## **DEPARTMENT OF EDUCATION**

34 CFR Parts 75, 76, and 81 RIN 1880-AA56

## General Education Provisions Act— Enforcement: Equitable Offsets

**AGENCY:** Department of Education. **ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to amend Part 81 of Title 34 of the Code of Federal Regulations, containing regulations regarding enforcement under the General Education Provisions Act (GEPA). The amendment would include regulations clarifying the circumstances under which equitable offset is taken into account in determining harm to an identifiable Federal interest under section 453(a)(1) of the GEPA. The proposed regulations would enhance grantee flexibility and reduce burden by contributing to the early resolution of audit disputes and the avoidance of protracted litigation.

The proposed regulations in this notice do not apply to programs under the Higher Education Act of 1965 or the Impact Aid statutes (Pub. L. 81–874, Pub. L. 81–815, and Title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) as amended by Pub. L. 103–382).

**DATES:** Comments must be received on or before August 4, 1995.

ADDRESSEES: All comments concerning these proposed regulations should be addressed to Ted Sky, Senior Counsel, U.S. Department of Education, 600 Independence Avenue SW., Washington, DC 20202–2121.

FOR FURTHER INFORMATION CONTACT: Ted Sky. Telephone: (202) 401–6000. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

## SUPPLEMENTARY INFORMATION:

## I. Recognition of Offset Costs

Section 453(a)(1) of the GEPA, 20 U.S.C. 1234b(a)(1), provides that a recipient determined to have made an unallowable expenditure, or to have otherwise failed to discharge its responsibility to account properly for funds, shall be required to return funds in an amount that is proportionate to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which the recipient received the award.

The proposed regulations (in § 81.32 (c) and (d)) would state the

circumstances under which the Secretary or an authorized Department official, in determining the extent of harm to an identifiable Federal interest caused by a violation, may take into account costs that the recipient could have charged to the Federal grant or cooperative agreement in question but in fact did not. These costs are "offset costs." Issues pertaining to those so-called offset costs have arisen in connection with administrative litigation before the Office of Administrative Law Judges (OALJ).

The Secretary believes that regulatory guidance regarding these issues would be helpful to the field, would enhance grantee flexibility, would increase the possibilities for early resolution of disputes, and would reduce the need for protracted litigation arising from expenditure disallowance and other audit claims under Department programs, while maintaining proper accountability. The Secretary solicits additional public comments and suggestions as to how this balance may best be achieved.

Equitable offset is not a new concept initially proposed in these regulations. The concept has evolved over time, through case-by-case adjudication, both in decisions of the Secretary and the courts, arising from disputes under programs administered by the Secretary. The proposed regulations are consistent with this precedent.

If finally adopted, it is anticipated that the provisions of proposed §81.32 (c) and (d) would apply to existing cases before the OALJ, but without regard to §81.32(c)(5) (relating to early identification of offset costs).

The proposed regulations are based upon the conclusion that the recognition of offset costs, under appropriate circumstances and subject to appropriate limitations, is consistent with section 453(a)(1) of the GEPA. The proposed regulations would provide for the recognition of offset costs under the following circumstances:

- —The offset costs must meet all the requirements of the grant or cooperative agreement, including any applicable recordkeeping requirements;
- —The recipient must demonstrate that the offset costs could have been charged to the grant or cooperative agreement during the same Federal fiscal year as the original violation;
- —The charging of offset costs to the grant or cooperative agreement must not result in other violations of applicable requirements, such as maintenance of effort, matching or non-supplanting requirements;

- The practices and policies that resulted in the original violation must have been corrected and must not be likely to recur;
- —The original violation must not have been intentional or willful.

Under the proposed rule, the Secretary would have the burden of initially establishing a prima facie case that a violation was willful or intentional so as to preclude an offset. It is not anticipated that these cases will be frequent. However, on occasion, circumstances may suggest the existence of this situation. For example, where a recipient continues to incur costs or carry out program activities that the Department has advised the recipient are beyond the purview of the grant, the issue of whether a violation was willful or intentional might be presented.

Federal financial assistance under a program subject to a statutory nonsupplanting requirement must supplement and be additional to any State assistance for the project in question. A recipient of assistance under this type of program generally must use all Federal funds awarded for project purposes, irrespective of the use of State or local funds. To permit a recipient to offset disallowed costs under the federally funded project with State or local-funded costs would normally be contrary to the nonsupplanting requirement and would result in the diminution of the project to the detriment of the beneficiaries to be served and contrary to the purposes of the program.

In the case of a program with a nonsupplanting requirement, therefore, a recipient has a particularly heavy burden in showing that use of State or local funds as offset costs is consistent with the requirement. The Department has identified a limited number of situations in which this burden could be met

(1) State administrative expenses. Where a disallowance involves State administrative expenditures, and the recipient proposes to offset other State administrative expenditures that could have been charged to the grant but were not, the non-supplanting requirement should not present a bar to the offset. Presumably the State administrative expenditures would not have been made in the absence of the program.

<sup>&</sup>lt;sup>1</sup> One exception to this principle is the nonsupplanting requirement in section 614 of the Individuals with Disabilities Education Act which requires a local educational agency to supplement what it has expended on special education in the past. This approach is more similar to a maintenance of effort requirement than it is to the non-supplanting requirements in other statutes. (See 34 CFR 300.230.)