



DiFarnis

Memorandum to Presidents

Date: November 26, 1990 Vol. 90 No. 14

From: Offices of University Counsel and Vice Chancellor
for Legal Affairs and Vice Chancellor for Student
Affairs and Special Programs

Subject: Final Regulations Under the Drug-Free
Schools and Communities Act of 1989

To: Presidents, State-operated Campuses
Presidents, Community Colleges

In accordance with regulations issued by the U.S. Department of Education under the Drug-Free Schools and Communities Act of 1989, all State University campuses have certified to the Secretary of Education that they have adopted and are implementing drug prevention programs meeting certain specified minimum requirements (34 CFR Part 86; see also unnumbered memorandum to Presidents dated August 2, 1990).

The final regulations also impose substantial ongoing review and record-keeping obligations. The purpose of this Memorandum is to summarize the requirements of the final regulations with regard to both the required drug prevention program and the ongoing obligations imposed on the campuses. A copy of the regulations is attached.

THE DRUG PREVENTION PROGRAM

As a condition of receiving federal financial assistance, each of the campuses has already certified to the Secretary that it has adopted and is implementing a drug prevention program meeting the minimum requirements specified in the regulations. The program must include, at a minimum, the annual distribution of the following information, in writing, to all employees and students who are taking at least one class for credit, except those enrolled in continuing education classes:

1. Standards of conduct prohibiting the unlawful possession, use or distribution of illicit drugs or alcohol by students and employees on campus property or as part of any of its activities (the "drug policy").
2. A description of the applicable legal sanctions under state or federal law for the unlawful possession or distribution of illicit drugs and alcohol.

3. A description of the health risks associated with the use of illicit drugs and the abuse of alcohol.
4. A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees and students.
5. A description of the disciplinary sanctions, up to and including expulsion or termination of employment, which the campus will impose for violations of its drug policy, and the circumstances under which it will refer a person in violation of this policy to a police agency for investigation and possible prosecution.

BIENNIAL REVIEW AND RECORD-KEEPING

In addition to having a drug prevention program in place, the regulations impose ongoing duties of review and record-keeping on institutions of higher education. As a result, each campus must:

1. conduct a biennial review of its program to ascertain its effectiveness and to ensure that disciplinary sanctions imposed for violations of the drug policy are enforced consistently (the format of this review is left to the discretion of the individual campus); and
2. retain records pertaining to its program for at least three years following the fiscal year in which they are produced. These records must be made available to the U.S. Department of Education upon request in the event that the campus is selected for review. Such records should include, at a minimum:
 - the text of the information distributed annually in compliance with the Drug-Free Schools and Communities Act;
 - a record of the scope and method of the annual dissemination of this information;
 - personnel disciplinary records pertaining to violations of the drug policy;
 - student disciplinary records pertaining to violation of the drug policy, consistent with the Family Educational Rights and Privacy Act; and

- a record of the results of the biennial review of the program.

THE 1989 ACT AND THE DRUG-FREE WORKPLACE ACT OF 1988

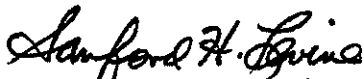
Questions have been raised about how obligations imposed on employers by the Drug-Free Workplace Act of 1988 are affected by the Drug-Free Schools and Communities Act of 1989. Compliance with the Drug-Free Schools and Communities Act does not supersede or replace compliance with the Drug-Free Workplace Act. The Drug-Free Workplace Act was the subject of two separate Memoranda to Presidents (Vol. 89, No. 6 and Vol. 89, No. 15, dated April 26 and July 27, 1989, respectively).

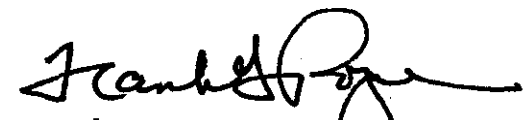
The provisions of the Drug-Free Workplace Act are narrower than those of the Drug-Free Schools and Communities Act since the former pertain only to employees involved in the performance of a federal grant or contract. Virtually the only students covered by the Drug-Free Workplace Act are Pell Grant recipients who, as individuals receiving federal grants, are required to certify that they will not engage in illegal drug-related activity during the period of their grant.

The Drug-Free Workplace Act also addresses only drug abuse in the workplace. It does not cover alcohol abuse as does the Drug-Free Schools and Communities Act.

Finally, under the Drug-Free Workplace Act, employers must require their employees to notify them of any criminal drug statute conviction occurring in the workplace. Employers must, in turn, report such convictions to the federal government. There is no similar reporting requirement under the Drug-Free Schools and Communities Act.

If you have any questions regarding either the Drug-Free Schools and Communities Act of 1989 or the Drug-Free Workplace Act of 1988, the Office of the University Counsel at (518) 443-5400 or the Office of Student Affairs at (518) 443-5139 may be contacted.


Sanford H. Levine


Frank G. Pogue, Jr.

cc: Chief Student Affairs Officers,
State-operated Campuses
Personnel Officers,
State-operated Campuses
Copies for information only to:
Deans, Statutory Colleges
President Call

Federal Register

**Thursday
August 16, 1990**

Part II

Department of Education

34 CFR Part 86

**Drug-Free Schools and Campuses; Final
Regulations**

DEPARTMENT OF EDUCATION

34 CFR Part 86

RIN 1880-AA46

Drug-Free Schools and Campuses

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Drug-Free Schools and Communities Act Amendments of 1989, Public Law 101-226, require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE), State educational agency (SEA), or local educational agency (LEA) must certify that it has adopted and implemented a program to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees. The purpose of these final regulations is to implement these statutory requirements. The regulations specify the content of the drug prevention program to be adopted and implemented; the nature of the certification requirements; the responses and sanctions to be applied for failure to comply with the requirements of this part; and the appeal process.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: For information about these regulations and the certification process for SEAs, contact: Drug-Free Schools and Campuses Task Force, U.S. Department of Education, 400 Maryland Avenue, SW., room 4128, Washington, DC 20202-0498, telephone number: (202) 401-0709, or William H. Wooten (202) 401-0709.

For information about these regulations for IHEs, contact: Office of Policy Development, Office of Postsecondary Education, U.S. Department of Education, 7th & D Streets, SW., room 4060, Washington, DC 20202-5121, telephone number: (202) 708-9071, or Jerry M. Whitlock (202) 708-9071. For information about the certification process for IHEs, contact: Division of Eligibility and Certification, Office of Postsecondary Education, U.S. Department of Education, 7th & D Streets, SW., room 3916, Washington, DC 20202-5323, telephone number: (202) 708-7471, or Mary L. Jenkins (202) 708-7471.

SUPPLEMENTARY INFORMATION:

Additional Sources of Information

- *The National Institute on Drug Abuse Hotline*, 1-800-862-HELP, an information and referral line that directs callers to treatment centers in the local community;

- *The National Institute on Drug Abuse Workplace Helpline*, 1-800-843-4971, a line that provides information only to private entities about workplace programs and drug testing (This helpline will not assist SEAs, LEAs, or public IHEs.);

- *The National Clearinghouse for Alcohol and Drug Information*, 1-301-468-2800, an information and referral service that distributes Department of Education publications about drug and alcohol prevention programs, as well as material from other Federal agencies;

- *The Network of Colleges and Universities Committed to the Elimination of Drug and Alcohol Abuse*, 1-202-357-6206, was established in 1987 as a joint effort of the U.S. Department of Education and the higher education community for the purpose of developing an institutional response to the alcohol and other drug problems on campuses. As a means of self regulation, some 1,300 schools have adopted a set of Standards that were developed by the Network and reviewed, modified, and affirmed by the U.S. Department of Education. The Standards are designed to serve as education programs, assessment techniques, and enforcement procedures aimed at eradicating alcohol and other drug abuse on campuses, and may serve as a useful starting point for developing alcohol and other drug prevention programs that comply with these regulations. A copy of the Standards can be received by writing to the Network at the U.S. Department of Education, 555 New Jersey Avenue, NW., Washington, DC 20208-5844. Information can also be provided about training and conferencing activities, newly formed regional networks, and the IHEs in a particular State or region that are network members. IHEs are encouraged to contact network members in their State or region:

- *Department of Education Regional Centers Drug-Free Schools and Communities*, assist IHEs, SEAs, and LEAs in developing prevention programs by providing training and technical assistance. Addresses for the five centers are listed below.

Northeast Regional Center for Drug-Free Schools and Communities, 12 Overton Avenue, Sayville, NY 11782-0403, (516) 589-7022, serving Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New

Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Vermont;
Southeast Regional Center for Drug-Free Schools and Communities, The Hurt Building, 50 Hurt Plaza, Suite 210, Atlanta, Georgia 30303, (404) 688-9227, serving Alabama, District of Columbia, Florida, Georgia, Kentucky, North Carolina, Puerto Rico, South Carolina, Tennessee, Virginia, Virgin Islands, and West Virginia;
Midwest Regional Center for Drug-Free Schools and Communities, 2001 N. Clybourn, Suite 302, Chicago, IL 60614, (312) 883-8888, serving Indiana, Illinois, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin;
Southwest Regional Center for Drug-Free Schools and Communities, 555 Constitution Avenue, Norman, OK 73037, (405) 325-1454, serving Arizona, Arkansas, Colorado, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Texas, and Utah; and
Western Regional Center for Drug-Free Schools and Communities, 101 SW. Main Street, Suite 500, Portland, OR 97204, (503) 275-8476 ((800) 547-6339 outside Oregon), serving Alaska, American Samoa, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, Republic of Palau, Washington, and Wyoming.

Background

President Bush's National Drug Control Strategy issued in September 1989 proposed that the Congress pass legislation to require schools, colleges, and universities to implement and enforce firm drug prevention programs and policies as a condition of eligibility to receive Federal financial assistance. On December 12, 1989, the President signed the Drug-Free Schools and Communities Act Amendments of 1989 (Amendments), Public Law 101-226. Section 22 of the Amendments amends provisions of the Drug-Free Schools and Communities Act of 1986 and the Higher Education Act of 1965 to include these requirements.

On April 24, 1990, the Secretary published a notice of proposed rulemaking (NPRM) for Drug-Free Schools and Campuses in the Federal Register (55 FR 17384).

In the preamble to the NPRM, the Secretary summarized the provisions of the proposed regulations. In addition, the Secretary provided "Appendix D—Questions and Answers" to address specific concerns about implementing a drug prevention program in compliance with the regulations, and to provide

LEAs in complying with the statute. By and large, the questions and answers contained in appendix D to the NPRM have been incorporated in the discussion of public comments contained in appendix C to this document.

As a result of public comment, the Secretary has clarified the meaning of "student" for the purposes of the drug prevention program certification for IHEs and added a requirement that an IHE, SEA, or LEA seeking reinstatement after termination for violating these regulations must demonstrate that it has corrected the violation or violations on which the termination was based. The Secretary has also provided, in appendices A and B to this document, a description of the sanctions under Federal law for the unlawful possession or distribution of illicit drugs and alcohol, and a description of the health risks associated with the use of illicit drugs and the abuse of alcohol.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 94 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as appendix C to this document.

Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Intergovernmental Review

Some of the programs affected by these regulations are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for these programs.

Assessment of Educational Impact

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rule and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 86

Drug abuse, Education, Elementary and secondary education, Grant programs—education, Postsecondary education, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Number does not apply.)

Dated: August 2, 1990.

Lauro F. Cavazos,

Secretary of Education.

The Secretary amends title 34 of the Code of Federal Regulations by adding a new part 86, to read as follows:

PART 86—DRUG-FREE SCHOOLS AND CAMPUSES

Subpart A—General

Sec.

- 86.1 What is the purpose of the Drug-Free Schools and Campuses Regulations?
- 86.2 What Federal programs are covered by this part?
- 86.3 What actions shall an IHE, SEA, or LEA take to comply with the requirements of this part?
- 86.4 What are the procedures for submitting a drug prevention program certification?
- 86.5 What are the consequences if an IHE, SEA, or LEA fails to submit a drug prevention program certification?
- 86.6 When must an IHE, SEA, or LEA submit a drug prevention program certification?
- 86.7 What definitions apply to this part?

Subpart B—Institutions of Higher Education

- 86.100 What must the IHE's drug prevention program include?
- 86.101 What review of IHE drug prevention programs does the Secretary conduct?
- 86.102 What is required of an IHE that the Secretary selects for annual review?
- 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

Subpart C—State and Local Educational Agencies

- 86.200 What must the SEA's and LEA's drug prevention program for students include?
- 86.201 What must the SEA's and LEA's drug prevention program for employees include?

- 86.202 What review of SEA and LEA drug prevention programs is required under this subpart?

- 86.203 What is required of an SEA or LEA that is selected for review?

- 86.204 What records and information must an SEA or LEA make available to the Secretary and the public concerning its drug prevention program?

Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE, SEA, or LEA

- 86.300 What constitutes a violation of this part by an IHE, SEA, or LEA?
- 86.301 What actions may the Secretary take if an IHE, SEA, or LEA violates this part?
- 86.302 What are the procedures used by the Secretary for providing information or technical assistance?
- 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?
- 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance?

Subpart E—Appeal Procedures

- 86.400 What is the scope of this subpart?
 - 86.401 What are the authority and responsibility of the ALJ?
 - 86.402 Who may be a party in a hearing under this subpart?
 - 86.403 May a party be represented by counsel?
 - 86.404 How may a party communicate with an ALJ?
 - 86.405 What are the requirements for filing written submissions?
 - 86.406 What must the ALJ do if the parties enter settlement negotiations?
 - 86.407 What are the procedures for scheduling a hearing?
 - 86.408 What are the procedures for conducting a pre-hearing conference?
 - 86.409 What are the procedures for conducting a hearing on the record?
 - 86.410 What are the procedures for issuance of a decision?
 - 86.411 What are the procedures for requesting reinstatement of eligibility?
- Authority: 20 U.S.C. 1145g, 3224a.

Subpart A—General

§ 86.1 What is the purpose of the Drug-Free Schools and Campuses Regulations?

The purpose of the Drug-Free Schools and Campuses Regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which adds section 1213 to the Higher Education Act and section 5145 to the Drug-Free Schools and Communities Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher

education (IHE), State educational agency (SEA), or local educational agency (LEA) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.2 What Federal programs are covered by this part?

The Federal programs covered by this part include—

(a) All programs administered by the Department of Education under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance; and

(b) All programs administered by any other Federal agency under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.3 What actions shall an IHE, SEA, or LEA take to comply with the requirements of this part?

(a) An IHE, SEA, or LEA shall adopt and implement a drug prevention program as described in § 86.100 for IHEs, and §§ 86.200 and 86.201 for SEAs and LEAs, to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.

(b) An IHE, SEA, or LEA shall provide a written certification that it has adopted and implemented the drug prevention program described in § 86.100 for IHEs, and §§ 86.200 and 86.201 for SEAs and LEAs.

(Approved by the Office of Management and Budget under control number 1880-0522)
(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.4 What are the procedures for submitting a drug prevention program certification?

(a) *IHE drug prevention program certification.* An IHE shall submit to the Secretary the drug prevention program certification required by § 86.3(b).

(b) *SEA drug prevention program certification.* An SEA shall submit to the Secretary the drug prevention program certification required by § 86.3(b).

(c) *LEA drug prevention program certification.*

(1) The SEA shall develop a drug prevention program certification form and a schedule for submission of the certification by each LEA within its jurisdiction.

(2) An LEA shall submit to the SEA the drug prevention program certification required by § 86.3(b).

(3)(i) The SEA shall provide to the Secretary a list of LEAs that have not

submitted drug prevention program certifications and certify that all other LEAs in the State have submitted drug prevention program certifications to the SEA.

(ii) The SEA shall submit updates to the Secretary so that the list of LEAs described in paragraph (c)(3)(i) of this section is accurate at all times.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.5 What are the consequences if an IHE, SEA, or LEA fails to submit a drug prevention program certification?

(a) An IHE, SEA, or LEA that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE, SEA, or LEA receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.6 When must an IHE, SEA, or LEA submit a drug prevention program certification?

(a) After October 1, 1990, except as provided in paragraph (b) of this section, an IHE, SEA, or LEA is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE, SEA, or LEA has submitted a drug prevention program certification.

(b)(1) The Secretary may allow an IHE, SEA, or LEA until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE, SEA, or LEA establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE, SEA, or LEA that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that—

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3)(i) An IHE or SEA shall submit a request for an extension to the Secretary.

(ii)(A) An LEA shall submit any request for an extension to the SEA.

(B) The SEA shall transmit any such request for an extension to the Secretary.

(C) The SEA may include with the LEA's request a recommendation as to whether the Secretary should approve it.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.7 What definitions apply to this part?

(a) *Definitions in the Drug-Free Schools and Communities Act.* The following terms used in this part are defined in the Act:

Drug abuse education and prevention
Illicit drug use

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR part 77:

Department
EDGAR
Local educational agency
Secretary
State educational agency.

(c) *Other definitions.* The following terms used in this part are defined as follows:

Compliance agreement means an agreement between the Secretary and an IHE, SEA, or LEA that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE, SEA, or LEA will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part.

Institution of higher education means—

(1) An institution of higher education, as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education, as defined in 34 CFR 600.5;

(3) A postsecondary vocational institution, as defined in 34 CFR 600.6; and

(4) A vocational school, as defined in 34 CFR 600.7.

(Authority: 20 U.S.C. 1145g, 3224a)

Subpart B—Institutions of Higher Education

§ 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

(a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of

the length of the student's program of study, of—

(1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;

(2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;

(3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;

(4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and

(5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary action may include the completion of an appropriate rehabilitation program.

(b) A biennial review by the IHE of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522) (Authority: 20 U.S.C. 1145g)

§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?

The Secretary annually reviews a representative sample of IHE drug prevention programs.

(Authority: 20 U.S.C. 1145g)

§ 86.102 What is required of an IHE that the Secretary selects for annual review?

If the Secretary selects an IHE for review under § 86.101, the IHE shall provide the Secretary access to personnel records, documents and any other necessary information requested by the Secretary to review the IHE's operation and implementation of its drug prevention program.

(Approved by the Office of Management and Budget under control number 1880-0522)

§ 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

(a) Each IHE that provides the drug prevention program certification required by § 86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by § 86.100(a) as well as the results of the biennial review required by § 86.100(b).

(b)(1) An IHE shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraph (a) of this section.

(ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1145g)

Subpart C—State and Local Educational Agencies

§ 86.200 What must the SEA's and LEA's drug prevention program for students include?

The SEA's and LEA's program for all students must, at a minimum, include the following:

(a) Age-appropriate, developmentally based drug and alcohol education and prevention programs (which address the legal, social, and health consequences of drug and alcohol use and which provide information about effective techniques for resisting peer pressure to use illicit drugs or alcohol) for all students in all grades of the schools operated or served by the SEA or LEA, from early childhood level through grade 12.

(b) A statement to students that the use of illicit drugs and the unlawful possession and use of alcohol is wrong and harmful.

(c) Standards of conduct that are applicable to students in all the SEA's and LEA's schools and that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students on school premises or as part of any of its activities.

(d) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law), up to and including

will be imposed on students who violate the standards of conduct required by paragraph (c) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(e) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to students.

(f) A requirement that all parents and students be given a copy of the standards of conduct required by paragraph (c) of this section and the statement of disciplinary sanctions described in paragraph (d) of this section.

(g) Notification to parents and students that compliance with the standards of conduct required by paragraph (c) of this section is mandatory.

(h) A biennial review by the SEA or LEA of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (d) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 1232a)

§ 86.201 What must the SEA's and LEA's drug prevention program for employees include?

The SEA's and LEA's program for all employees must, at a minimum, include the following:

(a) Standards of conduct applicable to employees that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol on school premises or as part of any of its activities.

(b) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law) up to and including termination of employment and referral for prosecution, will be imposed on employees who violate the standards of conduct required by paragraph (a) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(c) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to employees.

(d) A requirement that employees be given a copy of the standards of conduct required by paragraph (a) of this section

sanctions described in paragraph (b) of this section.

(e) Notification to employees that compliance with the standards of conduct required by paragraph (a) of this section is mandatory.

(f) A biennial review by the SEA and LEA of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (b) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

§ 86.202 What review of SEA and LEA drug prevention programs is required under this subpart?

(a)(1) An SEA shall annually review a representative sample of LEA programs.

(2) If an SEA finds, as a result of its annual review, that an LEA has failed to implement its program or consistently enforce its disciplinary sanctions, the SEA shall submit that information, along with the findings of its review, to the Secretary within thirty (30) days after completion of the review.

(b) The Secretary may annually select a representative sample of SEA programs for review.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

§ 86.203 What is required of an SEA or LEA that is selected for review?

(a) If the Secretary selects an SEA for review under § 86.202(b), the SEA shall provide the Secretary access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(b) If the SEA selects an LEA for review under § 86.202(a), the LEA shall provide the SEA access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(Authority: 20 U.S.C. 3224a)

§ 86.204 What records and information must an SEA or LEA make available to the Secretary and the public concerning its drug prevention program?

(a)(1) Each SEA that provides the drug prevention program certification shall, upon request, make available to the Secretary and the public full information about the elements of its drug prevention program, including the results of its biennial review required by §§ 86.200(h) and 86.201(f).

(2) The SEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the SEA's compliance with the certification.

(b)(1) Each LEA that provides the drug prevention program certification shall, upon request, make available to the Secretary, the SEA, and the public full information about the elements of its program, including the results of its biennial review required by §§ 86.200(h) and 86.201(f).

(2) The LEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the LEA's compliance with the certification.

(c)(1) Each SEA or LEA shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraphs (a) and (b) of this section.

(ii) Any other records related to the SEA's or LEA's compliance with the certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the SEA or LEA shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880-0522)

(Authority: 20 U.S.C. 3224a)

Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE, SEA, or LEA

§ 86.300 What constitutes a violation of this part by an IHE, SEA, or LEA?

An IHE, SEA, or LEA violates this part by—

(a) Receiving any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification in accordance with § 86.3(b); or

(b) Violating its certification. Violation of a certification includes failure of an IHE, SEA, or LEA to—

(1) Adopt or implement its drug prevention program; or

(2) Consistently enforce its disciplinary sanctions for violations by students and employees of the standards of conduct adopted by an IHE under § 86.100(a)(1) or by an SEA or LEA under §§ 86.200(c) and 86.201(a).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.301 What actions may the Secretary take if an IHE, SEA, or LEA violates this part?

(a) If an IHE, SEA, or LEA violates its certification, the Secretary may issue a response to the IHE, SEA, or LEA. A response may include, but is not limited to—

(1) Provision of information and technical assistance; and

(2) Formulation of a compliance agreement designed to bring the IHE, SEA, or LEA into full compliance with this part as soon as feasible.

(b) If an IHE, SEA, or LEA receives any form of Federal financial assistance without having submitted a certification or violates its certification, the Secretary may impose one or more sanctions on the IHE, SEA, or LEA, including—

(1) Repayment of any or all forms of Federal financial assistance received by the IHE, SEA, or LEA when it was in violation of this part; and

(2) The termination of any or all forms of Federal financial assistance that—

(i)(A) Except as specified in paragraph (b)(2)(ii) of this section, ends an IHE's, SEA's, or LEA's eligibility to receive any or all forms of Federal financial assistance. The Secretary specifies which forms of Federal financial assistance would be affected; and

(B) Prohibits an IHE, SEA, or LEA from making any new obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.302 What are the procedures used by the Secretary for providing information or technical assistance?

(a) The Secretary provides information or technical assistance to an IHE, SEA, or LEA in writing, through site visits, or by other means.

(b) The IHE, SEA, or LEA shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE, SEA, or LEA in writing of—

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance; and

(2) The response the Secretary intends to issue.

(b) An IHE, SEA, or LEA may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph (a)(2) of this section within 30 days after the date the IHE, SEA, or LEA receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE, SEA, or LEA, the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE, SEA, or LEA shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE, SEA, or LEA does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE, SEA, or LEA in accordance with the procedures in § 86.304.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance?

(a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance by sending the IHE, SEA, or LEA a notice by certified mail with return receipt requested. This notice—

(1) Informs the IHE, SEA, or LEA of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(2) Specifies, as appropriate—

(i) The amount of Federal financial assistance that must be repaid and the date by which the IHE, SEA, or LEA must repay the funds; and

(ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and

(3) Informs the IHE, SEA, or LEA that the repayment of Federal financial assistance will not be required or that the termination will not be effective on

the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE, SEA, or LEA receives the notice of intent described in this paragraph—

(i) Written material indicating why the repayment of Federal financial assistance or termination should not take place; or

(ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's, SEA's, or LEA's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE, SEA, or LEA contends need not be repaid.

(b) If the IHE, SEA, or LEA does not request a hearing but submits written material—

(1) The IHE, SEA, or LEA receives no additional opportunity to request or receive a hearing; and

(2) The designated Department official, after considering the written material, notifies the IHE, SEA, or LEA in writing whether—

(i) Any or all of the Federal financial assistance must be repaid; or

(ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g, 3224a)

Subpart E—Appeal Procedures

§ 86.400 What is the scope of this subpart?

(a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE, SEA, or LEA to receive some or all forms of Federal financial assistance for violations of this part.

(b) An Administrative Law Judge (ALJ) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.401 What are the authority and responsibility of the ALJ?

(a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to—

(1) Scheduling of conferences;

(2) Setting time limits for hearings and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether—

(1) The IHE, SEA, or LEA received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE, SEA, or LEA violated its certification.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.402 Who may be a party in a hearing under this subpart?

(a) Only the designated Department official and the IHE, SEA, or LEA that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.403 May a party be represented by counsel?

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.404 How may a party communicate with an ALJ?

(a) A party may not communicate with an ALJ on any fact at issue in the case or on any matter relevant to the merits of the case unless the other party is given notice and an opportunity to participate.

(b)(1) To obtain an order or ruling from an ALJ, a party shall make a motion to the ALJ.

(2) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with § 86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in § 86.405(d).

§ 86.405 What are the requirements for filing written submissions?

(a) Any written submission under this subpart must be filed by hand-delivery or by mail through the U.S. Postal Service.

(b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail.

(c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d)(1) The filing date for a written submission is either—

- (i) The date of hand-delivery; or
- (ii) The date of mailing.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.406 What must the ALJ do if the parties enter settlement negotiations?

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.

(b) The following are not admissible in any proceeding under this part:

- (1) Evidence of conduct during settlement negotiations.
- (2) Statements made during settlement negotiations.
- (3) Terms of settlement offers.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.407 What are the procedures for scheduling a hearing?

(a) If the IHE, SEA, or LEA requests a hearing by the time specified in § 86.304(a)(3), the designated Department official sets the date and the place.

(b)(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.

(2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.

(c) No termination takes effect until after a hearing is held and a decision is issued by the Department.

(d) With the approval of the ALJ and the consent of the designated Department official and the IHE, SEA, or LEA, any time schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.408 What are the procedures for conducting a pre-hearing conference?

(a)(1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by—

- (i) The designated Department official; or
- (ii) The IHE, SEA, or LEA.

(2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.

(b) A pre-hearing conference may consist of—

- (1) A conference telephone call;
- (2) An informal meeting; or
- (3) The submission and exchange of written material.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.409 What are the procedures for conducting a hearing on the record?

(a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.

(b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

- (1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or
- (2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE, SEA, or LEA. Procedures to expedite may include, but are not limited to, the following:

- (1) A restriction on the number or length of submissions.
- (2) The conduct of the hearing by telephone conference call.
- (3) A review limited to the written record.
- (4) A certification by the parties to facts and legal authorities not in dispute.
- (d)(1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.

(2) The designated Department official has the burden of persuasion in any proceeding under this subpart.

(3)(i) The parties may agree to exchange relevant documents and information.

(ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any other exchange between the parties of documents or information.

(4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to—

(1) The designated Department official; and

(2) The IHE, SEA, or LEA on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.410 What are the procedures for issuance of a decision?

(a)(1) The ALJ issues a written decision to the IHE, SEA, or LEA, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after—

- (i) The last brief is filed;
- (ii) The last day of the hearing if one is held; or
- (iii) The date on which the ALJ terminates the hearing in accordance with § 86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

(c)(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE, SEA, or LEA does not take effect pending the Secretary's review.

(e)(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 88.411 What are the procedures for requesting reinstatement of eligibility?

(a)(1) An IHE, SEA, or LEA whose eligibility to receive any or all forms of Federal financial assistance has been terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE, SEA, or LEA must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment

obligation imposed upon it under § 88.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE, SEA, or LEA shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

Appendix A

Note: This appendix will not be codified in the Code of Federal Regulations.

This appendix contains a description of Federal trafficking (i.e., distribution) penalties for substances covered by the Controlled Substances Act (21 U.S.C. 811), and is taken from a Department of Justice publication entitled *Drugs of Abuse* (1989 Edition). Persons interested in acquiring the entire publication or in obtaining subsequent editions in the future should contact the Superintendent of Documents, Washington, DC 20402. This appendix also contains a

description prepared by the Department of Justice of Federal penalties and sanctions for illegal possession of a controlled substance. Legal sanctions for the unlawful possession or distribution of alcohol are found primarily in State statutes.

The Department of Education is providing this information as an example of the minimum level of information that IHEs may provide to their students and employees in order to comply with the requirements in § 88.100(a)(2) of these regulations relating to the distribution to students and employees of a description of the applicable legal sanctions under Federal law for the unlawful possession or distribution of illicit drugs and alcohol. The Secretary considers this description as meeting the requirements of the regulations, but IHEs are not precluded from distributing additional or more detailed information in future years. IHEs should distribute the most current editions of these documents that are available.

BILLING CODE 4000-01-0

Federal Trafficking Penalties

APPENDIX A.

CSA	PENALTY		Quantity	DRUG	Quantity	PENALTY																						
	2nd Offense	1st Offense				1st Offense	2nd Offense																					
I and II	Not less than 10 years. Not more than life. If death or serious injury, not less than life.	Not less than 5 years. Not more than 40 years. If death or serious injury, not less than 20 years. Not more than life.	10-99 gm or 100-999 gm mixture	METHAMPHETAMINE	100 gms or more or 1 kg or more mixture	Not less than 10 years. Not more than life. If death or serious injury, not less than 20 years. Not more than life.	Not less than 20 years. Not more than life. If death or serious injury, not less than life.																					
			100-999 gm mixture	HEROIN	1 kg or more mixture																							
			500-4,999 gm mixture	COCAINE	5 kg or more mixture																							
			5-49 gm mixture	COCAINE BASE	50 gm or more mixture																							
	Fine of not more than \$4 million individual, \$10 million other than individual.	Fine of not more than \$2 million individual, \$5 million other than individual.	10-99 gm or 100-999 gm mixture	PCP	100 gms or more or 1 kg or more mixture	Fine of not more than \$4 million individual, \$10 million other than individual.	Fine of not more than \$2 million individual, \$20 million other than individual.																					
			1-10 gm mixture	LSD	10 gm or more mixture																							
			40-399 gm mixture	FENTANYL	400 gms or more mixture																							
			10-99 gm mixture	FENTANYL ANALOGUE	100 gms or more mixture																							
	<table><tr><th>Drug</th><th>Quantity</th><th>First Offense</th><th>Second Offense</th></tr><tr><td>Others¹</td><td>Any</td><td>Not more than 20 years. If death or serious injury, not less than 20 years, not more than life. Fine \$1 million individual, \$5 million not individual.</td><td>Not more than 30 years. If death or serious injury, life. Fine \$2 million individual, \$10 million not individual.</td></tr><tr><td>III</td><td>All</td><td>Any</td><td>Not more than 5 years. Fine not more than \$250,000 individual, \$1 million not individual.</td></tr><tr><td>IV</td><td>All</td><td>Any</td><td>Not more than 3 years. Fine not more than \$250,000 individual, \$1 million not individual.</td></tr><tr><td>V</td><td>All</td><td>Any</td><td>Not more than 1 year. Fine not more than \$100,000 individual, \$250,000 not individual.</td></tr></table>								Drug	Quantity	First Offense	Second Offense	Others ¹	Any	Not more than 20 years. If death or serious injury, not less than 20 years, not more than life. Fine \$1 million individual, \$5 million not individual.	Not more than 30 years. If death or serious injury, life. Fine \$2 million individual, \$10 million not individual.	III	All	Any	Not more than 5 years. Fine not more than \$250,000 individual, \$1 million not individual.	IV	All	Any	Not more than 3 years. Fine not more than \$250,000 individual, \$1 million not individual.	V	All	Any	Not more than 1 year. Fine not more than \$100,000 individual, \$250,000 not individual.
	Drug	Quantity	First Offense	Second Offense																								
	Others ¹	Any	Not more than 20 years. If death or serious injury, not less than 20 years, not more than life. Fine \$1 million individual, \$5 million not individual.	Not more than 30 years. If death or serious injury, life. Fine \$2 million individual, \$10 million not individual.																								
	III	All	Any	Not more than 5 years. Fine not more than \$250,000 individual, \$1 million not individual.																								
	IV	All	Any	Not more than 3 years. Fine not more than \$250,000 individual, \$1 million not individual.																								
	V	All	Any	Not more than 1 year. Fine not more than \$100,000 individual, \$250,000 not individual.																								

Law as originally enacted states 100 gm. Congress requested to make technical correction to 1 kg.

¹Does not include marijuana, hashish, or hash oil. (See separate chart.)

Federal Trafficking Penalties - Marijuana

As of November 18, 1988

Quantity	Description	First Offense	Second Offense
1,000 kg or more; or 1,000 or more plants	Marijuana Mixture containing detectable quantity*	Not less than 10 years, not more than life. If death or serious injury, not less than 20 years, not more than life. Fine not more than \$4 million individual, \$10 million other than individual.	Not less than 20 years, not more than life. If death or serious injury, not less than life. Fine not more than \$8 million individual, \$20 million other than individual.
100 kg to 1,000 kg; or 100-999 plants	Marijuana Mixture containing detectable quantity*	Not less than 5 years, not more than 40 years. If death or serious injury, not less than 20 years, not more than life. Fine not more than \$2 million individual, \$5 million other than individual.	Not less than 10 years, not more than life. If death or serious injury, not less than life. Fine not more than \$4 million individual, \$10 million other than individual.
50 to 100 kg	Marijuana	Not more than 20 years. If death or serious injury, not less than 20 years, not more than life. Fine \$1 million individual, \$5 million other than individual.	Not more than 30 years. If death or serious injury, life. Fine \$2 million individual, \$10 million other than individual.
10 to 100 kg	Hashish		
1 to 100 kg	Hashish Oil		
50-99 plants	Marijuana		
Less than 50 kg	Marijuana	Not more than 5 years. Fine not more than \$250,000, \$1 million other than individual.	Not more than 10 years. Fine \$500,000 individual, \$2 million other than individual.
Less than 10 kg	Hashish		
Less than 1 kg	Hashish Oil		

*Includes Hashish and Hashish Oil

(Marijuana is a Schedule I Controlled Substance)

**Federal Penalties and Sanctions for
Illegal Possession of a Controlled
Substance****21 U.S.C. 844(a)**

1st conviction: Up to 1 year imprisonment and fined at least \$1,000 but not more than \$100,000, or both.

After 1 prior drug conviction: At least 15 days in prison, not to exceed 2 years and fined at least \$2,500 but not more than \$250,000, or both.

After 2 or more prior drug convictions: At least 90 days in prison, not to exceed 3 years and fined at least \$5,000 but not more than \$250,000, or both.

Special sentencing provisions for possession of crack cocaine: Mandatory at least 5 years in prison, not to exceed 20 years and fined up to \$250,000, or both, if:

(a) 1st conviction and the amount of crack possessed exceeds 5 grams.

(b) 2nd crack conviction and the amount of crack possessed exceeds 3 grams.

(c) 3rd or subsequent crack conviction and the amount of crack possessed exceeds 1 gram.

21 U.S.C. 853(a)(2) and 881(a)(7)

Forfeiture of personal and real property used to possess or to facilitate possession of a controlled substance if that offense is punishable by more than 1 year imprisonment. (See special sentencing provisions re: crack)

21 U.S.C. 881(a)(4)

Forfeiture of vehicles, boats, aircraft or any other conveyance used to transport or conceal a controlled substance.

21 U.S.C. 844a

Civil fine of up to \$10,000 (pending adoption of final regulations).

21 U.S.C. 853a

Denial of Federal benefits, such as student loans, grants, contracts, and professional and commercial licenses, up to 1 year for first offense, up to 5 years for second and subsequent offenses.

18 U.S.C. 922(g)

Ineligible to receive or purchase a firearm.

Miscellaneous

Revocation of certain Federal licenses and benefits, e.g. pilot licenses, public housing tenancy, etc., are vested within the authorities of individual Federal agencies.

Note: These are only Federal penalties and sanctions. Additional State penalties and sanctions may apply.

Appendix B

Note: This appendix will not be codified in the Code of Federal Regulations.

This appendix contains a description of health risks associated with

substances covered by the Controlled Substances Act (21 U.S.C. 811), and is taken from a Department of Justice publication entitled *Drugs of Abuse* (1989 Edition). The appendix also includes a summary of health risks associated with alcohol, as described in *What Works: Schools Without Drugs* (1989 Edition), a Department of Education publication.

Persons interested in acquiring the publications or in obtaining subsequent editions in the future should contact the Superintendent of Documents, Washington, DC 20402, for *Drugs of Abuse*; and *Schools Without Drugs*, Pueblo, CO 81009, for *What Works: Schools Without Drugs*.

The Department of Education is providing this information as an example of the minimum level of information that IHEs may provide to their students and employees in order to comply with the requirement in § 88.100(a)(3) of these regulations relating to the distribution of the health risks associated with the use of illicit drugs and the abuse of alcohol. The Secretary considers this information as meeting the requirements of the regulations, but IHEs are not precluded from distributing additional or more detailed information. If an IHE distributes this information in future years, it should use the most current editions of *Drugs of Abuse* and *Schools Without Drugs* that are available.

SELLING CODE 4028-01-05

Controlled Substances - Uses & Effects

DRUGS CSA SCHEDULES	TRADE OR OTHER NAMES	MEDICAL USES	DEPENDENCE Physical Psychological	TOLERANCE	DURATION (Hours)	USUAL ADMINISTRATION	POSSIBLE EFFECTS
NARCOTICS							
Opium	II III V Dover's Powder, Paregon	Analgesic, antidiarrheal	High High	Yes	3-6	Oral	Euphoria, drowsiness, respiratory depression, constipated pupils, nausea
Morphine	II III Morphine, MS Contin	Analgesic, antitussive	High High	Yes	3-6	Oral, smoked	
Codeine	II III V Tylenol w/Codeine, Elavon w/Codeine, Robaxan & C, Fentanyl w/Codeine	Analgesic, antitussive	Moderate Moderate	Yes	3-6	Inhaled	
Heroin	I Diacetylmorphine, torso, Synga	None	High High	Yes	3-6	Inhaled, smoked	
Hydromorphone	II Delaud	Analgesic	High High	Yes	3-6	Inhaled	
Meprobidine (Pethidine)	II Demipal	Analgesic	High High	Yes	3-6	Inhaled	
Methadone	II Doloprene, Methadone	Analgesic	High High-Low	Yes	12-24	Inhaled	
Other Narcotics	II III IV V Morphine, Percodan, Percoral, Tylenol, Tussionex, Fentanyl, Duran, Lendal, Talwin	Analgesic, antidiarrheal, antitussive	High-Low High-Low	Yes	Variable	Inhaled, smoked	
DEPRESSANTS							
Chloral Hydrate	IV Noche	Hypnotic	Moderate Moderate	Yes	5-8	Oral	Slurred speech, disorientation, drunken behavior without odor of alcohol
Barbiturates	II III IV Amytal, Soluval, Fenit, Talbutal, Nembutal, Secobarbital, Phenobarbital	Anesthetic, anticonvulsant, sedative, hypnotic, veterinary euthanasia agent	High-Mod. High-Mod.	Yes	1-16	Oral	
Benzodiazepines	IV Alivan, Dalmane, Dalorpan, Lorazepam, Klonopin, Valium	Anxiolytic, anticonvulsant, sedative, hypnotic	Low Low	Yes	4-8	Oral	
Methaqualone	I Quaalude	Sedative, hypnotic	High High	Yes	4-8	Oral	
Gluethimide	III Doriden	Sedative, hypnotic	High Moderate	Yes	4-8	Oral	
Other Depressants	III IV Equanil, Miltown, Miltex, Miltex, Valium	Anxiolytic, sedative, hypnotic	Moderate Moderate	Yes	4-8	Oral	
STIMULANTS							
Cocaine	II Coke, Flak, Snow, Crack	Local anesthetic	Possible High	Yes	1-2	Inhaled, smoked	Increased alertness, excitation, euphoric increased pulse rate & blood pressure, insomnia, loss of appetite
Amphetamines	II Biphentamine, Dextroamphetamine, Deserone, Proton	Adrenergic, central stimulant	Possible High	Yes	2-4	Inhaled	
Phenmetrazine	II Prelude	Weight control	Possible High	Yes	2-4	Inhaled	
Methylphenidate	II Ritalin	Adrenergic, central stimulant, narcotic	Possible Moderate	Yes	2-4	Inhaled	
Other Stimulants	III IV Adipex, Orlan, Dextro, Miltex, Miltex, Sibutramine, Tenuate, Tenuate, Proton	Weight control	Possible High	Yes	2-4	Inhaled	
HALLUCINOGENS							
LSD	I Acid, Microdot	None	None Unknown	Yes	8-12	Oral	Hallucinations and disturbances, poor perception of time and distance
Mescaline and Peyote	I Mescaline, Peyote	None	None Unknown	Yes	8-12	Oral	
Amphetamine Variants	I 3,4-DMA, 3,4-DMA, 3,4-DMA, 3,4-DMA, 3,4-DMA, 3,4-DMA	None	Unknown Unknown	Yes	Variable	Inhaled	
Phencyclidine	II PCP, Angel Dust	None	Unknown High	Yes	Days	Inhaled	
Phencyclidine Analogues	I PCP, PCP, PCP	None	Unknown High	Yes	Days	Inhaled	
Other Hallucinogens	I Buckhorn, Ecstasy, DMF, DET, Psilocybin, Psilocybe	None	None Unknown	Possible	Variable	Inhaled, smoked	
CANNABIS							
Marijuana	I Pot, Cannabis, Hash, Hash, Sinsemilla, Thai Buds	None	Unknown Moderate	Yes	2-4	Inhaled	Euphoria, relaxation, inhibition increased appetite, disoriented behavior
Tetrahydrocannabinol	II THC, Mandol	Cancer chemotherapy antitumor	Unknown Moderate	Yes	2-4	Inhaled	
Hashish	I Hash	None	Unknown Moderate	Yes	2-4	Inhaled	
Hashish Oil	I Hash Oil	None	Unknown Moderate	Yes	2-4	Inhaled	

Presynthesized a narcotic under the CSA Not presynthesized a narcotic under the CSA

Prescribed a narcotic under the CSA. Not prescribed a narcotic under the CSA.

APPENDIX B.

Alcohol**Effects**

Alcohol consumption causes a number of marked changes in behavior. Even low doses significantly impair the judgment and coordination required to drive a car safely, increasing the likelihood that the driver will be involved in an accident. Low to moderate doses of alcohol also increase the incidence of a variety of aggressive acts, including spouse and child abuse. Moderate to high doses of alcohol cause marked impairments in higher mental functions, severely altering a person's ability to learn and remember information. Very high doses cause respiratory depression and death. If combined with other depressants of the central nervous system, much lower doses of alcohol will produce the effects just described.

Repeated use of alcohol can lead to dependence. Sudden cessation of alcohol intake is likely to produce withdrawal symptoms, including severe anxiety, tremors, hallucinations, and convulsions. Alcohol withdrawal can be life-threatening. Long-term consumption of large quantities of alcohol, particularly when combined with poor nutrition, can also lead to permanent damage to vital organs such as the brain and the liver.

Mothers who drink alcohol during pregnancy may give birth to infants with fetal alcohol syndrome. These infants have irreversible physical abnormalities and mental retardation. In addition, research indicates that children of alcoholic parents are at greater risk than other youngsters of becoming alcoholics.

Appendix C—Analysis of Comments and Responses

Note: This appendix will not be codified in the Code of Federal Regulations.

In response to the Secretary's invitation in the NPRM, 94 parties submitted comments on the proposed regulations. An analysis of the comments follows:

Subpart A—General**§ 86.1 What is the purpose of the Drug-Free Schools and Campuses Regulations?****Entities Affected by These Regulations**

Comments: A commenter asked how community-based organizations are affected by the Drug-Free Schools and Campuses regulations.

Discussion: The Act requires only IHEs, SEAs, and LEAs to submit the certification; thus, community-based organizations are not required to submit the certification. If a community-based

organization provides Federal funds to IHEs, SEAs, or LEAs, the organization should determine whether or not the IHE, SEA, or LEA has submitted a drug prevention program certification before providing Federal funds. See the discussion in this appendix under § 86.3 explaining how the Department will identify those IHEs, SEAs, and LEAs that have not submitted certifications.

Changes: None.

Applicability of These Requirements to Private Elementary and Secondary Schools

Comments: Several commenters asked whether nonpublic schools are required to submit a drug prevention program certification. Commenters questioned the applicability of the Drug-Free Schools and Campuses regulations to nonpublic schools; one commenter had difficulty reconciling the absence of a requirement for nonpublic schools to submit a drug prevention program certification with the requirement found in some Federal programs that an SEA or LEA must provide for the equitable participation of pupils from nonpublic schools. One commenter suggested that the regulations include a requirement for the equitable participation of nonpublic school pupils in the SEA's or LEA's drug prevention program.

Discussion: The statute identifies IHEs, SEAs, and LEAs as the entities that must submit certification of a drug prevention program in order to remain eligible to receive funds or any other form of financial assistance under any Federal program. Definitions of these entities can be found in § 86.7 of the regulations. Certification requirements apply only to IHEs, SEAs, and LEAs.

SEAs and LEAs may allow nonpublic school pupils to participate in the SEA's or LEA's age-appropriate, developmentally based drug and alcohol education and prevention programs required under § 86.200(a) of the regulations. To the extent those programs are funded under a Federal program that requires the equitable participation of nonpublic school pupils, such as part B of the Drug-Free Schools and Communities Act of 1986, SEAs and LEAs must provide for the equitable participation of nonpublic school pupils in projects and activities supported by that Federal program. Furthermore, to the extent that an SEA or LEA conducts a Federally funded drug prevention program or any other Federal program that requires the equitable participation of pupils from nonpublic schools (e.g., chapter 1 of title I of the Elementary and Secondary Education Act), participating pupils from nonpublic schools will be subject to the standards of conduct

disciplinary sanctions, and other elements of the SEA's or LEA's drug prevention program (§ 86.200 (b) through (h)) during periods of time when the pupils are under the direct supervision and control of the SEA or LEA. Disciplinary sanctions imposed upon nonpublic school pupils by SEAs and LEAs must be limited to the pupil's participation in the SEA or LEA program.

Changes: None.

Federal Control Over Curriculum

Comment: Commenters expressed concern that in implementing Public Law 101-228 the Department not have any direct involvement in curriculum decisions at the local school level.

Discussion: Public Law 101-228 specifically provides that its statutory requirements apply notwithstanding the requirements in section 432 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232a) and section 103(b) of the Department of Education Organization Act (20 U.S.C. 3403(b)), which prohibit the Secretary from exercising "any direction, supervision, or control" over curriculum decisions at the local school level in connection with the administration of Federal education programs. Section 86.200(a) requires LEAs to adopt and implement a drug prevention program but does not prescribe a particular drug prevention curriculum. Instead, local school districts are afforded broad discretion in designing a drug prevention program that responds to local needs as determined by local education officials.

Changes: None.

§ 86.4 What are the procedures for submitting a drug prevention program certification?**Transmission of Certification Form**

Comment: A commenter asked if the Department will permit electronic transmissions of drug prevention program certifications.

Discussion: The Department does not currently have the resources to permit electronic transmission of drug prevention program certifications. The Department will mail the certification form to IHEs and SEAs in August, 1990; IHEs and SEAs should submit that form by mail or courier service by the suggested date of September 4, 1990 in order to ensure that there will be no interruption in the flow of Federal financial assistance. In order to process the more than 9,000 certifications that the Department expects to receive from IHEs, the IHE certification will be bar coded so that it is machine readable.

The Secretary will consider the possibility of electronic transmission of certifications in the future as technological developments permit.

Changes: None.

One-Time Submission of Certifications

Comment: A commenter suggested that the regulations state explicitly that an IHE, SEA, or LEA is required to submit a drug prevention program certification only once.

Discussion: Generally, each IHE, SEA, or LEA is required to submit a drug prevention program certification only once. The drug prevention program certification forms for IHEs and SEAs do not limit the certification to a particular school year or other period of time. There are circumstances, however, under which a new certification may be required, such as change of ownership of an IHE or division or consolidation of an LEA. The Secretary believes that it is preferable to address the issue of new certifications in guidance to the affected entities rather than in the regulations.

Changes: None.

Relationship of Certification to Funding Under the Drug-Free Schools and Communities Act

Comment: One commenter understood the regulations to require resubmission of a drug prevention program certification if an LEA does not apply for funding under the Drug-Free Schools and Communities Act and suggested that it would be unfair to tie the receipt of Federal monies to the completion of an application for funds under Part B of the Drug-Free Schools and Communities Act.

Discussion: Under these regulations, receipt of any Federal funds is tied to the submission of a drug prevention program certification, not to an application for funds under the Drug-Free Schools and Communities Act. An LEA is not required under these regulations to fund its drug prevention program from Federal sources such as Part B of the Drug-Free Schools and Communities Act. Consequently, an LEA is not required to resubmit a drug prevention program certification if the LEA chooses not to apply for funding under the Drug-Free Schools and Communities Act.

Changes: None.

Informing Other Federal Agencies of Which IHEs, SEAs, and LEAs Have Submitted Certifications

Comment: A commenter inquired whether the certification requirement applied to receipt of funds from Federal agencies other than the Department of Education and, if so, whether the

Department would "administer" the certifications for other Federal agencies. Several commenters wanted to know how the Department will inform other Federal agencies of the names of the IHEs, SEAs, or LEAs that have submitted a drug prevention program certification or been granted an extension of time to submit the certification.

Discussion: The certification requirement is a statutory requirement applying to receipt of all Federal financial assistance, not just Federal financial assistance administered by the Department. Consistent with Public Law 101-226, the Department will send out the certification form to all IHEs and SEAs eligible to participate in its programs.

Rather than listing those IHEs, SEAs, and LEAs that have submitted drug prevention program certifications or been granted extensions of time to submit those certifications, the Department will submit a list of those entities that have not submitted a certification or received an extension to the General Services Administration for inclusion in its "List of Parties Excluded from Federal Procurement or Nonprocurement Programs." Unless an IHE, SEA, or LEA appears on this list, Federal agencies and other interested parties can consider the IHE, SEA, or LEA eligible, for the purposes of the Drug-Free Schools and Campuses regulations, to receive Federal financial assistance.

Changes: None.

Relationship to Drug-Free Workplace and Other Certifications

Comments: A commenter suggested that the Department consider developing a single database of required certifications, and sending all certification forms to each IHE, SEA, or LEA at one time, rather than requiring separate submissions. Another commenter wanted amendments to § 86.1 to create a consolidation of these regulations and the Drug-Free Workplace Act certification. Several commenters sought clarification on whether compliance with these regulations would supersede or replace Drug-Free Workplace Act requirements.

Discussion: The Department has been attempting, where possible, to consolidate certifications. For example, the Drug-Free Workplace certification for use beginning in fiscal year 1991 is now combined on one form with the Lobbying and the Debarment and Suspension certifications.

Because of the differences between the requirements of Public Law 101-226 and its regulations and the requirements

of the Drug-Free Workplace Act and its regulations, it is not practicable to combine these two certifications. Moreover, compliance with the Drug-Free Schools and Campuses regulations does not supersede or replace compliance with the Drug-Free Workplace Act.

The certification requirement in these Drug-Free School and Campuses regulations applies only to IHEs, SEAs, and LEAs. The certification requirement in the Drug-Free Workplace Act applies not only to IHEs, SEAs, and LEAs but also to all recipients of Federal grants, including individuals.

The Drug-Free Workplace Act prohibits any Federal department or agency from making a grant to an institutional grantee unless the grantee submits a certification that it will provide a drug-free workplace. The Drug-Free Workplace Act also prohibits any Federal department or agency from making a grant to an individual in the absence of a required certification. Final regulations for the Drug-Free Workplace Act were issued by Federal agencies on May 25, 1990 (55 FR 21681).

Under the Drug-Free Workplace Act, the certification submitted by a grantee (other than an individual) relates to conduct in the grantee's workplace and thus pertains only to its employees. Virtually the only students to which the Drug-Free Workplace Act certification requirement applies are Pell grant recipients who, as individuals receiving a Federal grant, are required to certify that they will not engage in any illicit drug-related activity during the period of their Pell grant. These Drug-Free Schools and Campuses regulations, on the other hand, apply to students as well as employees insofar as an IHE, SEA, and LEA is required to develop and implement a drug prevention program for both students and employees. However, under these Drug-Free Schools and Campuses regulations, individual students are not required to submit a certification; the certification requirement applies only to IHEs, SEAs, and LEAs.

Employee use of alcohol is not addressed in the Drug-Free Workplace Act. The certification under these Drug-Free Schools and Campuses regulations relates to the illicit use of alcohol as well as drugs.

Under the Drug-Free Workplace Act, the certification must be submitted only by an entity or individual that receives a grant or contract directly from the Federal government; the certification is not required of subgrantees or contractors under a grant. Under these Drug-Free Schools and Campuses

regulations the certification requirements apply whether the agency or institution is applying directly to the Federal government, or is applying for a subgrant or contract from a grantee that has received a Federal grant, such as an LEA applying to an SEA for Federal funds.

The Drug-Free Workplace Act requires an IHE, SEA, or LEA to establish an on-going drug-free awareness program with certain specified components, notify employees of certain conditions of employment, including notification of the employer in writing by an employee convicted of a drug-related offense, and take certain specified actions if an employee is convicted of a drug-related offense. In contrast, these Drug-Free Schools and Campuses regulations require annual distribution to students and employees of certain information, and the formulation of standards of conduct, without specifying that certain actions must be taken if an employee or student is convicted of a drug- and alcohol-related offense.

Because of these separate requirements in each statute, compliance with one cannot be equated with compliance with the other. Moreover, the Drug-Free Workplace certification must be submitted with each application for a grant or contract; the Drug-Free Schools and Campuses certification is generally a one-time certification. Thus, it is not possible to consolidate the Drug-Free Workplace and the Drug-Free Schools and Campuses certifications.

Changes: None.

Responsibility To Notify LEAs of Requirements

Comment: One commenter suggested that the regulations should include a requirement that LEAs be notified of their responsibilities under the statute and regulations.

Discussion: The Secretary agrees that LEAs should be notified of their responsibilities under the statute and regulations. Since the statute makes SEAs responsible for administering LEA certification, the Secretary believes that SEAs should, as a matter of course, notify LEAs of their responsibilities under the statute and regulations.

Changes: None.

Requirement for SEA To Develop Forms and Procedures for LEA Certifications

Comments: One commenter suggested that the requirement for SEAs to develop forms and procedures for LEA certification should be dropped and that SEAs should not be required to identify LEAs that have not submitted

certification forms. The commenter believed that these requirements result in an unnecessarily early submission of certification by LEAs and, further, that the SEA reporting process does not provide for possible reporting errors such as listing of an LEA as not having submitted a certification when in fact the LEA had done so, or failure of an SEA to submit its own certification after having received proper certifications from LEAs. The commenter would rely upon State review to discover whether LEAs have a program that fulfills the statutory requirements.

Discussion: In order to remain eligible to receive funds or any other form of financial assistance under any Federal program, an LEA must submit a certification to the SEA that it has adopted and implemented a drug prevention program. The Secretary needs to know which LEAs have not certified in order to ensure that they do not receive Federal financial assistance from any source after October 1, 1990. The Secretary believes that the most efficient means to accomplish this is to require SEAs to identify LEAs that have not submitted certification forms. Under this procedure, an earlier submission date for LEAs is unavoidable.

Waiting for an SEA review to discover which LEAs have not submitted a drug prevention program certification increases the likelihood that Federal financial assistance will be provided to ineligible LEAs and could result in the imposition of disciplinary sanctions on LEAs, up to and including the return of all Federal funds received during the period in which the LEA was not eligible to receive Federal financial assistance.

Prior to declaring an SEA or LEA ineligible to receive funds or any other form of financial assistance under any Federal program, the Secretary intends to verify whether that SEA or LEA has submitted a certification. The SEA reporting process is designed to assist the Secretary in identifying SEAs and LEAs that have not submitted the certification.

Changes: None.

§ 88.3 What are the consequences if an IHE, SEA, or LEA fails to submit a drug prevention program certification?

Receipt of Federal Funds

Comment: A commenter sought clarification on the effect of an IHE's, SEA's, or LEA's failure to submit a drug prevention program certification, and asked whether ineligibility to "receive" Federal funds means the same thing as inability to obligate funds.

Discussion: The effect of an IHE's, SEA's, or LEA's loss of eligibility to receive Federal funds, including the ability to obligate funds, is governed by the applicable program statute and regulations. For example, the effect of an IHE's ineligibility to receive funds under the Federal student financial assistance programs authorized by title IV of the Higher Education Act of 1965, as amended, is governed by the Student Assistance General Provisions regulations in 34 CFR 688.94.

Changes: None.

Definition of Federal Financial Assistance

Comment: A commenter requested a description of the forms of Federal financial assistance for which an IHE, SEA, or LEA that fails to submit a drug prevention program might become ineligible. Another commenter suggested that the Department should clarify that an IHE's drug prevention program is an institution-wide responsibility because these rules affect all possible Federal funds received by an IHE, not just Federal student financial assistance programs, and all students and employees. The commenter was concerned that IHEs might delegate compliance with these regulations to their financial aid offices.

Discussion: A definition of Federal financial assistance is unnecessary because Public Law 101-228 applies to all forms of Federal financial assistance. Some examples are grants, contracts, participation in federally financed or guaranteed loan programs, and participation in school breakfast or lunch programs. The Secretary agrees with the second commenter that in view of the broad applicability of these requirements, implementation of the drug prevention program must be institution-wide. However, the Secretary believes that each IHE should determine which offices within the IHE should have responsibility for implementation.

Changes: None.

§ 88.6 When must an IHE, SEA, or LEA submit a drug prevention program certification?

Timing of Submission of Drug Prevention Program Certification

Comments: Numerous commenters expressed concerns about the October 1, 1990, effective date of these requirements and the Department's suggested September 4, 1990, deadline for submission of the drug prevention program certification. Commenters felt that the effective date should be delayed or extensions granted freely upon self-

certification by the agency or institution that it had satisfied the statutory requirements for an extension of time. Among the reasons given by the commenters for the need for delay for IHEs were the need for issuance of the final regulations and certification forms, negotiation requirements under the National Labor Relations Act (NLRA), the expense of printing materials in addition to those that have already been prepared for fall semester orientation of students, the need to develop the written materials, such as the descriptions of health risks and legal sanctions, and the need to involve students and employees in amending the campus judicial code and employee handbooks. For LEAs, commenters cited the lack of administrators working over the summer in rural school districts, the need for time to create a high-quality program, and the need for time to develop policies and obtain school board approval.

Related to these concerns, commenters also asked for clarification about the degree to which an IHE, SEA, or LEA must have implemented its drug prevention program before the certification is signed and submitted. Commenters asked for interpretations of the certification to the effect that an IHE by October 1, 1990, must have developed required materials but need not have actually distributed them, have in place a schedule for review of its disciplinary policies but need not have actually completed the process of amending its standards of conduct, begun negotiation with labor unions but need not have completed its negotiations, or simply have in effect an implementation plan.

Discussion: As was explained in question four of appendix D to the NPRM, the Secretary believes that Congress intended the required drug prevention programs and policies to be in effect for school year 1990-91 to the extent feasible. Moreover, this is a realistic expectation: Public Law 101-228, the provisions of which are generally clear and understandable, was enacted December 12, 1988, and proposed rules were published on April 24, 1990. In addition, certain elements of these programs—such as the distribution of required documents—are discrete tasks that, in most instances, can be accomplished before, or at the same time, the certification is submitted. For these reasons, any request for extension of time to submit a drug prevention program certification must include a written justification as required in § 88.8(b)(2) of this part, in order to provide a basis for evaluation by the Secretary.

Because of the wide variety of institutions involved, and the unique circumstances that affect many of these institutions, it is not possible to identify with precision which steps an institution must have taken to implement its programs and policies prior to the date of the certification or October 1, 1990. However, general guidance is possible: The Secretary believes that institutions must have adopted the programs and policies required by the regulations and have taken significant steps to implement those programs and policies before their certification is submitted. Further, the Secretary believes that the certification must represent a good faith commitment on the part of the certifying institution to complete implementation of its programs and policies as quickly as feasible during school year 1990-91, consistent with the purposes of Public Law 101-228. If, in order to implement its drug prevention program for employees, an IHE, SEA, or LEA is required by the NLRA or State law to negotiate changes to a labor agreement, the IHE, SEA, or LEA may submit the certification if it has developed the components of its drug prevention program affecting employees, including the standards of conduct and disciplinary sanctions, and if it has actually begun the negotiation process and has a plan for prompt completion of that process.

Changes: None.

Review of LEA Extension Requests

Comment: One commenter understood the regulations to require SEAs to review LEAs' requests for extension of time to submit a drug prevention program certification. The commenter also questioned what would happen to LEAs whose extension requests were still being processed as of October 1, 1990, and whether there would be any appeal rights if a request for extension of time is denied.

Discussion: Section 88.8 does not require SEAs to review LEA requests for extension of time to submit a drug prevention program certification. The SEA may, however, forward to the Secretary with an LEA's request for an extension a recommendation as to whether the Secretary should approve the LEA's request.

The Secretary announced in 55 FR 17402 (April 24, 1990) that extension requests received by the Secretary after August 1, 1990, would not be considered. The Secretary anticipates that all requests received by August 1, 1990, will be processed prior to October 1, 1990. The regulations do not provide for an appeal if a request for extension of time is denied.

Changes: None.

Subpart B—Institutions of Higher Education

§ 88.100 What must the IHE's drug prevention program include?

Selective Applicability/Implementation

Comment: A commenter expressed the view that the regulations should require that each IHE assess the level of the drug and alcohol problem on its campus, and that an IHE be required to implement a drug prevention program only where rates of illicit drug and alcohol use exceed a particular level. Other commenters also suggested that each IHE perform an institutional self-evaluation and then determine whether it is appropriate to provide students with the information required by this section or to take other measures.

Discussion: Though the regulations do not require institutional self-evaluation, the Secretary agrees that those evaluations can be a useful first step in addressing illicit drug use and alcohol abuse and encourages IHEs to undertake those evaluations. However, Public Law 101-228 requires that each IHE, in order to receive Federal financial assistance implement all aspects of the drug prevention program described in this section, and the Secretary has no authority to waive compliance with this requirement.

Changes: None.

Applicability of Certification Requirement to Proprietary Schools Under New Ownership

Comment: Several commenters asked for clarification on whether a new owner of a proprietary school will be required to submit a certification.

Discussion: The Secretary intends to treat this certification requirement similarly to other certification requirements applicable to IHEs. An IHE with a new owner would be required to submit a drug prevention program certification only if, under 34 CFR 600.31, there has been a change of ownership resulting in a change of control, and the Secretary determines that the IHE under new ownership does not meet the requirements to be considered the same IHE as under previous ownership.

Changes: None.

Applicability of Certification Requirement to State Agencies That Receive and Allocate Federal Funds to IHEs

Comment: A commenter asked whether a State agency such as a State Board of Vocational, Technical, and

Adult Education that receives and allocates Federal funds to IHEs, is required to submit the certification.

Discussion: Only IHEs, SEAs, or LEAs as defined in § 88.7 are required to submit a drug prevention program certification. Unless the State agency itself meets one of those definitions, it is not required to submit a certification.

Changes: None.

Additional Material Recommended for Certification

Comment: A commenter thought that each IHE should be required, as part of its drug prevention program, to describe its drug prevention program design and plan for implementation, identify the individuals who will plan and implement the program, list their qualifications, specify the percentage of time they will spend on implementing the drug prevention program and identify the administrative structure under which they will function. Another commenter recommended adding a requirement that each IHE identify and provide an employee assistance program and student assistance program.

Discussion: In implementing their drug prevention programs, IHEs may choose to adopt the commenters' suggestions; however, under these regulations they are not required to do so. The Secretary believes that beyond meeting the statutory requirements for its drug prevention program, each IHE should have the discretion to determine what, if any, additional aspects of a program it should implement. The statute and regulations impose minimum requirements for drug prevention programs, and the Secretary encourages IHEs to implement appropriate additional aspects of their drug prevention programs.

Changes: None.

Burden of Distributing Materials to All Students and Employees

Comments: Numerous IHEs protested that annual distribution in writing of the materials required by this subparagraph to each student and employee will be expensive and burdensome, and that individual written notices are not the most effective means of communication. Some commenters pointed out that the phrase "in writing" does not appear in the Act and wanted to satisfy the requirements of the Act by holding assemblies or simply posting notices of the availability of the materials. Other commenters wanted clarification on whether including the materials in campus publications or handing out materials to those who care to take them

requirement. An IHE asked about its liability if it mailed the materials, and they were returned as undeliverable because of a bad address. Commenters also asked if, after the initial distribution of materials, IHEs could distribute the materials only to new students and employees. A commenter also wanted to select one date in the academic year and distribute materials only on that date; this commenter did not want to have to distribute materials to new students enrolling for subsequent academic terms in that year.

A number of commenters asked that the regulations define "student". These commenters did not want to have to distribute the drug prevention program materials to everyone who came into "instructional contact" with an IHE, for example, continuing education students, participants in alumni enrichment activities, and children participating in activities in the IHE's facilities.

Finally, an IHE asked if it could send only the standards of conduct to each student along with a notification that the information on legal sanctions and health risks was available on request. Another IHE suggested that rather than sending out long technical documents, concise summaries should be provided.

Discussion: Public Law 101-228 specifies that each IHE must distribute the required materials to each student and employee. While the phrase "in writing" does not appear in the statute, the Secretary believes that in order to ensure that each student has access to and can refer to the required materials, they must be in writing. If an IHE wished also to hold assemblies or post notices about its drug prevention program, it is free to do so, but it must also distribute the required materials in writing to each student and employee. Including the materials in campus publications such as student or employee handbooks is acceptable, as long as the publications are distributed to each student and employee.

An IHE should determine the most effective method for ensuring that the required materials are distributed to each student and employee. However, the method chosen should be one that will reach every student and employee, such as a method for distributing grade reports or pay checks. Merely making the materials available to those who wish to take them does not satisfy the requirements of Public Law 101-228 or the regulations, because it does not ensure distribution to each student and employee of the IHE. If an IHE uses mailing as its means of distribution and the mailing to a particular student is returned, the IHE should use the method

mailing to a particular student under those circumstances.

Public Law 101-228 requires annual distribution to all students and employees. Thus, an IHE must distribute the materials each year to each student and employee, not just to new students and employees. If new students enroll or new employees are hired after the initial distribution in the academic year, these students and employees must also receive the materials. However, the Secretary agrees that the term "student" should be clarified so that only students taking one or more classes for academic credit are considered "students" for purposes of these regulations.

Notification to students about the availability of materials is not sufficient; the actual materials must be distributed. However, the Secretary agrees that long technical documents may not be the most effective way of communicating with students and employees. A concise summary, with references to longer technical documents, may be appropriate. Guidance as to the level of detail expected for the various types of materials is discussed below.

Changes: Language clarifying that only students who are taking one or more classes for any type of academic credit except for continuing education units are covered by the certification has been added to § 88.100.

Treatment of Alcohol in an IHE's Standards of Conduct

Comment: An IHE thought that alcohol, which is a legal substance, should be treated differently from illicit drugs in its standards of conduct so that IHEs can teach their students the responsible drinking of alcoholic beverages.

Discussion: Public Law 101-228 and regulations require that an IHE's standards of conduct, at a minimum, prohibit "the unlawful possession, use or distribution of illicit drugs or alcohol (emphasis added). Thus, an IHE's standards of conduct must prohibit unlawful activities associated with alcohol, including prohibition against use by students who are under-age. The regulations do not, however, specify what standards of conduct an IHE must adopt toward lawful activities associated with alcohol; these standards are left to the discretion of the IHE.

Changes: None.

"Activities" To Be Covered by Standards of Conduct

Comment: An IHE suggested clarifying that the term "activities" applies to all on-campus and officially

including field trips, but not to student-sponsored social activities or to professional meetings attended by employees. A second IHE noted that the answer to question 8 in appendix D to the NPRM states that only off-campus activities that are part of IHE-sponsored activities are covered. This commenter asked how the standards of conduct required under these regulations affects Pell grant certifications under the Drug-Free Workplace Act, which apply to any activity during the period covered by the Pell grant.

Discussion: The standards of conduct must prohibit, at a minimum, the unlawful possession, use or distribution of illicit drugs and alcohol by students and employees on school premises or property, or as part of any of its activities. Thus, the term "activities" does apply to all on-campus and off-campus activities that are considered to be school activities, such as officially sanctioned field trips. The standards of conduct must also apply to student-sponsored social activities or professional meetings attended by employees, if these activities or meetings are considered IHE-sponsored activities.

Under the Drug-Free Workplace Act, a Pell grant recipient must certify that he or she will not engage in any activity involving illicit drugs during the period covered by the Pell grant; thus, the certification may apply to activities that are not sponsored by the IHE, such as off-campus nonacademic pursuits. The scope of the Pell grant certification is therefore broader than the required scope of the standards of conduct. An IHE is not required under these regulations to establish standards of conduct for activities unrelated to its students' attendance at an IHE, though there is nothing in the regulations prohibiting it from doing so.

Changes: None.

Description of Legal Sanctions Should Be Provided

Comments: A number of commenters asked for assistance with preparation of a description of applicable legal sanctions. Most wanted the Department to provide a description of the sanctions under Federal law. Many also wanted the Department to provide descriptions of State and local laws, as well. Commenters asked for clarification as to how detailed the description should be.

Discussion: A description of the sanctions under Federal law for the unlawful possession or distribution of illicit drugs and alcohol is contained in appendix A to this document. The Secretary considers this description as meeting the requirements of the

regulations, but IHEs are not precluded from distributing additional or more detailed information.

Obtaining descriptions of State and local sanctions is the responsibility of the IHE. The Secretary suggests that IHEs may want to coordinate with other IHEs in their locality and State to avoid duplication of effort in obtaining this information. The description of Federal sanctions included in appendix A can provide guidance as to the minimum level of detail for the description of sanctions under State and local laws.

Changes: None.

Description of Health Risks Should Be Provided

Comments: A number of commenters asked for assistance with preparation of a description of the health risks associated with the use of illicit drugs and the abuse of alcohol. Most commenters wanted the Department to provide a description of health risks. Commenters asked for clarification as to how detailed the description should be.

Discussion: A description of the health risks associated with the use of illicit drugs and the abuse of alcohol is contained in appendix B to this document. The Secretary considers this description as meeting the requirements of the regulations, but IHEs are not precluded from distributing additional or more detailed information.

Changes: None.

Clarification on Description of Health Risks

Comments: Several comments were submitted asking for clarification on various aspects of the description of health risks associated with the use of illicit drugs and the abuse of alcohol. An IHE wanted a definition of the abuse of alcohol. Another commenter asked if IHEs were required to list health risks of drugs commonly abused on their campuses or for entire classes of drugs. A third commenter inquired whether illicit drugs means only controlled substances or includes the abuse of drugs that are otherwise legal, noting that it would be difficult to describe risks attached to otherwise legal drugs.

Discussion: The definition of abuse of alcohol is within the discretion of the IHE. The description of health risks in appendix B provides guidance on the minimum level of detail required should an IHE wish to prepare its own description of health risks. IHEs are encouraged to provide at least a general discussion of the health risks associated with the abuse of otherwise legal drugs, but are not required to provide a detailed description of these risks.

Changes: None.

Clarification on Description of Available Counseling, Treatment, or Rehabilitation Programs

Comments: An IHE wanted the required description of any drug or alcohol counseling, treatment, or rehabilitation programs available to students and employees to be limited to on-campus programs, and merely provide directions on obtaining information about off-campus resources. Another IHE wanted to provide no description at all, and merely make this information available on an as-needed basis.

Discussion: An IHE must provide each student and employee with a description of any programs available on-campus. An IHE should provide a description of off-campus programs, but is required to do so only if no on-campus programs are available.

Changes: None.

Description of Disciplinary Sanctions

Comments: A commenter asked if an IHE could just list the sanctions that might be imposed for violations of the standards of conduct, or whether the statement must describe what sanctions will be applied for each type of offense. Another commenter recommended that the description consist of a summary in nontechnical language, rather than a specific description of the sanctions to be imposed.

Discussion: The Secretary believes that it is important that students and employees know what penalties may be imposed by an IHE for violation of the IHE's standards of conduct. The description should identify the sanctions or range of sanctions that will be imposed for a particular violation of the standards of conduct.

Changes: None.

Enforcement Role of IHEs

Comments: Several IHEs objected to the requirement that IHEs impose sanctions on students who violate rules prohibiting illicit drug and alcohol possession or distribution on the grounds that the regulation assigned a law enforcement or *in loco parentis* role to IHEs that they felt was inappropriate.

Discussion: The regulatory requirement that IHEs distribute a clear statement that they will impose disciplinary sanctions for violations of the IHE's standards of conduct, and consistently enforce those sanctions, are found in Public Law 101-225. The Secretary has no authority to change the requirement.

Changes: None.

Discretion of IHEs

Comment: Several IHEs felt that having to specify particular disciplinary sanctions for each offense restricts an IHE's discretion to consider the severity of each incident and the prior disciplinary history of the student or employee. Another commenter felt that threats of disciplinary and legal sanctions could interfere with the professional approach of IHE medical personnel in their counseling and medical practice.

Discussion: The regulations require a clear statement that the IHE will impose disciplinary sanctions for violations of its standards of conduct, and consistent enforcement of those sanctions, but they do not prevent an IHE from considering the circumstances surrounding an offense. Nor do the regulations require medical or counseling personnel employed by an IHE to refer a student or employee for disciplinary action or prosecution. The Secretary also notes that completion of a rehabilitation program may be one of the disciplinary sanctions imposed by an IHE.

Changes: None.

Referral for Prosecution

Comment: Several IHEs asked if all violations of their standards of conduct must be referred to law enforcement officials for prosecution. A commenter also asked if referral for prosecution conflicts with the Family Education Rights and Privacy Act (FERPA), sometimes referred to as the Buckley Amendment.

Discussion: Under these regulations, it is up to the discretion of the IHE to decide which violations of its standards of conduct to refer for prosecution.

FERPA requires educational agencies and institutions that receive Federal funds under applicable programs to engage in certain record-keeping practices intended to give students access to their records and to prohibit release of these records in certain circumstances without the permission of the student. See 20 U.S.C. 1232c.

Under an exception to FERPA, the records of a law enforcement unit established by an IHE to enforce campus security are not considered "education records" as defined by FERPA if the law enforcement unit does not have access to the education records of the IHE, and the IHE does not have access to the law enforcement unit's records. (20 U.S.C. 1232c(a)(4)(B)(iii)). Under these conditions, the law enforcement unit may refer violations for prosecution.

IHEs should be aware that FERPA applies only to records, not to individual

observations. Therefore, an IHE may adopt a policy requiring staff, faculty, and students to report violations to the police. However, any record of the IHE related to the reported violation could not be provided to the police or other law enforcement officials.

Changes: None.

"Consistent With Local, State and Federal Law"

Comment: Several commenters stated that the requirement that an IHE impose disciplinary sanctions on its students and employees "consistent with local, State and Federal law" was not clear. They sought clarification as to whether this phrase referred to criminal law relating to drug and alcohol abuse or to constitutional law protecting rights of defendants, which is problematic for private IHEs who do not regard themselves as state actors. Another commenter asked if this phrase also refers to laws relating to discrimination regarding handicaps, since alcoholism is treated as a handicap under some of these statutes.

Discussion: Public Law 101-223 requires IHEs to impose disciplinary sanctions, but only those disciplinary sanctions that are otherwise authorized by local, State or Federal laws. To the extent that an IHE is currently bound by antidiscrimination statutes, contract law, and constitutional protections, it will continue to be bound by those laws.

Changes: None.

Meaning of "Effectiveness"

Comment: Commenters sought clarification on what "effectiveness" means in the context of the biennial review to determine the effectiveness of an IHE's drug prevention program. Commenters also asked what documentation of evaluation of effectiveness would be acceptable. An IHE assumed that it would be up to each IHE to determine its own criteria for effectiveness. Another IHE thought a sophisticated sociological model was needed because multiple variables affecting drug and alcohol use would make it impossible to measure the effectiveness of an IHE's drug prevention program in isolation.

Discussion: Recognizing the variety of drug prevention programs that IHEs will develop to comply with these regulations, the Secretary does not specify particular criteria or measures to gauge program effectiveness beyond requiring that evaluations of program effectiveness do not rely solely on anecdotal observations. To the extent possible, the Secretary encourages, but does not require, IHEs to use objective measures that would allow an

institution to track the use levels of alcohol and other drugs by students and employees.

Because collection of data that bears directly on the issue of incidence and prevalence of drug use can be costly and difficult to collect, IHEs may want to consider the use of other measures that could include, but are not limited to:

- tracking the number of drug- and alcohol-related disciplinary sanctions imposed;
- tracking the number of drug- and alcohol-related referrals for counseling or treatment;
- tracking the number of drug- and alcohol-related incidents recorded in the logs of campus police or other law enforcement officials;
- tracking the number of drug- and alcohol-related incidents of vandalism;
- tracking the number of students or employees attending self-help or other counseling groups related to alcohol or drug abuse; and
- tracking student, faculty and employee attitudes and perceptions about the drug and alcohol problem on campus.

Changes: None.

Consistent Enforcement of Disciplinary Sanctions

Comment: A commenter felt that requiring consistent enforcement of disciplinary sanctions would prevent a student judicial system from deciding appropriate sanctions on the facts of each case. Another commenter felt that in requiring consistent enforcement, the regulations should take into account the different positions at an IHE of students, faculty, and staff, and the limited authority of the IHE over students and faculty.

Discussion: The Secretary does not believe that consistent enforcement precludes an IHE from considering the circumstances surrounding each case or imposing different sanctions on students, faculty and staff. An IHE must, however, treat similarly situated offenders in a similar manner.

Changes: None.

§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?

Representative Sample

Comment: A commenter asked how the Secretary will choose representative samples of IHE drug prevention programs for review and recommended that the sample be chosen geographically. Another commenter felt that the reviews should not be conducted as part of reviews of an IHE's

administration of the Federal student financial aid programs under title IV of the Higher Education Act, but instead by the Drug-Free Schools and Campuses Task Force.

Discussion: The Department is studying various means of choosing the representative sample of IHE drug prevention programs for review. Choosing a sample geographically or conducting reviews as part of title IV reviews are only several of the types of samples under discussion.

Changes: None.

Distribution of Drug Prevention Program Materials

Comment: An IHE recommended that the Department facilitate the exchange and distribution of campus-developed materials collected as part of the review process to provide assistance to all IHEs.

Discussion: The Secretary agrees that exchange of materials developed for IHE drug prevention programs is a good practice. The Network of Colleges and Universities Committed to the Elimination of Drug and Alcohol Abuse, established as a joint effort of the Department of Education and the higher education community for the purpose of developing an institutional response to the alcohol and other drug problems on campuses, has agreed to act as a facilitator for distribution of these materials.

Changes: None.

§ 88.102 What is required of an IHE that the Secretary selects for annual review?

The Department's Access to Information and Records

Comment: Several commenters were concerned that release of personnel, medical or counseling records to Department reviewers might violate Federal, State, or local laws concerning access to records. Commenters also noted that under campus disciplinary codes and faculty hearing mechanisms, many student and faculty records are considered confidential; these commenters felt that the Department should be prepared to issue subpoenas for these records in order to protect IHEs from third party liability.

Discussion: Authorized representatives of the Secretary may have access to education records of students as necessary to enforce the Federal legal requirements related to the receipt of funds under Federally-supported education programs without violating the privacy rights of students under the Family Educational Rights and Privacy Act (FERPA). See 20 U.S.C.

1232g (b)(1)(C) and (b)(3). However, unless collection of the information is specifically authorized by Federal law, the provision of FERPA that authorizes this disclosure requires that the personally identifiable information collected from those records must be protected so as not to disclose the identity of the students to anyone other than the officials involved in the monitoring, auditing, or enforcement action. Further, whenever the records are no longer required for the purposes for which they were collected, the records must be destroyed. Any monitoring or auditing by Federal or other education officials will be done in conformance with these requirements, which are more than adequate to protect the privacy of students.

Regarding access to records of IHE personnel, FERPA provides that authorized representatives of the Secretary and the Comptroller General of the United States shall have access to any records, including personnel records, of a recipient of Federal financial assistance that may be related to the compliance of the recipient with a requirement of any applicable program. Therefore, the Secretary may have access to any records, including personnel records, which relate to compliance with Public Law 101-228.

Changes: None.

§ 88.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

What Records Must Be Kept

Comments: Several IHEs sought clarification as to what records must be maintained to confirm annual distribution of materials to students and employee. In particular, an IHE wanted to know if it is necessary to maintain signed documentation of receipt of materials for each student.

Discussion: An IHE is not required to obtain from each student and employee a signed statement that the IHE has provided the student or employee with the materials required by these regulations. At a minimum, an IHE must maintain a copy of materials distributed, and any additional materials made available to students and employees, records indicating that these materials were distributed to each of the IHE's students and employees, and the results of the IHE's annual evaluation of its drug prevention program.

Changes: None.

Subpart C—State and Local Educational Agencies

§ 88.200 What must the SEA's and LEA's drug prevention program for students include?

Applicability of This Subpart to Certain IHEs

Comment: A State Board of Vocational, Technical and Adult Education that operates vocational, technical and adult education districts that have been certified as institutions of higher education under 34 CFR part 600 asked if these districts are required to meet the certification requirements for SEAs and LEAs as well.

Discussion: Only those entities that meet the definitions of "SEA" and "LEA" in § 88.7 are required to submit the certification required under this subpart.

Changes: None.

Additional Material Recommended for Certification

Comment: A commenter recommended adding the requirement that each SEA and LEA, as a part of its drug prevention program, identify and provide an employee and student assistance program.

Discussion: SEAs and LEAs may choose to implement the commenters' suggestions; however, under these regulations they are not required to do so. The Secretary believes that beyond meeting the statutory requirements for its drug prevention program, each SEA and LEA should have the discretion to determine what, if any, additional aspects of a program it should implement. The statute and regulations impose only minimum requirements for drug prevention programs, and the Secretary encourages SEAs and LEAs to implement additional aspects of drug prevention programs as appropriate.

Changes: None.

Early Childhood Level Programs

Comment: One commenter asked whether an LEA is required to design an early childhood level drug and alcohol education and prevention program if the LEA does not operate an early childhood level program and, further, whether an LEA is required to design a drug prevention program for pupils in Head Start.

Discussion: An LEA is not required to design an early childhood level drug and alcohol education and prevention program if the LEA does not operate an early childhood level program. If the LEA itself operates a Head Start program or other early childhood education program, however, the LEA

would need to have an early childhood level component in its drug prevention program.

Changes: None.

Frequency/Mean of Distribution of Materials to Parents and Students

Comment: Commenters wanted clarification on the frequency with which parents, students and employees must be given copies of required materials and notified that compliance with the standards of conduct is mandatory. In addition, commenters questioned what would constitute adequate notification. One commenter thought that existing channels such as parent handbooks and school newsletters should be used for notification; that separate notification should not be required; and that verbal notification should be allowed as an alternative to written notification for elementary and ungraded students.

Discussion: The Secretary believes that it would be most effective for SEAs and LEAs to distribute annually the materials required by §§ 86.200 and 86.201. In addition, compliance with the distribution requirements could be easily documented with an annual distribution. However, if an SEA or LEA intends to maintain detailed documentation to show how the SEA or LEA has satisfied the distribution requirements, a less frequent distribution of materials may be possible.

The regulations do not require a separate dissemination of information. Existing channels, such as parent handbooks, that are designed to reach every parent and student are acceptable means of dissemination. The Secretary believes that verbal notification is an appropriate means of notifying very young students or students who are unable to read. However, all other students and all parents should receive written materials.

Changes: None.

§ 86.202 *What review of SEA and LEA drug prevention programs is required under this subpart?*

Periodic Reviews by SEAs

Comment: One commenter, in response to the requirement in § 86.202(a)(1) that SEAs annually review a representative sample of LEA programs, suggested that SEAs be given discretion to decide whether the statutory requirement for periodic review means annual review.

Discussion: The review process is designed to provide information on whether LEAs have properly implemented drug prevention programs.

In order to make the review process effective, the Secretary has determined that the reviews must be conducted annually.

Changes: None.

Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE, SEA, or LEA

§ 86.200 *What constitutes a violation of this part by an IHE, SEA, or LEA?*

Basis for Sanctions

Comment: An IHE commented that failure to consistently enforce disciplinary sanctions for violations of an IHE's standards of conduct should be eliminated as a basis for sanctions; disciplinary sanctions should be based on the facts of each individual case and not reviewed by the Department.

Discussion: Consistent enforcement of disciplinary sanctions is a statutory requirement and thus failure to consistently enforce those sanctions cannot be eliminated as a possible violation. However, nothing in these regulations precludes an IHE, SEA or LEA from basing disciplinary sanctions on the circumstances of each individual case. See the discussion under § 86.100, "Consistent enforcement of disciplinary sanctions," in this Appendix.

Changes: None.

Suggested Limits on the Imposition of Particular Sanctions by the Secretary

Comments: A commenter believed these regulations should specify that repayment of Federal funds or termination will not be imposed during an initial period of noncompliance, unless the Department has previously attempted alternative means to resolve an IHE's noncompliance, an IHE is a repeat offender, or the Department determines that an IHE was acting in bad faith or attempting to deceive the Department. Several other commenters advocated that an IHE that submits a certification "in good faith" should be able to rely on the Department's acceptance of its certification and not be obligated to repay funds if the Department later determines that a drug prevention program is "technically deficient."

Discussion: Repayment of Federal funds or termination are only part of a range of responses and sanctions that the Secretary may impose if an IHE, SEA, or LEA violates this part. The type of response or sanction the Secretary will impose will depend on the severity of the violation. It is likely that the Secretary would give an IHE, SEA, or LEA an opportunity to correct less serious violations through the provision of technical assistance or by entering

into a compliance agreement. However, the Secretary has no authority to waive compliance with the certification requirements.

Changes: None.

§ 86.301 *What actions may the Secretary take if an IHE, SEA, or LEA violates this part?*

Coordination With Other Federal Agencies

Comment: Several commenters asked how the Department would inform other agencies when it imposed sanctions on an IHE, SEA, or LEA. One commenter felt that other agencies should have input into the Department's choice of sanctions, particularly if the sanctions of repayment of Federal funds or termination would affect participation in programs that benefit children, such as the School Lunch Program. Another commenter wanted to know, if the sanction of repayment of Federal funds is imposed, which Federal agency would receive the funds, and how the distribution of repaid funds would be coordinated.

Discussion: The Department will submit the names of those entities that have been terminated from receiving some or all forms of Federal financial assistance for violations of this part to the General Services Administration for inclusion in its "List of Parties Excluded from Federal Procurement or Nonprocurement Programs."

The Secretary agrees that other Federal agencies should be consulted as to the Department's choice of sanctions; the Department is in the process of determining how those consultation procedures would operate. The Department is also in the process of determining how the repayment procedures would operate, and will work through intra-governmental channels to coordinate repayment with other Federal agencies.

Changes: None.

Repayment of Funds

Comment: A commenter suggested that repayment of any or all forms of Federal financial assistance received by an IHE, SEA, or LEA when it was in violation of this part should not be included as a sanction because it is not specifically authorized by Public Law 101-228.

Discussion: Section 86.301 includes among the specified sanctions the "repayment of any or all forms of Federal financial assistance received by the IHE, SEA, or LEA when it was in violation of this part." Public Law 101-228 provides that an IHE or LEA shall

not be "eligible" to receive financial assistance under any Federal program unless it makes the required certification. The traditional remedy available to the government if an entity that is ineligible receives Federal funds is a demand for repayment of those funds. Indeed, a Federal agency is generally obliged to seek the repayment of funds committed to its administration in situations where an ineligible entity has received them. 51 Dec. Comp. Gen. 162 (1971).

The absence in Public Law 101-228 of language repeating this principle does not signify that Congress intended that it should not apply if an entity fails to file the requisite certification but nevertheless receives Federal funds. On the contrary, Public Law 101-228 authorizes the Secretary to impose a range of responses and sanctions, "including [provision of] information and technical assistance, the development of a compliance agreement, and the termination of any form of Federal financial assistance." While this list does not specifically authorize repayment of Federal financial assistance received by an IHE, SEA, or LEA when it was in violation of this part, the use of the word "including" indicates Congressional intent that the Secretary have the discretion to issue or impose additional responses and sanctions. Under these circumstances, the inclusion in the regulations of provisions for repayment of funds is both authorized and consistent with Public Law 101-228 and general principles of law.

Changes: None.

Debarment and Suspension

Comment: A commenter questioned why the proposed regulations do not include debarment or suspension as sanctions to be imposed by the Secretary under this subpart.

Discussion: The Secretary does not believe it is necessary to prescribe suspension and debarment as additional sanctions. The regulations already provide for termination, which has much the same effect as debarment, and was specifically included as a possible sanction in Public Law 101-228.

Changes: None.

Effect of Sanctions on Consortia

Comment: A commenter asked whether sanctions imposed on an IHE would affect an IHE's participation in a Federally funded consortium.

Discussion: An IHE may be sanctioned by termination of any or all forms of Federal financial assistance, which could include Federal funds received through participation in a

consortium. In those circumstances, an IHE may continue to participate in a Federally funded consortium only if the IHE does not receive Federal financial assistance through the consortium.

Changes: None.

§ 88.304 *What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance?*

Comment: A commenter interpreted the regulations as authorizing the Secretary to impose a sanction while an appeal to an Administrative Law Judge (ALJ) is pending, and suggested that the regulations provide a "show cause" procedure so that an IHE, SEA, or LEA can respond to the Department before a sanction is imposed.

Discussion: The regulations specifically provide, in §§ 88.304(a)(3) and 88.407(c), that repayment of Federal financial assistance will not be required or that termination will not be effective on the date specified by the Secretary if the IHE, SEA, or LEA submits a timely request for a hearing. Thus, sanctions will not be imposed while an appeal is pending. A "show cause" procedure is therefore unnecessary.

Changes: None.

Subpart E—Appeal Procedures

Applicability of GEPA/Secretarial Review of ALJ Decisions

Comment: Several commenters criticized the proposed regulations because, in their view, the regulations improperly limited the power of ALJs in appeal proceedings by not authorizing them to, among other things, order discovery or issue subpoenas, and by making the decision of an ALJ reviewable by the Secretary. In this regard, the commenters said that the proposed regulations were arguably inconsistent with part E of the General Education Provisions Act (GEPA), relating to the enforcement of grant terms and conditions, and that the provisions of the proposed regulations authorizing the Secretary to review ALJ decisions were arguably inconsistent with the "plain meaning" of Public Law 101-228.

Discussion: The appeal procedures in subpart E of the regulations are designed to produce a swift but fair resolution of disputes arising out of Departmental decisions to demand the repayment of Federal financial assistance or to terminate the eligibility of an IHE, SEA, or LEA. In no sense are these procedures intended to limit arbitrarily the powers of the ALJs; in

fact, the procedures are modeled on the fine, limitation, suspension, and termination proceedings for IHEs in subpart G of 34 CFR part 688, which are themselves conducted by ALJs, because of the greater similarity of such proceedings to those appeals expected to arise under the Drug-Free Schools and Campuses certification program. The provisions of part E of GEPA do not govern appeals unless the Secretary, acting under section 451(a) of GEPA, designates such proceedings accordingly, and there is nothing in the text or legislative history of Public Law 101-228 that indicates a Congressional intent, or even expectation, that this would be done. To the contrary, section 22 of Public Law 101-228 broadly commands the Secretary, "to publish regulations to implement and enforce," the certification requirements it contains. In addition, the fact that certain of the appeal provisions specified in section 22 (timing of hearings; availability of Secretarial review of ALJ decisions) differ on their face from their counterparts in part E suggests that wholesale incorporation of the latter provisions was not intended.

The regulations in subpart E of part 88 authorize, but do not require, the Secretary to review ALJ decisions. The preamble to the NPRM (55 FR 17386 (April 24, 1990)) explained that an interpretation of the statute that prohibited Secretarial review would ignore two fundamental rules of statutory construction, namely that statutes should, as far as possible, be read to harmonize with related statutes and to avoid constitutional difficulties. In fact, such an interpretation would produce a result that is not only unprecedented within the Department's experience and inconsistent with the organic statutes that govern the operations of the Department, but would also be subject to serious constitutional question under the Appointments Clause. Particularly in the absence of any clear evidence that Congress intended such an unlikely result, the Secretary believes that the purposeful interpretation offered in the NPRM is the better reading of the law.

Changes: A clarifying change has been made to § 88.410(b)(1) to conform more closely to the language of the statute.

§ 88.400 *What is the scope of this subpart?*

Failure To Submit Certification

Comment: An IHE expressed the view that the hearing procedures in this

subpart should apply to failure to submit certification.

Discussion: The hearing procedures do apply if the Secretary proposes to impose a sanction on an IHE, SEA, or LEA that received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification. However, the hearing procedures do not apply to the Secretary's determination that an IHE, SEA, or LEA is ineligible to receive Federal financial assistance because of failure to submit a certification. Because the statute gives no discretion in this matter, there would be no reason for a hearing if an IHE, SEA, or LEA becomes ineligible for failure to submit a certification.

Changes: None.

§ 86.402 Who may be a party in a hearing under this subpart?

Comment: A commenter suggested that Federal agencies should be parties to hearings under this subpart if the other parties agree; the commenter believed that participation by Federal agencies could assist in settlement negotiations.

Discussion: The only issues to be decided by an ALJ in a hearing under this subpart are: (1) Whether an IHE, SEA, or LEA received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or (2) whether the IHE, SEA, or LEA violated its certification. These are issues with which other Federal agencies would not be familiar, and thus there would be no purpose served by their participation.

Changes: None.

§ 86.405 What are the requirements for filing written submissions?

Comment: An IHE suggested that the means of communication in proceedings under this subpart should include telefacsimile and express mail.

Discussion: The Secretary considers both express mail and courier services to be forms of hand delivery, and are thus permitted means of communication under this subpart. Because of the problems with ensuring that a telefacsimile is actually received, submission by telefacsimile cannot be permitted at this time.

Changes: None.

§ 86.410 What are the procedures for issuance of a decision?

Judicial Review

Comment: A commenter felt that the regulations should state that the final decision of the Secretary is subject to judicial review, presumably under the Administrative Procedure Act.

Discussion: Public Law 101-228 is silent on the issue of judicial review and therefore it is governed by the Administrative Procedure Act. Because the Secretary cannot regulate on the issue of judicial review, the Secretary does not believe it is necessary or appropriate to address the issue in these regulations.

Changes: None.

§ 86.411 What are the procedures for requesting reinstatement of eligibility?

Comments: A number of commenters objected to the requirement that an IHE, SEA, or LEA wait 18 months after the

effective date of a termination to apply for reinstatement as an eligible entity. Several commenters suggested that an IHE, SEA, or LEA be permitted to reapply on demonstration of compliance with this part, rather than after a specified period of time, and that there was no legal basis for an 18-month period before reinstatement of eligibility. Commenters felt that the 18-month period was "punitive" and could interfere with Federally-funded research and hurt low income students who need financial aid.

Discussion: The Secretary believes that Public Law 101-228, in authorizing termination as a possible sanction, gives the Secretary the discretion to determine an appropriate length of time before an IHE, SEA, or LEA may be reinstated. The Secretary also believes that an 18-month period before reinstatement is appropriate. For termination to have any effect, it must last for a substantial period of time. The 18-month period is the same as termination for other violations by an IHE, and the Secretary considers violations of this part as serious as violations of the Federal student financial assistance regulations. The Secretary agrees, however, that demonstration of compliance is a necessary criterion for determining if a terminated institution should be reinstated as eligible.

Changes: A requirement has been added to § 86.411(a) that an IHE, SEA, or LEA that has been terminated for violations of this part demonstrate compliance with this part before it can be reinstated.

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