

attributable to mitigating circumstances under the standards in § 81.23; and

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

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

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

§ 81.32 Proportionality.

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

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

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

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

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

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

§ 81.33 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly

for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

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

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

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

(3) The recipient actually relied on the guidance as the basis for the conduct that constituted the violation; and

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

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

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

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

(3) The request—

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

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

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

(i) Examined the proposed expenditure or practice; and

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