

(2) *Other cases where the offset expenditures would not have been incurred in the absence of the Federal program.* In exceptional circumstances a recipient may be able to establish that the State or local expenditures sought to be used as an offset would not have been incurred in the absence of the program and thus do not give rise to a question under the non-supplanting requirement. For example, the recipient might be able to show that a particular cost was so related to the Federal grant that it would not have been incurred in the absence of that grant.

(3) *Statutorily excluded funds.* Under the statute governing the program in question, there may be categories of expenditures that may be specifically excluded from the reach of the non-supplanting requirement. For example, under section 1120A(b)(1)(B) of the Title I (ESEA) statute, 20 U.S.C. 6322(b)(1)(B), certain State and local funds may be excluded for purposes of determining compliance with the Title I non-supplanting requirement. These funds would be available for offset purposes, despite the non-supplanting requirement, assuming that other requirements of the proposed rule would be met.

In proposing these rules, the Secretary does not intend to encourage recipients to incur unallowable costs or engage in activities that will give rise to accountability issues. On the contrary, the Secretary believes that the proposed regulations will enable the Department to more readily focus time on those areas where the most serious accountability problems occur.

## II. Early Identification of Issue

The proposed regulations provide that, if the recipient is apprised of the violation in a draft audit report or other written communication issued prior to the final audit report, the offset costs must be presented to the auditor within a 60-day period. This provision is designed to ensure that offset claims are raised sufficiently early in the audit process to permit the auditor to verify the claimed offset costs and make recommendations regarding those costs, within the overall context of the auditor's responsibility, prior to the issuance of the final audit report. Even if an oral rather than a written communication regarding the violation is made during the audit process, recipients are encouraged to present offset cost claims to the auditor so that these matters may be taken into account in the audit report in an orderly fashion.

If the recipient is first apprised of the violation in the final audit report, the offset costs must, under the proposed

regulations, be presented to the authorized Department official within a 60-day period after the issuance of the final audit report. If the recipient is first apprised of the violation after the issuance of the final audit report, then the 60-day period runs from this first written notice. In either event, offset cost "claims" must be presented in the form of facts verified by an independent auditor.

Early notice of these issues is intended to encourage and contribute to early resolution of disallowance cases (through alternative means of dispute resolution or otherwise) and reduction of litigation expense for recipients as well as for the Department.

The early notice provision in § 81.32(c)(5) is also designed to avoid introduction of offset cost issues late in the audit appeal process. The introduction of offset cost issues at the litigation stage in prior and currently pending cases before the OALJ has caused administrative problems, requiring more audit work long after the original audit is over, thus delaying resolution of these cases. However, as indicated above, these advance notice requirements would not apply to pending cases.

In addition to adding the proposed provisions to 34 CFR Part 81, a cross-reference is proposed to be added to Subpart G of 34 CFR Part 75 and Subpart H of 34 CFR Part 76.

### Executive Order 12866

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently as discussed in those sections of the preamble that relate to specific sections of the regulations. Burdens specifically associated with information collection requirements, if any, are identified and explained elsewhere in this preamble.

### Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. States and State agencies are not considered to be small entities under the Regulatory Flexibility Act. Small local educational agencies could be affected by these regulations. However, these proposed regulations are intended

to implement statutory provisions and are designed to provide greater flexibility and reduce litigation in the administration of the programs in question. They should not have a significant economic impact on any small entities affected.

### Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

### Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 5400, 600 Independence Avenue SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of the Executive Order and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

### List of Subjects

#### 34 CFR Part 75

Education Department, Grant programs—education, Grant administration, Incorporation by reference.

#### 34 CFR Part 76

Education Department, Grant programs—education, Grant administration, Intergovernmental relations, State-administered programs.

#### 34 CFR Part 81

Enforcement, General Education Provisions Act, Offset costs.

Dated: March 16, 1995.

**Richard W. Riley,**

*Secretary of Education.*

(Catalog of Federal Domestic Assistance Number does not apply)

The Secretary proposes to amend Parts 75, 76, and 81 of Title 34 of the Code of Federal Regulations as follows:

### PART 81—GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

1. The authority citation for Part 81 continues to read as follows: