scheduling of initial proceedings, and forwards to the Panel and parties an initial hearing record that includes—

- (1) The final audit determination;
- (2) The application for review; and
- (3) Other relevant documents, such as audit reports.

(20 U.S.C. 1234a(b))

§ 100d.15 Rejection of the application for review.

(a) If the Board Chairperson determines that an application for review does not satisfy the requirements of § 100d.13 (*Filing an application for review*), the Board Chairperson returns the application to the appellant, together with the reasons for the rejection, by certified mail with return receipt requested.

(b) The appellant has 20 calendar days after the date it receives the notice of rejection to file an acceptable application.

(c) If an application for review is rejected two times, OE may take appropriate administrative action to collect the expenditures disallowed in the final audit determination.

(20 U.S.C. 1234a(b))

Burden of Proof

§ 100d.16 Burden of proof.

The appellant shall present its case first and has the burden of proving the allowability of the expenditures disallowed in the final audit determination.

(20 U.S.C. 1234a(b))

§§ 100d.17-100d.20 [Reserved]

Subpart C—Withholding and Termination

Written Notice

§ 100d.21 Written notice of an intent to withhold or terminate funds.

(a) An authorized OE official may issue a written notice of an intent to withhold or terminate funds to a recipient under an applicable program.

(b) In the written notice, the authorized OE official—

(1) States the facts that indicate the recipient failed to comply substantially with a requirement that applies to the funds;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the recipient that it may request a hearing before the Board.

(c) The authorized OE official sends the written notice to the recipient by certified mail with return receipt requested.

(20 U.S.C. 1234b (a), (b))

Application for a Withholding or Termination Hearing

§ 100d.22 Filing an application for a withholding or termination hearing.

(a) An appellant seeking a withholding or termination hearing before the Board shall file a written application with the Board Chairperson within 30 calendar days after the date it receives the written notice.

(b) In the application for a withholding or termination hearing, the appellant shall attach a copy of the written notice and shall, to the satisfaction of the Board Chairperson—

(1) Identify the issues and facts in dispute; and

(2) State the appellant's position, together with the pertinent facts and reasons supporting that position.

(20 U.S.C. 1234b(b))

§ 100d.23 Acceptance of the application.

(a) If the appellant files an application that meets the requirements of § 100d.22 (*Filing an application for a withholding or termination hearing*), the Board Chairperson issues a notice of the acceptance of the application to the appellant and the authorized OE official who issued the notice of the intent to withhold or terminate.

(b) The Board Chairperson publishes a notice of acceptance of the application in the *Federal Register* prior to the scheduling of initial proceedings.

(c) If the appellant files an acceptable application, the Board Chairperson

refers the appeal to a Panel, arranges for the scheduling of a hearing, and forwards to the Panel and the parties an initial hearing record that includes—

- (1) The written notice;
- (2) The application for a hearing; and
- (3) Other relevant documents.

(20 U.S.C. 1234b(b))

§ 100d.24 Rejection of the application.

(a) If the Board Chairperson determines that an application for a withholding or termination hearing does not satisfy the requirements of § 100d.22 (*Filing an application for a withholding or termination hearing*), the Board Chairperson returns the application to the appellant, together with the reasons for the rejection, by certified mail with return receipt requested.

(b) The appellant has 20 calendar days after the date it receives the notice of rejection to file an acceptable application.

(c) If an application is rejected two times, OE takes appropriate administrative action to withhold or terminate funds.

(20 U.S.C. 1234b(b))

Suspension of Payments

§ 100d.25 Written notice of an intent to suspend funds.

(a) An authorized OE official may issue to the recipient a written notice of an intent to suspend funds during the course of the withholding or termination hearing.

(b) In the written notice, the authorized OE official—

- (1) Indicates the reasons for the suspension; and
- (2) Advises the recipient that the suspension becomes effective 10 calendar days after the date the recipient receives the written notice, unless within those 10 calendar days the recipient requests an opportunity to show cause why payments should not be suspended.

(c) The authorized OE official sends the written notice to the recipient by certified mail with return receipt requested.

(20 U.S.C. 1234b(c))

§ 100d.26 Request to show cause.

A recipient seeking an opportunity to show cause why payments should not be suspended shall submit a written request for a show cause hearing to the authorized OE official who issued the written notice.

(20 U.S.C. 1234b(c))

§ 100d.27 Show cause hearing.

(a) If a show cause hearing is requested, the authorized OE official—

(1) Notifies the recipient of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee does not have to be a member of the Board but may not be a party to, or have or have had any responsibility for, the matter before the Board.

(b) At the show cause hearing, the designee considers such matters as—

(1) The necessity for the suspension of payments;

(2) Possible factual errors in the written notice of the intent to withhold or terminate;

(3) The nature of the violation charged in the written notice of the intent to withhold or terminate; and

(4) Hardship resulting from the suspension.

(20 U.S.C. 1234b(c))

§ 100d.28 Decision.

(a) The designee who conducts the show cause hearing—

(1) Decides whether there should be a suspension during the course of the withholding or termination hearing;

(2) Issues a written decision which includes a statement of findings;

(3) Submits the decision to the Board Chairperson; and

(4) Sends a copy of the decision to the recipient by certified mail with return receipt requested.

(b) The designee's decision is effective on receipt by the recipient and is not subject to review by the Commissioner.

(c) The Board Chairperson retains the designee's decision as part of the record of the withholding or termination hearing.

(20 U.S.C. 1234b(c))

§§ 100d.29–100d.30 [Reserved]

Subpart D—Cease and Desist

Written Notice

§ 100d.31 Written notice of a cease and desist complaint.

(a) An authorized OE official may issue a written notice of a cease and desist complaint to a recipient receiving funds under an applicable program. The cease and desist proceeding may be used as an alternative to a withholding or termination hearing.

(b) In the written notice, the authorized OE official—

(1) States the facts that indicate the recipient failed to comply substantially with a requirement that applies to the funds;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Gives notice of a hearing that is to be held at least 30 calendar days after

the date the recipient receives the written notice.

(c) The authorized OE official sends the written notice to the recipient by certified mail with return receipt requested.

(20 U.S.C. 1234c(a))

Hearing

§ 100d.32 Right to appear at the cease and desist hearing.

The recipient has the right to appear at the cease and desist hearing, which is held before a Panel of the Board on the date specified in the complaint.

(20 U.S.C. 1234c(b))

§ 100d.33 Opportunity to show cause.

At the hearing the recipient shall have the opportunity to present reasons why a cease and desist order should not be issued by the Board based on the violation of law stated in the complaint.

(20 U.S.C. 1234c(b))

Order

§ 100d.34 Written report and order.

If, after the hearing, the Panel decides that the recipient has violated a legal requirement as stated in the complaint, the Panel—

(a) Makes a written report stating its findings of fact; and

(b) Issues a cease and desist order.

(See § 100d.85 (*The cease and desist report and order*).)

(20 U.S.C. 1234c(c))

§§ 100d.35–100d.40 [Reserved]

Subpart E—Practice and Procedure

General Rules

§ 100d.41 Applicability of this subpart.

This subpart applies only to proceedings before the Board.

(20 U.S.C. 1234(e))

§ 100d.42 Applicability of other laws.

(a) Sections 554, 556, and 557 of the Administrative Procedure Act (5 U.S.C.) apply to proceedings before the Board with respect to—

(1) The receipt of oral or written testimony;

(2) Notice of the issues to be considered;

(3) The right to counsel;

(4) Intervention of third parties; and

(5) Transcripts of proceedings.

(b) Other provisions of the Administrative Procedure Act and the Federal Rules of Civil Procedure do not apply to proceedings before the Board.

(20 U.S.C. 1234(e))

§ 100d.43 Intervention.

(a) A person, group, or agency with an interest in and having relevant information about a case before the Board may file with the Board Chairperson as application to intervene.

(b) The application to intervene shall contain—

(1) A statement of the applicant's interest; and

(2) A summary of the relevant information.

(c)(1) If the application is filed before a case is assigned to a Panel, the Board Chairperson decides whether approval of the application to intervene will aid the Panel in its disposition of the case.

(2) If the application is filed after the Board Chairperson has assigned the case to a Panel, the Panel decides whether approval of the application to intervene will aid the Panel in its disposition of the case.

(d) The Board Chairperson notifies the applicant seeking to intervene and the other parties of the approval or disapproval of the application to intervene.

(e) If an application to intervene is approved, the intervenor becomes a party to the proceedings.

(f) If an application to intervene is disapproved, the applicant may submit to the Board Chairperson an amended application to intervene.

(20 U.S.C. 1234(e))

§ 100d.44 Representation by counsel.

Parties may be represented by counsel.

(20 U.S.C. 1234(e))

§ 100d.45 Filing of documents.

(a) An applicant shall file with the Board Chairperson one copy of an application for review or to intervene.

(b) Once a Panel has been assigned, parties shall—

(1) File with the Board Chairperson five copies of all written motions, briefs—including cited materials that are not readily available—and other documents; and

(2) Provide a copy to each of the other parties to the proceedings.

(c) Parties have 25 calendar days from the date of receipt of any motion to file a response with the Board Chairperson, unless the Panel Chairperson grants an extension for a good reason.

(d) The date of filing is the date the document is postmarked or hand-delivered to the Office of the Board Chairperson. If a scheduled filing date occurs on a Saturday, Sunday, or Federal holiday, the next business day is the date of filing.

(20 U.S.C. 1234(e))

§ 100d.46 Availability of decisions.

The Board Chairperson maintains the files of the Board. The decision of the Board are available to the public on request and with payment of reproduction costs.

(20 U.S.C. 1234(e))

§ 100d.47 Communications.

No party shall communicate with the Panel or Board Chairperson on matters under review, except minor procedural matters, unless all parties to the case are given—

(a) Timely and adequate notice of the communication; and

(b) Reasonable opportunity to respond.

(20 U.S.C. 1234(e))

§ 100d.48 Transcripts.

(a) The Board Chairperson—

(1) Arranges for the preparation of a transcript of each hearing;

(2) Retains the original transcript as part of the record of the hearing; and

(3) Provides one copy of the transcript to each party and Panel member.

(b) Additional copies of the transcript are available on request and with payment of the reporting service's reproduction fee.

(20 U.S.C. 1234(e))

§ 100d.49 Subpoenas.

(a) The Panel does not have authority to issue subpoenas.

(b) The Panel may ask a party to provide for oral or written examination one or more available witnesses who have knowledge about the matter under review.

(20 U.S.C. 1234(e))

§ 100d.50 Exchange of information.

There is no discovery as conducted under the Federal Rules of Civil Procedure, but the parties are encouraged to exchange relevant documents and information.

(20 U.S.C. 1234(e))

§ 100d.51 Evidence.

The Panel accepts any evidence that it finds is relevant and material to the proceedings. Parties may object to evidence they consider to be irrelevant, immaterial, or unduly repetitious.

(20 U.S.C. 1234(e))

§ 100d.52 Panel decisions.

Decisions of the Panel are made by a majority of the Panel members.

(20 U.S.C. 1234(e))

§ 100d.53 Intermediate review.

The parties may not file comments with the Commissioner regarding

matters under review or any rulings of a Panel until the Panel has reached its decision. (See § 100d.81 (*The Panel's decision*.)

(20 U.S.C. 1234(e))

§§ 100d.54–100d.60 [Reserved]**Panel Proceedings****§ 100d.61 Authority and responsibilities of Panels.**

(a) The Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of an appeal.

(2) The Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(3) The Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(4) The Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Panel.

(5) The Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(6) The Panel may rule on motions and other issues at any stage of the proceedings.

(7) Although hearings are open to the general public, the Panel may establish reasonable rules for public attendance and media coverage of the proceedings.

(8) The Panel may examine witnesses.

(9) The Panel may set reasonable time limits for submission of written documents.

(10) The Panel may end an appeal and issue a decision against a party if that party does not meet the time limits set by the Panel or otherwise delays the appeal.

(b) The Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(20 U.S.C. 1234(e))

§ 100d.62 Conferences.

(a) The Board Chairperson may schedule a prehearing conference of the Panel members and parties.

(b) A Panel member or party may request a conference of the Panel members and parties except in the case of a show cause proceeding. The Panel Chairperson decides whether a conference is necessary.

(c) At a prehearing or other conference the Panel and the parties may consider such subjects as—

(1) Narrowing and clarifying issues;

(2) Assisting the parties in reaching agreements and stipulations;

(3) Clarifying the positions of the parties;

(4) Presenting the direct case of the parties in writing, in whole or in part, or conducting an oral argument or evidentiary hearing;

(5) Setting the dates for the exchange of written documents, the receipt of comments from the parties on the need for an oral argument or evidentiary hearing, and further proceedings before the Panel; and

(6) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimates of time for each presentation.

(d) At a prehearing or other conference the parties shall be prepared to respond to the subjects listed in paragraph (c).

(e) Following a prehearing or other conference the Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(20 U.S.C. 1234(e))

§§ 100d.63–100d.70 [Reserved]

Presentation of Case

§ 100d.71 Written submissions normally required.

The parties shall present their positions through briefs and the submission of other documents but may request an oral argument or evidentiary hearing. The Panel shall determine whether an oral argument or evidentiary hearing is needed to clarify the positions of the parties.

(20 U.S.C. 1234(e))

§ 100d.72 Notice of an oral argument or evidentiary hearing.

If the Panel decides that an oral argument or evidentiary hearing is necessary, the Panel Chairperson sends written notice of this decision to all parties. The notice states the time and place of the proceeding and the issues to be considered. The notice may be published in the Federal Register upon the request of a party or Panel member.

(20 U.S.C. 1234(e))

§ 100d.73 Conduct of a hearing.

A hearing is generally conducted by all the Panel members, but, if circumstances require, a hearing may be conducted by one or more Panel members. All the Panel members shall participate in the Panel's decision.

(20 U.S.C. 1234(e))

§§ 100d.74–100d.80 [Reserved]

Subpart F—Decisions and Orders

Final Audit Determinations, Withholdings, and Terminations

§ 100d.81 The Panel's decision.

The Panel issues a decision in the appeal from the final audit determination or the intent to withhold or terminate funds. The Board Chairperson submits the Panel's decision to the Commissioner and sends a copy to each party by certified mail with return receipt requested.

(20 U.S.C. 1234a(d), 20 U.S.C. 1234b(d))

§ 100d.82 Opportunity to comment on the Panel's decision.

(a) *Initial comments and recommendations.* Each party has the opportunity to file comments and recommendations on the Panel's decision with the Board Chairperson within 15 calendar days of the date the party receives the Panel's decision.

(b) *Responsive comments and recommendations.* The Board Chairperson sends a copy of a party's initial comments and recommendations to each of the other parties by certified mail with return receipt requested. Each party may file responsive comments and recommendations with the Board Chairperson within 7 calendar days of the date the party receives the initial comments and recommendations.

(c) The Board Chairperson forwards the parties' initial and responsive comments on the Panel's decision to the Commissioner.

(20 U.S.C. 1234a(d), 20 U.S.C. 1234b(d))

§ 100d.83 The Commissioner's decision.

(a) The Panel's decision becomes the final decision of the Commissioner 60 calendar days after the date the recipient receives the Panel's decision, unless the Commissioner, for good cause shown, modifies or sets aside the Panel's decision. If the recipient wishes to file a petition for judicial review of the Panel's decision, the recipient shall file the petition within those 60 days. (See Section 455 of the General Education Provisions Act (20 U.S.C. 1234d) for a discussion of judicial review.)

(b) If the Commissioner modifies or sets aside the Panel's decision within the 60 days, the Commissioner issues a decision that—

(1) Includes a statement of the reasons for this action; and

(2) Becomes the Commissioner's final decision 60 calendar days after it is issued.

(c) The Board Chairperson sends a copy of the Commissioner's final decision and statement of reasons, or a notice that the Panel's decision has become the Commissioner's final decision, to the Panel and to each of the parties. If the recipient wishes to file a petition for judicial review of the Commissioner's final decision, the recipient shall file the petition within 60 calendar days of the date of the Commissioner's final decision (see 20 U.S.C. 1234d).

(d) The final decision of the Commissioner is the final decision of the Department.

(20 U.S.C. 1234a(d), 1234b(d), 1234d)

§ 100d.84 Collection.

If the final decision of the Commissioner sustains the final audit determination or the intent to withhold or terminate funds, OE takes immediate steps to collect the debt or withhold or terminate funds.

(20 U.S.C. 1234a(e), 20 U.S.C. 1234b)

Cease and Desist

§ 100d.85 The cease and desist report and order.

(a) If the Panel issues a cease and desist report and order (described in § 100d. 34 (*Written report and order*)), the Board Chairperson sends the report and order to the recipient by certified mail with return receipt requested.

(b) The order becomes final 60 calendar days after the date the order is received by the recipient. The recipient may file a petition for judicial review within those 60 days. (See Section 455 of the General Education Provisions Act (20 U.S.C. 1234d) for a discussion of judicial review.) The order is not subject to review by the Commissioner.

(20 U.S.C. 1234c(d), 1234d)

§ 100d.86 Enforcement.

(a) If the Panel issues a cease and desist report and order, the recipient shall take immediate steps to comply with the order.

(b) If, after a reasonable period of time, the Commissioner determines that the recipient has not complied with the cease and desist order, the Commissioner may—

(1) Withhold funds payable to the recipient under the affected program, including funds payable for administrative costs, without any further proceedings before the Board; or

(2) Certify the facts of the matter to the Attorney General for enforcement through appropriate proceedings.

(20 U.S.C. 1234c(e))

§§ 100d.87-100d.90 [Reserved]

Appendix A to Part 100d—Audit Appeal Jurisdiction

State-Administered Programs within the Audit Appeal Jurisdiction of the Education Appeal Board:

(a) Programs referred to in Section 452 of the General Education Provisions Act (20 U.S.C. 1234a):

(1) Financial assistance to State and local educational agencies under Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2701).

(2) Financial assistance for school library resources, textbooks, and other instructional materials under Title II of the Elementary and Secondary Education Act of 1965 (as in effect, September 30, 1978) (20 U.S.C. 821).

(3) State basic skills improvement programs under Title II-B of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2901).

(4) Supplementary educational centers and services; guidance, counseling, and testing under Title III of the Elementary and Secondary Education Act of 1965 (as in effect, September 30, 1978) (20 U.S.C. 841).

(5) Instructional materials and school library resources; improvement in local educational practices; and guidance, counseling, and testing under Title IV of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 1801).

(6) Community schools programs under Title VIII of the Elementary and Secondary Education Act of 1965 (except sections 809-813) (20 U.S.C. 3281).

(7) Gifted and talented children's education programs under Title IX of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3311).

(8) Assistance to States for education of handicapped children under Part B of the Education of the Handicapped Act (20 U.S.C. 1411).

(9) State adult education programs under the Adult Education Act (except sections 309, 316, and 318) (20 U.S.C. 1201).

(10) Financial assistance for strengthening instruction in science, mathematics, modern foreign languages, and other critical subjects under Title III-A of the National Defense Education Act of 1958 (except section 305) (20 U.S.C. 441).

(11) Programs under the Career Education Incentive Act (except sections 10, 11, and 12) (20 U.S.C. 2601).

(12) Programs under Title II of the Indochina Refugee Children's Assistance Act (20 U.S.C. 1211b).

(13) Programs under Title VI, Part A of the Higher Education Act (20 U.S.C. 1121).

(14) Educational information centers programs under Sections 418 A and B of the Higher Education Act (20 U.S.C. 1070d-2).

(b) Programs designated by the Commissioner as being within the audit appeal jurisdiction of the Education Appeal Board:

(1) Vocational education programs under the Vocational Education Act of 1963: part A of title I (State vocational education programs) (20 U.S.C. 2301).

(2) Community service and continuing education programs under Part A of Title I of the Higher Education Act of 1965 (except sections 106, 110, and 111) (20 U.S.C. 1001).

(3) Programs under the Library Services and Construction Act (20 U.S.C. 351).

Note.—This Appendix B for Part 100d will not be published in Title 45 of the Code of Federal Regulations.

Appendix B to Part 100d—Response to Public Comments

The Commissioner has responded to all the public comments OE received concerning the interim final regulations for the Education Appeal Board with the exceptions of general comments that did not suggest how the regulations could be changed, statements that could not be understood, or statements that concerned issues beyond the scope of regulations establishing procedures for the Board. A summary of those comments and the Commissioner's responses follows.

General

Comment. Two commenters raised questions concerning the jurisdiction of the Educational Appeal Board. One commenter suggested that the regulations clarify the fact that the Board has no jurisdiction over bypass actions under Titles I and IV, ESEA, and one commenter asked who would hear appeals if applications for funds are denied.

Response. No change has been made. At present, the Board does not have jurisdiction to conduct bypass actions. It has specific statutory authority to hear appeals from State educational agencies if applications for funds under Title I of the Elementary and Secondary Education Act of 1965, as amended, are disapproved by the Commissioner, but that authority does not extend to appeals from denials of other applications for funds.

Both these points are made in the preamble to the final regulations. However, the Commissioner does not believe that it would be useful to attempt to list all proceedings that fall outside the Board's jurisdiction or

appropriate to single out a few of those proceedings for special mention in the final regulations.

Comment. One commenter suggested that cease and desist orders be used to effect compliance with Title IX, and that the regulations make explicit the possibility that violations of program prohibitions against sex discrimination might trigger withholding, termination, or cease and desist proceedings.

Response. No change has been made. Since regulations have been promulgated that give the Department's Office for Civil Rights authority to enforce Title IX, the Commissioner sees a number of legal and practical difficulties in using cease and desist proceedings before the Education Appeal Board to enforce Title IX against recipients of Federal education funds. The Commissioner has determined that in view of possible legal problems resulting from the use of cease and desist orders to enforce Title IX, and the already substantial caseload of the Board, Board proceedings should not be used as an alternative means of enforcing Title IX.

Violations of program prohibitions against sex discrimination contained in various program regulations may give rise to OE enforcement action before the Board. However, the purpose of the Board regulations is to establish the Board and rules for the conduct of proceedings before the Board. The Commissioner does not consider it appropriate, through the publication of these regulations, to single out any particular program or program prohibitions for special emphasis, to suggest that some program prohibitions are more or less important than others, or to involve the neutral and impartial Board in statements of OE policy.

Comment. One commenter suggested that the regulations spell out the form of determinations that may trigger OE initiation of Board proceedings. Another commenter suggested that the regulations set out an internal review process for OE initiation of Board proceedings.

Response. No change has been made. Any attempt to define OE internal decision-making processes through the Board regulations would go beyond the stated purpose of the regulations and exceed the Board's authority. In the Commissioner's judgment, it would be improper to link the Board to any degree with internal OE decisions to initiate enforcement proceedings.

Comment. One commenter suggested that the regulations state when an audit is complete; set standards for the quality of a final audit determination; and limit

audit appeals to the issues presented in the final audit determination.

Response. No change has been made. The Board has no authority to set standards for audits of OE programs. However §§ 100d.11 and 100d.12 of the regulations set notice standards for final audit determinations and provide for review of final audit determinations that have been appealed to ensure that the determinations meet the notice standards. Section 100d.51 and 100d.61(a)(4) allow Panels to rule on questions of relevancy. The Commissioner believes that these provisions are sufficient.

Comment. One commenter suggested that the regulations express the Secretary's intent to ensure adequate representation of women and minorities on the Board.

Response. No change has been made. The Secretary, the Assistant Secretary for Education, and the Commissioner remain committed to ensuring that women and members of minority groups are adequately represented on the Board. Special efforts have been and are being made to recruit women and minorities to fill Board vacancies.

Comment. One commenter objected to the designation of the Title I Audit Hearing Board as the Education Appeal Board.

Response. No change has been made. The Commissioner's designation, and the Secretary's approval, of the Title I Audit Hearing Board as the Education Appeal Board was authorized by Section 451(f) of the General Education Provisions Act. The only requirement was that the existing appeal board be capable of carrying out the functions of the Education Appeal Board. The Commissioner and the Secretary determined that the Title I Audit Hearing Board met this requirement.

Comment. Two commenters questioned the policy of not including in the regulations all the provisions contained in Sections 451 through 456 of the General Education Provisions Act in the regulations.

Response. The Commissioner believes that all the sections that pertain directly to Board proceedings, and that recipients need to know to participate in Board proceedings, are included in the regulations. The sections outlining the Commissioner's authority to compromise claims or return recovered funds and the section providing for judicial review are not appropriate subjects for inclusion in procedural regulations for the Board.

Comment. Several commenters objected to OE's decision to proceed with interim final regulations rather than a notice of proposed rulemaking.

Response. No change has been made. In view of the procedural nature of the rules, the Commissioner does not believe that OE was required to publish a notice of proposed rulemaking. In addition, the Commissioner believes that it was in the public interest to establish the Board as an effective appeal mechanism at the earliest possible date so that recipients would be able to exercise their newly-granted rights of appeal.

The members of the public were given an opportunity to comment on the interim final regulations. Those comments were considered carefully in the drafting of the final regulations.

Section 100d.3 Definitions.

Comment. Two commenters objected to the definition of "authorized OE official" as being too broad and suggested that including the Commissioner as an authorized OE official might lead to a conflict of interest since the Commissioner reviews all decisions. The commenters also suggested that granting authority to "authorized OE officials" conflicts with the recently-published Notice of Proposed Rulemaking for the Education Division General Administrative Regulations (44 FR 26298, May 4, 1979), specifically § 100b.900 which reads:

No act or failure to act by an official agent, or employee of HEW can affect the responsibility of the Commissioner to enforce a regulation.

Response. No change has been made. The Commissioner does not agree that the definition of "authorized OE official" is too broad, because it is necessary as an administrative matter to allow OE employees to be designated to act for the Commissioner. However, the statute clearly gives the Commissioner the authority to issue final audit determinations and notice of withholding, termination, and cease and desist proceedings, and does not require the Commissioner to delegate that authority. For that reason, the definition of "authorized OE official" includes both the Commissioner and OE employees designated to act under the Commissioner's authority.

Further, the Commissioner does not see a conflict between allowing authorized OE officials to act for the Commissioner and § 100b.900 of the Education Division General Administrative Regulations. Section 100b.900 does not suggest that the Commissioner may not designate OE employees to act under the Commissioner's authority.

Comment. Two commenters objected to the inclusion of the phrase "or initiate

a required practice" in the definition of "cease and desist" on the ground that a cease and desist order cannot mandate a required act.

Response. No change has been made. Section 454 of the General Education Provisions Act allows the Board to issue a cease and desist order requiring a recipient that has violated the law to cease and desist from the practice, policy, or procedure that resulted in the violation. The Commissioner believes that, in some instances, compliance with the cease and desist order will require the recipient to perform an affirmative act.

For example, if the recipient violated a statutory or regulatory requirement by failing to keep adequate records, the recipient would have to implement an adequate recordkeeping system to comply with both the order and the law. The Commissioner believes that the definition of "cease and desist" contained in § 100d.3 simply reflects that possibility.

Comment. One commenter said that the definition of "hearing" should be more limited.

Response. No change has been made. Adequate review in a case before the Board could range from a Panel's review of written submissions to an extended series of conferences, oral arguments, or evidentiary hearings. The definition of the word "hearing" was intended to be broad so that Panels might have maximum flexibility in adequately reviewing cases.

Comment. Several commenters suggested that the definition of "recipient" explicitly include a local educational agency.

Response. A change has been made. The word "initially" has been added to the definition of "recipient" so that "recipient" is defined as "the named party or entity that initially receives Federal funds under an OE grant or cooperative agreement."

Under some direct grant programs, a local educational agency will be the named party or entity that initially receives funds, and will have the right to appeal adverse audit determinations or withholding, termination, or cease and desist actions.

Under most State-administered programs, however, the State educational agency initially receives the funds, bears the responsibility for ensuring that Federal education funds are spent properly, and should receive the final audit determination or written notice of withholding, termination, or cease and desist proceedings. An example now noted in the definition is a program conducted under Title I of the Elementary and Secondary Education

Act of 1965, as amended, where the State educational agency is the recipient and will have the right of appeal.

The addition of the word "initially" to the definition of recipient, and the inclusion of the example, should clarify this point.

Section 100d.4 Board membership.

Comment. One commenter suggested that employees of the HEW Audit Agency be prohibited from serving on the Board.

Response. No change has been made. Section 451 of the statute provides that the Secretary shall designate the members of the Board in consultation with the Assistant Secretary for Education and the Commissioner. The only restriction imposed by the statute is that no more than one-third of the Board members may be HEW employees.

Section 100d.5 Panels.

Comment. One commenter suggested that HEW employees representing the programs involved in the cases before the Board be appointed to the Board.

Response. No change has been made. The Commissioner believes that the Board should be as impartial as possible and that program representatives would have, or at least appear to have, an interest or bias in the matter.

Comment. One commenter pointed out that the statute requires only that a majority of the members of a Panel not be individuals in the full-time employment of the Federal government. The interim final regulations were more restrictive.

Response. A change has been made. The regulations have been amended to reflect the statute.

Comment. One commenter noted that the statute excludes an individual who has responsibility for a matter before the Board from serving on the Panel that hears the matter, while the regulations broaden the provision to exclude any person who has or has had responsibility.

Response. The regulations are more restrictive in an effort to minimize further the possibility that a Board member will have a conflict of interest or bias with regard to the matter at hand.

Section 100d.7 Exhaustion of remedies.

Comment. Several commenters stated that exhaustion of remedies should not be required if the Panel fails or refuses to rule on questions of its own jurisdiction or on the validity of OE rules and regulations.

Response. A change has been made. The Commissioner agrees that if the only issues in a case before the Board

fall outside the Board's jurisdiction, the recipient should not be required to argue those issues before the Board. The change in the regulations allows the Panel assigned to hear an appeal to decide that there are no issues in the case within the Board's jurisdiction and to issue a decision or order to that effect. That decision or order would be subject to review by the Commissioner but, once final, should allow the recipient to proceed to court.

Comment. One commenter objected to imposing a timeliness requirement on the recipient but not OE.

Response. A change has been made. The use of the word "timely" in § 100d.7 was not intended to suggest that only the recipient was required to proceed in a timely manner, and the word has been deleted to remove that suggestion. Of course, the recipient must still bring a proper administrative appeal, and a proper administrative appeal would necessarily be timely.

Comment. One commenter objected to the failure to cite a statutory authority for the section, and suggested that the section was contrary to the legislative intent expressed in Section 455 of the General Education Provisions Act providing for judicial review.

Response. A change has been made. Statutory citations have been supplied. The Commissioner believes that by establishing the Board as an administrative forum and providing for judicial review of Board actions, Congress intended recipients to take their cases to the Board before going into court.

Section 100d.11 Written notice of a final audit determination.

Comment. One commenter suggested that OE be required to list the source documents used in making the audit determination.

Response. No change has been made. The written notice of a final audit determination is designed simply to advise the recipient that OE has determined that Federal education funds were misspent, not to lay out OE's case in detail. A listing of source documents may be requested at a later date under § 100d.50 providing for an exchange of relevant information between the parties.

Section 100d.12 Review of the written notice.

Comment. Two commenters suggested that the Board Chairperson review the final audit determination before it is sent to the audited agency.

Response. No change has been made. A final audit determination does not come within the Board's jurisdiction

until it has been appealed. Further, the Commissioner does not believe that it would be appropriate to involve the Board in the audit determination process. That involvement would jeopardize the Board's neutrality.

Section 100d.13 Filing an application for review.

Section 100d.14 Acceptance of an application for review.

Section 100d.15 Rejection of an application for review.

Comment. One commenter asked why the Board's authority to review and accept or reject an application for review was delegated under the regulations to the Board Chairperson.

Response. The Board Chairperson was delegated responsibility for reviewing applications for review because it would be administratively difficult, time-consuming, and unduly expensive to convene the entire Board, or even several members of the Board, to review each application for review.

By allowing the Board Chairperson to initially review each application to see if it meets minimal information requirements, the regulations help to streamline the appeal process and allow the time and attention of the other Board members to be saved for, and directed to, the merits of the cases.

Section 100d.13 Filing an application for review.

Comment. One commenter noted that under the statute, the Board is to specify the form and information required in an application for review, but that under the regulations it appeared that the Commissioner is prescribing the format and information required in the application.

Response. No change has been made. The regulations set out certain minimal requirements for review so that appellants will not have to contact the Board or turn to other sources for information before submitting their applications for review. Since appellants have only 30 days in which to seek review, it is to their advantage to have easy reference to the application requirements. Current members of the Board were involved in the drafting of the regulations.

Comment. One commenter noted that the statute—unlike the regulations—did not allow an extension of time for filing an application for review.

Response. No change has been made. Although the legislation does not provide for an extension of the 30-day time period for filing an application for review, the Title I Audit Hearing Board—the predecessor to the

Education Appeal Board—found that some cases involved such complicated issues or so many different localities that 30 days did not allow an appellant sufficient time in which to prepare an adequate application for review.

The Title I Board Chairperson, having received a fair number of requests from appellants for extensions of the 30-day time period, attempted to accommodate the appellants if the requests appeared reasonable. The Commissioner believes that the Education Appeal Board should have the same flexibility.

Comment. Several commenters suggested that the 30 calendar days allowed for filing an application for review should be extended to 60 calendar days.

Response. No change has been made. The 30 day time limit was set by the statute.

Section 100d.14 Acceptance of the application for review.

Comment. One commenter said that the regulations should speak to the quality of audit reports included in initial hearing records.

Response. No change has been made. Since the Board has no authority to oversee audits conducted by employees of the Department, it would not be appropriate to include standards for audit reports in the Board regulations.

Section 100d.15 Rejection of the application for review.

Comment. Several commenters thought that an appellant should have 60 calendar days, rather than 20, to file a second, acceptable application for review. Another commenter thought that an appellant should be allowed to request technical assistance from OE in preparing the second application for review.

Response. The Commissioner believes that since the appellant has already had 30 days to prepare the initial application for review, 20 additional days allows the appellant a reasonable amount of time in which to prepare an amended application for review. The Commissioner also believes that technical assistance from OE is neither necessary, since the requirements for an application for review are so minimal, nor appropriate, since the appellant is appealing an OE determination.

Section 100d.16 Burden of proof.

Comment. One commenter asked why the regulations specified that the appellant in an audit appeal is required to present its case first, and why the statutory wording placing the burden of proof on the appellant was rephrased in the regulations.

Response. No change has been made. The regulations specify that the appellant shall present its case first to settle a procedural issue that frequently arose in cases before the Title I Audit Hearing Board. The Title I Board found that since the appellant had the burden of proof, and generally had access to the necessary materials—e.g., payroll records—it made sense to have the appellant present its case first.

Although the wording of the regulations is slightly different than the wording of the statute with regard to the burden of proof in an audit appeal, the change in wording is not intended to change the meaning of the law. The change was made because the phrase "burden of proof" is commonly used while "burden of demonstration" does not have the same generally accepted meaning.

Comment. One commenter said that the auditing agency should have the burden of proving that expenditures should be disallowed.

Response. No change has been made. Section 452(b) of the statute places the burden of proof in an audit appeal on the appellant.

Subpart C—Withholding and Termination.

Comment. Two commenters objected to the interpretation of withholding to include termination.

Response. A change has been made, as noted in section B of the supplementary information contained in the preamble to the regulations. To remove any objection, the Commissioner designates, under section 451(a)(4) of the statute and through the publication of these regulations, termination proceedings initiated by authorized OE officials as being within the jurisdiction of the Education Appeal Board.

Section 100d.25 Written notice of an intent to suspend funds.

Comment. Several commenters said that a recipient of a written notice of an intent to suspend funds should have 30 days, rather than 10, to request an opportunity to show cause why payments should not be suspended.

Response. No change has been made. The Commissioner believes that if funds are to be suspended to prevent the misspending of the funds, the funds should be suspended as quickly as possible. Further, since the recipient is only required to request an opportunity to show cause why payments should not be suspended within the 10 days, and the suspension is only a temporary hold on funds pending the outcome of the withholding or termination proceeding,

the Commissioner believes that the 10 day period is adequate to protect the recipient's interests.

Section 100d.26 Request to show cause.

Section 100d.27 Show cause hearing.

Section 100d.28 Decision.

Comment. One commenter was concerned about who is to be the authorized OE official responsible for overseeing the show cause proceeding, and whether it would present a conflict of interest to have the official who first issued the notice designate the person to conduct the show cause hearing.

Response. A change has been made. The suspension procedures were designed so that any improper expenditure of Federal education funds may be halted as soon as possible. The regulations therefore allow an authorized OE official to designate a person who is not necessarily a Board member, but who is immediately available, to conduct the show cause proceeding.

The regulations have been amended to impose the same conflict of interest standard on a designee as the statute imposes on a Board member; i.e., a person may not be designated to conduct a suspension proceeding who is a party to, or has or has had any responsibility for, the matter before the Board.

Comment. Two commenters did not think that it was clear how a suspension proceeding meshed with a withholding or termination hearing, and suggested that the disposition become part of the record of the case.

Response. A change has been made. The regulations now provide that an order to suspend funds will become part of the record in a withholding or termination proceeding.

Comment. One commenter asked why the decision was not subject to review by the Commissioner.

Response. No change has been made. The designee's decision was not made subject to review by the Commissioner because review would require a substantial amount of time and unduly delay the effective date of the suspension. Since a suspension is only temporary pending the outcome of a withholding or termination hearing, the lack of review should not irreparably harm the appellant.

Section 100d.42 Applicability of other laws.

Comment. Several commenters argued that the entire Administrative Procedure Act and the Federal Rules of Civil Procedure, in particular Rules 26-37

providing for discovery, should be applicable to Board proceedings.

Response. No change has been made. Since section 451(e) of the statute specified certain sections of the Administrative Procedure Act that were to be applicable to Board proceedings, the Commissioner believes that Congress intended only those sections of the APA to apply to Board proceedings. The Commissioner believes that Board proceedings are intended to be less formal, less time-consuming, and less complicated than hearings conducted by administrative law judges or courts of law. For the same reason, the Commissioner does not believe that the Rules of Civil Procedure should be made applicable to Board proceedings.

Section 100d.43 Intervention.

Comment. One commenter was concerned that a party who could aid the Board in its disposition of a case might be denied permission to intervene under § 100d.43.

Response. A change has been made. The regulations require approval for intervention so that only those third parties who have a real interest in or contribution to make to Board proceedings may take part in those proceedings. The regulations have been amended so that an applicant who could aid the Board in the disposition of a case will not be denied permission to intervene under this standard.

Comment. Several commenters argued that the regulations should provide for the joinder of local educational agencies in cases involving State-administered programs.

Response. No change has been made. The Board does not have authority under the statute to join local educational agencies that are unwilling to participate in a State educational agency's appeal. Local educational agencies may apply to intervene under § 100d.43 if their interests are at stake.

Section 100d.46 Availability of decisions.

Comment. One commenter asked whether § 100d.46 limited the provisions of the Freedom of Information Act.

Response. A change has been made. This section of the regulations was not intended to limit the Freedom of Information Act but rather to advise the public that Board decisions are available on request. The regulations have been amended to provide that Board decisions are available on request and with payment of the reproduction costs. This provision is consistent with the Freedom of Information Act.

Section § 100d.49 Subpoenas.

Section § 100d.50 Exchange of information.

Section § 100d.51 Evidence.

Comment. Several commenters suggested that the regulations be changed to require parties to lay proper foundations for the admission of evidence.

Response. No change has been made. Section 100d.51 is intended to allow Panels to (1) conduct proceedings that are less formal and less technical in nature than proceedings conducted by administrative law judges or courts of law, and (2) admit all information that may aid the Panels in reaching their decisions.

Section § 100d.61 Authority and responsibilities of Panels.

Comment. Several commenters stated that the Board should have a subpoena power and the authority to order discovery.

Response. No change has been made. The Board does not have statutory authority to issue subpoenas or mandate discovery. Again, the Commissioner believes that Board proceedings are intended to be less formal, less time-consuming, and less complicated than proceedings conducted by administrative law judges or courts of law.

Comment. One commenter stated that the regulations did not cite any statutory authority for § 100d.61.

Response. No change has been made. As noted in section D of the supplementary information in the preamble to the regulations, if all the provisions of a subpart are supported by the same citation, the citation is given at the end of the subpart. Section 100d.61 is supported by the citation given at the end of the subpart on Panel proceedings.

Comment. One commenter was concerned that the dissemination of information concerning a Board proceeding by the appellant might be limited or that proceedings before the Board might be closed to the public.

Response. A change has been made. It is not the Commissioner's intent to either limit the dissemination of information or close Board proceedings to the public. Section 100d.61(a)(7) has been amended to clarify that Board hearings are open to the general public but that the Panel may establish reasonable rules for public attendance and media coverage of the proceedings.

Comment. One commenter suggested that the Panel set a minimum of 30 days for responses unless the recipient indicates that it can respond in a shorter time span.

Response. A change has been made. The Commissioner wishes to allow the Panels maximum flexibility in setting time limits for the submission of written documents. However, the regulations

have been amended to provide that the Panel may set reasonable time limits.

Comment. Two commenters objected to the Panel's authority to end an appeal without giving the parties an opportunity for a show cause hearing, and argue that there is no statutory authority for the power.

Response. No change has been made. Section 451(e) of the General Education Provisions Act authorizes the Commissioner to prescribe rules for the conduct of proceedings before the Board. As noted in the preamble to the interim final regulations, the Title I Audit Hearing Board found that parties in several instances were unduly slow in presenting their cases. Panels were given the authority to end appeals so that they might avoid excessive delays in the future. The Commissioner recognizes that the ending of an appeal is a serious remedy, but expects that the remedy will be used judiciously.

Comment. One commenter stated that "Panel interpretations" should be printed in one source and made available.

Response. No change has been made. As provided in § 100d.46 of the regulations, Board decisions are available to the public on request and with payment of reproduction costs.

Section 100d.71 Written submissions normally required.

Comment. One commenter said that the audited agency should have the opportunity to request an oral argument or evidentiary hearing. A second commenter said that an oral argument or evidentiary hearing should be scheduled upon a showing of good cause by the recipient. A third commenter said that the regulations should provide standards to be used by Panels to determine the need for oral argument or full hearings.

Response. A change has been made. The regulations have been amended to provide that parties may request oral arguments or evidentiary hearings. The Commissioner believes that determinations as to the need for oral arguments or evidentiary hearings are properly left to the discretion of the Panels hearing the cases.

Section 100d.72 Notice of an oral argument or evidentiary hearing.

Comment. Two commenters argued that notice of oral arguments and evidentiary hearings should be published in the Federal Register.

Response. A change has been made. The Commissioner does not believe that it is either necessary in every case or required by law that the Board publish a notice of each hearing in the Federal Register. However, the regulations have

been amended to provide that a party or Panel member may request that a notice of a hearing be published in the Federal Register. The Commissioner expects that notices will be published if reasonable requests are made.

Section 100d.73 Conduct of a hearing.

Comment. One commenter thought that a three-member Panel should conduct a hearing. A second commenter asked why a quorum requirement was not imposed for proceedings other than oral arguments and evidentiary hearings.

Response. A change has been made. Under the statute, at least three Board members are assigned to each Panel. The regulations have been amended to make it clear that all the members of a Panel shall participate in the Panel's decision, and that hearings are generally conducted by all Panel members. This provision allows hearings to proceed as scheduled should a Panel member be unable to attend a hearing, but ensures that decisions are made by all the Panel members.

Section 100d.81 The Panel's decision.

Comment. One commenter suggested that the regulations specify that a majority of the Board be present to approve a finding or decision of a Panel and that a majority approve the findings or decisions.

Response. No change has been made. It was the practice of the Title I Audit Hearing Board to consider the decisions of its Panels to be the decisions of the Board. Since many of the cases are very complex, it would be time-consuming and expensive, as well as administratively difficult, to convene the entire Board or even a majority of Board members to review the decisions of its Panels. The Commissioner therefore believes that it is wise, as well as practical, to continue to allow Panels to make decisions for the Board for submission to the Commissioner.

Section 100d.82 Opportunity to comment on the Panel's decision.

Comment. Two commenters said that post-hearing comments are counterproductive and that the parties should have some assurance the Commissioner will review the comments.

Response. No change has been made. The Commissioner believes that comments will aid the Commissioner in reviewing Board decisions. Parties are not required to submit comments under the regulations, but may take advantage of the opportunity to submit comments for the Commissioner's consideration.

Section 100d.83 The Commissioner's decision.

Comment. One commenter said that it was not clear that the person reviewing the Panel's decision must be the Commissioner.

Response. No change has been made. The word "Commissioner" rather than the phrase "authorized OE official" is used to indicate that the person who reviews the Panel's decision is the Commissioner.

Comment. Two commenters pointed out that there was no statutory basis for stating that the Commissioner would modify or set aside the Panel's decision if that decision were clearly erroneous.

Response. A change has been made. The regulations have been amended to state that the Commissioner may modify or set aside the Panel's decision "for good cause shown," the standard used in the statute.

Section 100d.84 Collection.

Comment. One commenter asked why § 100d.84 on collection was included since it did not pertain directly to Board proceedings. Two commenters pointed out that no statutory authority was cited for the section.

Response. A change has been made. Although the section does not pertain directly to Board proceedings, the Commissioner thought it would be helpful to recipients to indicate the effect of a final decision in audit appeals or withholding or termination proceedings. Citations have been added, which refer readers to Sections 452(e) and 453 of the General Education Provisions Act. Section 452(e) provides that if a Board decision upholds a final audit determination, the decision establishes the amount of the determination as a claim of the United States that the recipient is required to pay. Section 453 authorizes the Commissioner to withhold funds.

Comment. One commenter asked whether local educational agencies would be directly accountable to OE.

Response. Local educational agencies will be directly accountable to OE if they are recipients under OE grants or cooperative agreements. (See the comment and response concerning the definition of "recipient" under the preceding discussion for § 100d.3.)

Section 100d.85 The cease and desist report and order.

Comment. One commenter suggested that the provisions of Section 454(e) of the General Education Provisions Act regarding the enforcement of a cease and desist order be included in the regulations.

Response. A change has been made. Section 100d.86 on enforcement of a cease and desist order has been added to the regulations. The section provides that if after a reasonable period of time, the Commissioner determines that a recipient has not complied with a cease and desist order, the Commissioner may withhold funds or refer the matter to the Attorney General.

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