

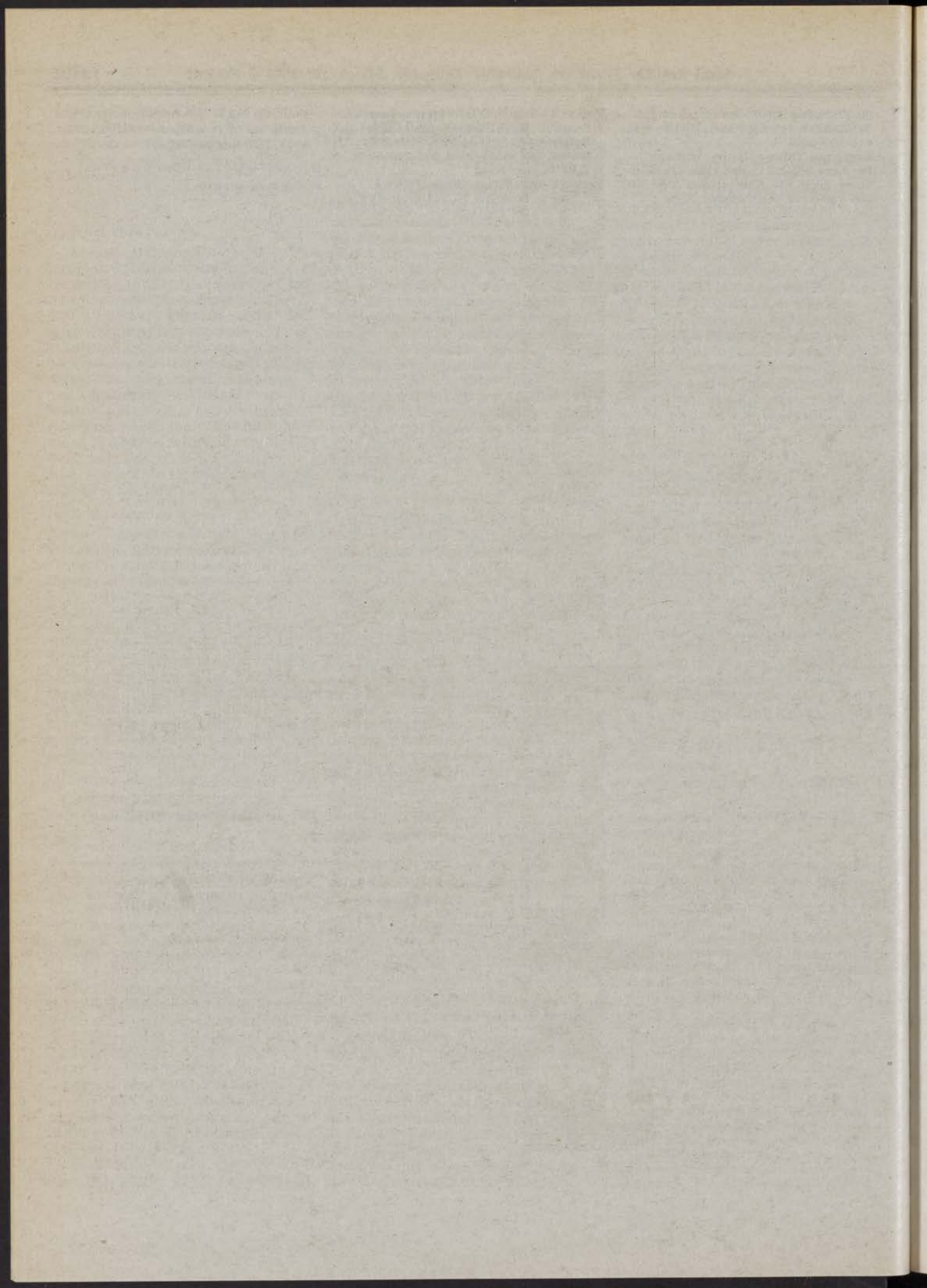
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Part VIII

Department of
Health and Human
Services

Agency for Toxic Substances and
Disease Registry

Status of the Superfund Substance-
Specific Applied Research Program;
Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Agency for Toxic Substances and Disease Registry
[ATSDR-79]
Status of the Superfund Substance-Specific Applied Research Program

AGENCY: Agency for Toxic Substances and Disease Registry (ATSDR), Public Health Service (PHS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: This notice provides the status of ATSDR's effort to implement the Agency's Substance-Specific Applied Research Program (SSARP). This research program, authorized by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA) [42 U.S.C. 9604 (i)], was initiated on October 17, 1991. At that time, a list of priority data needs for 38 priority hazardous substances was announced in the *Federal Register* (56 FR 52178). The list was subsequently revised based on public comments, and published in final form on November 16, 1992 (57 FR 54150).

The 38 substances, each of which is found on ATSDR's "List of Priority Hazardous Substances" (56 FR 52166, October 17, 1991), are aldrin/dieldrin, arsenic, benzene, beryllium, cadmium, carbon tetrachloride, chloroethane, chloroform, chromium, cyanide, p,p'-DDT, DDE, DDD, di(2-ethylhexyl)phthalate, lead, mercury, methylene chloride, nickel, polychlorinated biphenyl compounds (PCBs), polycyclic aromatic hydrocarbons (PAHs) (includes 15 substances), selenium, tetrachloroethylene, toluene, trichloroethylene, vinyl chloride, and zinc.

This notice also serves as a continuous call for voluntary research initiatives. ATSDR encourages private sector organizations to volunteer to conduct research to fill specific priority data needs. A Tri-Agency Superfund Applied Research Committee (TASARC) comprised of scientists from ATSDR, the National Toxicology Program (NTP), and the Environmental Protection Agency (EPA) will review all proposed voluntary research efforts.

DATES: ATSDR considers the voluntary research effort to be important to the continuing development of the SSARP. Therefore, the Agency encourages private sector organizations to volunteer

at any time to conduct research to fill identified data needs, until ATSDR announces that research has been initiated for a specific data need.

ADDRESSES: Private sector organizations interested in volunteering to conduct this type of research may write to Dr. William Cibulas, Chief, Research Implementation Branch, Division of Toxicology, Agency for Toxic Substances and Disease Registry, Mailstop E-29, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

FOR FURTHER INFORMATION CONTACT: Dr. William Cibulas, Chief, Research Implementation Branch, Division of Toxicology, Agency for Toxic Substances and Disease Registry, Mailstop E-29, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone (404) 639-6306.

SUPPLEMENTARY INFORMATION:
Background

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) or CERCLA, as amended by the Superfund Amendments and Reauthorization Act (SARA) [42 U.S.C. 9604(i)], requires that ATSDR (1) jointly with the Environmental Protection Agency (EPA), develop and prioritize a list of hazardous substances found at National Priorities List (NPL) sites, (2) prepare toxicological profiles for these substances, and (3) assure the initiation of a research program to fill identified data needs associated with the substances. Before starting such a program, ATSDR will consider recommendations of the Interagency Testing Committee established under section 4(e) of the Toxic Substances Control Act on the type of research that should be done.

On October 17, 1991, ATSDR announced the identification of the priority data needs for 38 priority hazardous substances (56 FR 52178), requested public comments, and invited private sector organizations to volunteer to conduct research to fill specific priority data needs. On November 16, 1992, the Agency published a revised list of 117 priority data needs for these priority hazardous substances (57 FR 54150).

The major goals of the ATSDR SSARP are: (1) To fill the substance-specific information needs of the public and scientific community, and (2) to supply information necessary to conduct comprehensive public health assessments of populations living near hazardous waste sites. This program also will provide data that can be generalized to other substances or areas

of science, including risk assessment of chemicals, thus creating a scientific base for filling a broader range of data needs.

CERCLA, in section 104(i)(5)(D), states that it is the sense of Congress that the costs for conducting this research program be borne by the manufacturers and processors of the hazardous substances under the Toxic Substances Control Act (TSCA) and by registrants under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), or by cost recovery from responsible parties under CERCLA. To effect this statutory intent, ATSDR developed a plan whereby parts of the SSARP will be conducted via regulatory mechanisms (TSCA/FIFRA), private sector voluntarism, and the direct use of CERCLA funds.

A Tri-Agency Superfund Applied Research Committee (TASARC) comprised of scientists from ATSDR, NTP, and the EPA has been set up to: (1) Advise on the assignment of priorities on mechanisms for filling data needs; (2) coordinate knowledge of research activities to avoid duplication of research in other programs and under other authorities; (3) advise on issues of science related to substance-specific data needs; and (4) maintain a scheduled forum that provides an overall review of the ATSDR SSARP. The TASARC has met four times since the initiation of the SSARP. This notice provides the status of ATSDR's efforts to implement the SSARP, focussing on ongoing activities relevant to test rule development under TSCA/FIFRA, private sector voluntarism, and direct use of CERCLA funds. Additional data needs are being addressed through an interagency agreement with NTP, by ATSDR's Great Lakes human health effects research program, and other Agency programs. To date, 59 priority data needs associated with 35 ATSDR priority hazardous substances (including 15 PAHs) are being addressed via these mechanisms (Table 1).

A. TSCA/FIFRA

In developing and implementing the SSARP, ATSDR, NTP, and EPA have established procedures to identify priority data needs of mutual interest to Federal programs. These data needs will be filled through a program of toxicological testing under TSCA. This portion of the research will be conducted according to established TSCA procedures and guidelines. This testing will fulfill more than one Federal program's need. During FY 1993, a subset of the 117 priority data needs for 38 substances (about 60) was referred to the EPA under its authorities following

review and endorsement by the TASARC oversight committee. Currently, 26 priority data needs associated with 11 ATSDR substances have been recommended by EPA to be added to its Master Testing List, the first step in test rule development under TSCA, section 4 (Table 2). Please note that although ATSDR has identified priority data needs for oral exposure to tetrachloroethylene, cyanide, and beryllium, in response to other Federal government agency needs, ATSDR will consider proposals to conduct inhalation studies in conjunction with pharmacokinetic studies for these substances in lieu of bioassays using oral exposures. It is anticipated that inhalation data derived from these studies can be used, in conjunction with pharmacokinetic modeling, to address ATSDR's oral toxicity data needs.

Some of ATSDR's priority hazardous substances will not be added to EPA's Master Testing list because they do not fall within the bounds of TSCA, Section 4 authority. For example, TSCA does not require testing chemicals that are out of production, such as PCBs. Furthermore, TSCA is not considered the appropriate mechanism for testing PAHs, because the PAHs are by-products of multiple industrial processes and, therefore, it is difficult to identify specific manufacturers. In addition, TSCA guidelines are not available for some of the ATSDR priority data needs such as the development of analytical methods for cadmium and beryllium, mechanistic studies on the neurotoxic effects of lead, and the mitigation of toxicity of vinyl chloride. Moreover, some of the ATSDR priority hazardous substances are considered more appropriate for FIFRA than TSCA, e.g., arsenic, DDT, and aldrin/dieldrin. The Office of Pollution, Prevention and Toxics (OPPT), EPA, forwarded the data needs for these substances to the Office of Pesticide Programs for evaluation.

B. Private Sector Voluntarism

As part of the SSARP, ATSDR initially announced a set of proposed procedures for conducting voluntary research on February 7, 1992 (56 FR 4758). It was revised based on public comments and published on November 16, 1992 (57 FR 54160). This voluntary research program fills priority data needs along with other mechanisms such as test rule development through EPA and CERCLA-funded research. Private sector organizations were encouraged to volunteer to conduct research to fill these specific priority data needs.

Currently, ATSDR is pursuing voluntary research interests with two private sector organizations: the General Electric Company (GE) and the Halogenated Solvents Industry Alliance (HSIA). To date, through the voluntary research efforts of GE and HSIA, four priority data needs for two substances are under discussion, potentially leading to the signing of two memorandums of understanding (Table 3).

During FY 1993, ATSDR staff members met with officials from GE to discuss the Agency's research agenda for PCBs. The Agency has identified mutual interests in environmental fate testing and human health endpoints assessments and has initiated discussion on these studies with GE.

ATSDR met with HSIA representatives to discuss the use of physiologically-based pharmacokinetic (PBPK) models to fill priority data needs for six volatile organic compounds. The Agency selected methylene chloride to start using PBPK modeling to address ATSDR's toxicity priority data needs because of the extensive database on this substance. The toxicity priority data needs for the remaining 5 volatile organic compounds (carbon tetrachloride, chloroethane, chloroform, tetrachloroethylene, and trichloroethylene) may be addressed via similar voluntary efforts in the future.

C. CERCLA-Funded Research (Minority Health Professions Foundation Research Program)

During FY 1992, ATSDR announced a \$4 million cooperative agreement program with the Minority Health Professions Foundation (MHPF) to support substance-specific investigations. This cooperative venture is supported by the direct use of CERCLA funds. During FY 1993, about \$4 million was allocated to continue this research program; no new projects were initiated. Currently, 9 priority data needs for 21 priority hazardous substances (including 15 PAHs) in the SSARP are being addressed by the MHPF institutions through this program. Also, the MHPF research program will address 13 other substance-specific data needs identified in the ATSDR toxicological profiles concerning exposures and related health effects. The institutions receiving awards and their respective research projects are listed in Table 4.

The MHPF, a not-for-profit 501(c)(3) organization, is comprised of 11 minority health professions schools. Its primary mission is to research the persistent health problems that disproportionately plague poor and

minority citizens. The purposes of the ATSDR-MHPF cooperative agreement are: (1) To initiate research to fill ATSDR-identified data needs for priority hazardous substances, and (2) to enhance existing disciplinary capacities to conduct research in environmental health at MHPF member institutions.

The areas of research at MHPF institutions include those related to broad areas of toxicology and environmental health science. Some of the MHPF member institutions are conducting health studies of minority groups exposed to ATSDR's priority hazardous substances.

D. National Toxicology Program

ATSDR maintains an interagency agreement (IAG) with NTP to conduct toxicological testing of substances identified at NPL sites. The studies determine levels of exposure that present a significant risk to humans of acute, subacute, and chronic health effects. Often these studies include an assessment of the substance's ability to cause cancer, reproductive toxicity, and birth defects. The results of these studies are used by regulatory agencies such as the Food and Drug Administration and the EPA, various environmental and industrial groups, and ATSDR to improve the ability to conduct public health assessments at NPL sites. Under this agreement, one toxicity priority data need identified in the SSARP (carbon tetrachloride, immunotoxicology battery of tests via oral exposure) is currently being addressed. This NTP study was begun in September 1993 and should be completed in February 1994.

E. Great Lakes Human Health Effects Research Program

Some of the priority data needs identified in the SSARP have been independently identified as research needs through the ATSDR Great Lakes human health effects research program, a separate research program. To date, 12 priority data needs for 19 priority hazardous substances (including 15 PAHs) identified in the SSARP are being addressed through this program. The institutions receiving awards and their respective studies are listed in Table 5.

The Great Lakes Critical Programs Act of 1990 mandates EPA, in consultation with ATSDR, to prepare a report by September 30, 1994, that assesses the adverse effects of pollutants in the Great Lakes system on the health of individuals in the Great Lakes states. A variety of persistent toxic substances are prevalent in the Great Lakes, including PCBs, DDT and its metabolites, dieldrin, toxaphene, mirex, mercury,

benzo[a]pyrene, hexachlorobenzene, furans, dioxins, and lead. Certain populations—Native Americans, sport anglers, fetuses and nursing infants of mothers who consume contaminated Great Lakes fish—have a potentially higher risk of long-term adverse effects resulting from exposure to these contaminants.

The ATSDR-supported research projects focus on these high-risk populations to try to further define the human health consequences of exposure to these persistently toxic substances. The research activities include, but are not limited to: (1) Characterizing exposure and determining the profiles and levels of Great Lakes contaminants in biological tissues and fluids in high-risk populations; (2) identifying sensitive and specific human reproductive/developmental end points and correlating them to exposure to Great Lakes contaminants; (3) determining the short- and long-term risk(s) of adverse health effects in progeny whose parents were exposed to Great Lakes contaminants; (4) investigating the feasibility of establishing registries and surveillance cohorts in the Great Lakes region; and (5) establishing a chemical mixtures database with emphasis on tissue and blood levels in order to identify new cohorts, conduct surveillance and health effects studies, and establish registries and surveillance cohorts.

During FY 1992, ATSDR announced a \$2 million grant program to conduct research on the impact on human health of contaminated fish consumption in the Great Lakes region. On September 30, 1992, ATSDR announced nine awards under this program.

In FY 1993, about \$3 million was allocated to support the continuation of the research projects conducted at the nine institutions originally funded during FY 1992. In addition, ATSDR awarded one new grant to the Michigan Department of Public Health to design, establish, and operate a professionally creditable interlaboratory quality assurance/quality control program for the ATSDR Great Lakes human health effects research program.

F. Other ATSDR Programs

In its role as a public health agency addressing environmental health, ATSDR may, where appropriate, collect human data to validate substance-specific exposure and toxicity findings; information on levels of contaminants in humans has been identified as a

priority data need for 37 of the 38 priority substances (Table 1). ATSDR will obtain this information through exposure and health effects studies, and through establishing and using substance-specific registries of people within the Agency's National Exposure Registry who have potentially been exposed to these substances.

The list of 38 priority hazardous substances in the SSARP was forwarded to ATSDR's Exposure and Disease Registry Branch (EDRB), Division of Health Studies, for consideration as potential candidates for subregistries of exposed persons, based on criteria described in EDRB's 1988 document, "Policies and Procedures for Establishing a National Registry of Persons Exposed to Hazardous Substances." To date, ATSDR has selected benzene, chromium, and trichloroethylene as primary contaminants to establish subregistries in the National Exposure Registry. However, aldrin/dieldrin, carbon tetrachloride, chloroethane, chloroform, cyanide, p,p'-DDT, DDE, DDD, di (2-ethylhexyl) phthalate, mercury, methylene chloride, PAHs, selenium, tetrachloroethylene, and vinyl chloride remain as a part of the candidate pool. They will be considered for selection as primary contaminants during each selection process (Table 1). Finally, arsenic, beryllium, cadmium, lead, nickel, PCBs, toluene, and zinc are not considered to be in the pool of candidate substances for an exposure registry at this time. This decision will be re-evaluated as more information on the chemicals and exposure sites become available.

With regard to epidemiologic studies, ATSDR believes that for many of the 38 priority hazardous substances, an extensive amount of animal data, and some human data, have already been collected; therefore, ATSDR considers it appropriate, where feasible, to conduct epidemiologic studies on such substances. In response to public comments, the Agency's SSARP will address substance-specific rather than site-specific epidemiologic studies.

The substance-specific studies are designed to determine substance-specific cause and effect. In this case, ATSDR is not necessarily directed toward populations exposed via the environment at hazardous substance release sites, as in a site-specific study. Instead, any appropriate population of suitable exposure via the environment,

consumer products, or occupation can be used to design a rigorous analytic epidemiologic investigation. Epidemiologic studies on several of ATSDR's 38 priority hazardous substances (such as DDT, PCBs, and PAHs) are being conducted by the ATSDR Great Lakes human health effects research program (Table 5).

Two epidemiologic studies on lead (identified as a data need by ATSDR), are also being conducted by the Morehouse School of Medicine and the King/Drew Medical Center of the Charles R. Drew University of Medicine and Science via the ATSDR—MHPF cooperative agreement. ATSDR expects that other substance-specific epidemiologic studies, identified as data needs or priority data needs in the SSARP, may potentially be conducted by other Divisions within ATSDR.

ATSDR acknowledges that the conduct of epidemiologic studies to determine possible linkages between exposure to hazardous substances and human health effects may be accomplished other than by Agency programs, or under other ATSDR-sponsored auspices. Toward that end, the Agency encourages the private sector and other government programs to use ATSDR's priority data needs to plan research activities to identify appropriate populations and conduct studies addressing the specific human health issues.

Finally, the collection, evaluation, and interpretation of data from contaminated media around hazardous waste sites have been identified as priority data needs for all 38 priority hazardous substances by ATSDR. However, the Agency realizes that a lot of information has already been collected through individual state programs and the EPA's CERCLA activities; therefore, ATSDR will evaluate the extant information from these programs in order to help fill data needs on substance-specific exposures.

The results of the research conducted via the SSARP will be used for public health assessments and to reassess ATSDR's substance-specific priority data needs. The Agency expects to re-evaluate the priority data needs for priority hazardous substances every three years.

Dated: March 3, 1994.

Walter R. Dowdle,
Deputy Administrator, Agency for Toxic
Substances and Disease Registry.

TABLE 1.—SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS CURRENTLY BEING ADDRESSED UNDER ATSDR'S APPLIED RESEARCH PROGRAMS

Substance	ID	Priority Data Need	Addressed
Lead	1A	Mechanistic studies on the neurotoxic effects of lead	✓
	1B	Analytical methods for tissue levels	
	1C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	✓
Arsenic	2A	Comparative toxicokinetic studies to determine if an appropriate animal species can be identified.	
	2B	Half-lives in surface water, groundwater	
	2C	Bioavailability from soil	
	2D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
Mercury	3A	Multigeneration reproductive toxicity study via oral exposure	✓
	3B	Dose-response data in animals for chronic-duration oral exposure	✓
	3C	Immunotoxicology battery of tests via oral exposure	✓
	3D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	✓
Vinyl Chloride	3E	Potential candidate for subregistry of exposed persons	✓
	4A	Dose-response data in animals for acute-duration inhalation exposure	✓
	4B	Multigeneration reproductive toxicity study via inhalation	✓
	4C	Dose-response data in animals for chronic-duration inhalation exposure	
	4D	Mitigation of vinyl chloride-induced toxicity	
	4E	2-species developmental toxicity study via inhalation	✓
Benzene	4F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	4G	Potential candidate for subregistry of exposed persons	✓
	5A	Dose-response data in animals for acute- and intermediate-duration oral exposure. The subchronic study should include an extended reproductive organ histopathology.	✓
	5B	2-species developmental toxicity study via oral exposure	✓
	5C	Neurotoxicology battery of tests via oral exposure	✓
Cadmium	5D	Epidemiological studies on the health effects of benzene (Special emphasis endpoints include: immunotoxicity).	
	5E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	6A	Analytical methods for biological tissues and fluids and environmental media	
	6B	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
PCBs	7A	Dose-response data in animals for acute- and intermediate-duration oral exposures	✓
	7B	Biodegradation of PCBs in water; bioavailability of PCBs in air, water and soil	✓
	7C	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology.	
	7D	Epidemiological studies on the health effects of PCBs (Special emphasis endpoints include: immunotoxicity, gastrointestinal toxicity, liver, kidney, thyroid toxicity, reproductive/developmental toxicity).	✓
	7E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	✓
Chloroform	8A	Dose-response data in animals for intermediate-duration oral exposure	
	8B	Epidemiological studies on the health effects of chloroform (Special emphasis endpoints include: cancer, neurotoxicity, reproductive and developmental toxicity, hepatotoxicity, and renal toxicity).	
	8C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	8D	Potential candidate for subregistry of exposed persons	✓
PAHs	9A	Dose-response data in animals for intermediate duration oral exposures. The subchronic study should include extended reproductive organ histopathology and immunopathology.	✓
	9B	2-species developmental toxicity study via inhalation or oral exposure	
	9C	Mechanistic studies on PAHs, on how mixtures of PAHs can influence the ultimate activation of PAHs, and on how PAHs affect rapidly proliferating tissues.	
	9D	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology and immunopathology.	✓
	9E	Epidemiological studies on the health effects of PAHs (Special emphasis endpoints include: cancer, dermal, hemolymphatic, and hepatic).	✓
	9F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	✓
Trichloroethylene	9G	Potential candidate for subregistry of exposed persons	✓
	10A	Dose-response data in animals for acute-duration oral exposure	✓
	10B	Neurotoxicology battery of tests via the oral route	✓
	10C	Immunotoxicology battery of tests via the oral route	✓
	10D	Epidemiological studies on the health effects of trichloroethylene (Special emphasis endpoints include: cancer, hepatotoxicity, renal toxicity, developmental toxicity, and neurotoxicity).	✓

TABLE 1.—SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS CURRENTLY BEING ADDRESSED UNDER ATSDR'S APPLIED RESEARCH PROGRAMS—Continued

Substance	ID	Priority Data Need	Addressed
DDT	10E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	11A	Dose-response data in animals for chronic-duration oral exposure	
	11B	Comparative toxicokinetic study (across routes/species)	
	11C	Bioavailability and bioaccumulation from soil	
	11D	Epidemiological studies on the health effects of DDT, DDD and DDE (Special emphasis endpoints include: immunotoxicity, reproductive and developmental toxicity).	✓
Chromium	11E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	✓
	11F	Potential candidate for subregistry of exposed persons	✓
	12A	Dose-response data in animals for acute-duration exposure to chromium (VI) and (III) via oral exposure and for intermediate-duration exposure to chromium (VI) via oral exposure.	✓
	12B	Multigeneration reproductive toxicity study via oral exposure to chromium (III) and (VI)	✓
	12C	Immunotoxicology battery of tests following oral exposure to chromium (III) and (VI)	✓
	12D	2-species developmental toxicity study via oral exposure to chromium (III) and (VI)	
Tetrachloroethylene	12E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	13A	Dose-response data in animals for acute-duration oral exposure, including neuropathology and demeanor, and immunopathology.	✓
	13B	Multigeneration reproductive toxicity study via oral exposure	✓
	13C	Dose-response data in animals for chronic-duration oral exposure, including neuropathology and demeanor, and immunopathology.	
	13D	2-species developmental toxicity study via oral exposure	✓
Aldrin/Dieldrin	13E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	13F	Potential candidate for subregistry of exposed persons	✓
	14A	Dose-response data in animals for intermediate-duration oral exposure	
	14B	Bioavailability from soil	
Cyanide	14C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	14D	Potential candidate for subregistry of exposed persons	✓
	15A	Dose-response data in animals for acute- and intermediate-duration exposures via inhalation. The subchronic study should include extended reproductive organ histopathology and evaluation of neurobehavioral and neuropathological endpoints.	✓
	15B	2-species developmental toxicity study via oral exposure	✓
	15C	Evaluation of the environmental fate of cyanide in soil	✓
Carbon Tetrachloride ...	15D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	15E	Potential candidate for subregistry of exposed persons	✓
	16A	Dose-response data in animals for chronic oral exposure. The study should include extended reproductive organ and nervous tissue (and demeanor) histopathology.	
	16B	Immunotoxicology battery of tests via oral exposure	✓
	16C	Half-life in soil	
Beryllium	16D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	16E	Potential candidate for subregistry of exposed persons	✓
	17A	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology.	✓
	17B	2-species developmental toxicity study via inhalation exposure	✓
	17C	Environmental fate in air; factors affecting bioavailability in air	✓
	17D	Analytical methods to determine environmental speciation	
Toluene	17E	Immunotoxicology battery of tests following oral exposure	✓
	17F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	18A	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathological evaluation of the immune system.	✓
	18B	Comparative toxicokinetic studies (Characterization of absorption, distribution, and excretion via oral exposure).	✓
	18C	Neurotoxicology battery of tests via oral exposure	✓
Nickel	18D	Mechanism of toluene-induced neurotoxicity	
	18E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	19A	Epidemiological studies on the health effects of nickel (Special emphasis endpoints include: reproductive toxicity).	
	19B	2-species developmental toxicity study via the oral route	
	19C	Dose-response data in animals for acute- and intermediate-duration oral exposures	
	19D	Neurotoxicology battery of tests via oral exposure	
	19E	Bioavailability of nickel from soil	
	19F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	

TABLE 1.—SUBSTANCE-SPECIFIC PRIORITY DATA NEEDS CURRENTLY BEING ADDRESSED UNDER ATSDR'S APPLIED RESEARCH PROGRAMS—Continued

Substance	ID	Priority Data Need	Addressed
Methylene Chloride	20A	Dose-response data in animals for acute- and intermediate-duration oral exposure. The subchronic study should include extended reproductive organ histopathology, neuropathology and demeanor, and immunopathology.	✓
	20B	2-species developmental toxicity study via the oral route	✓
	20C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	20D	Potential candidate for subregistry of exposed persons	✓
Zinc	21A	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathological evaluation of the immunologic and neurological systems.	✓
	21B	Multigeneration reproductive toxicity study via oral exposure	
	21C	Carcinogenicity testing (2-year bioassay) via oral exposure	
	21D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
DEHP	22A	Epidemiological studies on the health effects of DEHP (Special emphasis endpoints include: cancer).	
	22B	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathological evaluation of the immunologic and neurologic systems.	
	22C	Multigeneration reproductive toxicity study via oral exposure	
	22D	Comparative toxicokinetic studies (Studies designed to examine how primates metabolize and distribute DEHP as compared to rodents via oral exposure).	✓
	22E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
	22F	Potential candidate for subregistry of exposed persons	✓
Selenium	23A	Dose-response data in animals for acute-duration oral exposure	
	23B	Immunotoxicology battery of tests via oral exposure	
	23C	Epidemiological studies on the health effects of selenium (Special emphasis endpoints include: cancer, reproductive and developmental toxicity, hepatotoxicity and adverse skin effects).	
	23D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	
Chloroethane	23E	Potential candidate for subregistry of exposed persons	✓
	24A	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an evaluation of immune and nervous system (and behavior, demeanor) tissues, and extended reproductive organ histopathology.	✓
	24B	Dose-response data in animals for chronic inhalation exposures. The study should include an evaluation of nervous system (and behavior) tissues.	
	24C	Potential candidate for subregistry of exposed persons	✓

* These substances are included in the pool of candidate substances for subregistry development. These substances will be considered for selection as primary contaminants by the Division of Health Studies, ATSDR, during each selection process.

TABLE 2.—PRIORITY DATA NEEDS BEING ADDRESSED BY EPA RULE MAKING

Substance	ID	Priority Data Need	TSCA/FIFRA
Mercury	3B	Dose-response data in animals for chronic-duration oral exposure	TSCA.
	3C	Immunotoxicology battery of tests via oral exposure	TSCA.
Vinyl Chloride	4B	Multigeneration reproductive toxicity study via inhalation	TSCA.
	4E	2-species developmental toxicity study via inhalation	TSCA.
Benzene	5A	Dose-response data in animals for intermediate-duration oral exposure. The subchronic study should include an extended reproductive organ histopathology.	TSCA.
	5C	Neurotoxicology battery of tests via oral exposure	TSCA.
Trichloroethylene	10A	Dose-response data in animals for acute-duration oral exposure	TSCA.
	10C	Immunotoxicology battery of tests via the oral route	TSCA.
Chromium	12A	Dose-response data in animals for acute-duration exposure to chromium(VI) and (III) via oral exposure.	TSCA.
	12B	Multigeneration reproductive toxicity study via oral exposure to chromium (III) and (VI) .	TSCA.
	12C	Immunotoxicology battery of tests following oral exposure to chromium (III) and (VI)	TSCA.
Tetrachloroethylene	13A	Dose-response data in animals for acute-duration oral exposure, including neuropathology and demeanor, and immunopathology.	TSCA (inhalation study).
	13B	Multigeneration reproductive toxicity study via oral exposure	TSCA (inhalation study).
	13D	2-Species developmental toxicity study via oral exposure	TSCA (inhalation study).

TABLE 2.—PRIORITY DATA NEEDS BEING ADDRESSED BY EPA RULE MAKING—Continued

Substance	ID	Priority Data Need	TSCA/FIFRA
Cyanide	15A	Dose-response data in animals for acute- and intermediate-duration exposures via inhalation. The subacute study should include extended reproductive organ histopathology and evaluation of neurobehavioral and neuropathological endpoints.	TSCA.
	15B	2-Species developmental toxicity study via oral exposure	TSCA (inhalation study).
Beryllium	15C	Evaluation of the environmental fate of cyanide in soil	TSCA.
	17A	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology.	TSCA.
	17B	2-species developmental toxicity study via inhalation exposure	TSCA.
	17C	Environmental fate in air; factors affecting bioavailability in air	TSCA.
Toluene	17E	Immunotoxicology battery of tests following oral exposure	TSCA (inhalation study).
	18A	Dose-response data in animals for intermediate-duration oral exposures. The study should include an extended histopathological evaluation of the immune system.	TSCA.
Methylene Chloride	18B	Comparative toxicokinetic studies (Characterization of absorption, distribution, and excretion via oral exposure).	TSCA.
	20A	Dose-response data in animals for intermediate-duration oral exposure. The study should include extended immunopathology and neuropathology.	TSCA.
Chloroethane	20B	2-species developmental toxicity study via the oral route	TSCA.
	24A	Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an evaluation of immune and nervous system (and behavior, demeanor) tissues, and extended reproductive organ histopathology.	TSCA. (EPA will only address the immune system requirement of this Priority Data Need)

TABLE 3.—PRIORITY DATA NEEDS POTENTIALLY BEING ADDRESSED BY VOLUNTARY RESEARCH

Substance	ID	Priority data need	Firm
PCBs	7B	Biodegradation of PCBs in water	General Electric Company.
	7E	Epidemiological studies on the health effects of PCBs (Special emphasis endpoints include: immunotoxicity, gastrointestinal, toxicity, liver, kidney, thyroid, toxicity, reproductive/developmental, toxicity).	General Electric Company.
Methylene chloride	20A	Dose-response data in animals for acute- and intermediate-duration oral exposure. The subchronic study should include extended reproductive organ histopathology, neuropathology and demeanor, and immunopathology.	Halogenated Solvents Industry Alliance.
	20B	2-species developmental toxicity study via the oral route	Halogenated Solvents Industry Alliance.

TABLE 4.—PRIORITY DATA NEEDS BEING ADDRESSED BY MHPF INSTITUTIONS

Substance	ID	Priority data need	Institution
Lead	1A	Mechanistic studies on the neurotoxic effects of lead ...	Florida A & M University. Texas Southern University.
	1C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	The King/Drew Medical Center of the Charles R. Drew University of Medicine and Science. Morehouse School of Medicine.
Mercury	3A	Multigeneration reproductive toxicity study via oral exposure.	Tuskegee University.
Benzene	5B	2-species developmental toxicity study via oral exposure.	Xavier University.
PAHs	9A	Dose-response data in animals for intermediate duration oral exposures. The subchronic study should include extended reproductive organ histopathology and immunopathology.	Meharry Medical College.
	9D	Dose-response data in animals for acute- and intermediate-duration inhalation exposures. The subchronic study should include extended reproductive organ histopathology and immunopathology.	Meharry Medical College.
Trichloroethylene	10B	Neurotoxicology battery of tests via oral exposure	Texas Southern University.

TABLE 4.—PRIORITY DATA NEEDS BEING ADDRESSED BY MHPF INSTITUTIONS—Continued

Substance	ID	Priority data need	Institution
Toluene	18C	Neurotoxicology battery of tests via oral exposure Dose-response data in animals for acute- and intermediate-duration oral exposures. The subchronic study should include an extended histopathological evaluation of the immunologic and neurological systems.	Texas Southern University. Xavier University. Tuskegee University.
Zinc	21A		

TABLE 5.—PRIORITY DATA NEEDS BEING ADDRESSED BY THE ATSDR GREAT LAKES HUMAN HEALTH EFFECTS RESEARCH PROGRAM

Substance	ID	Priority data need	Institution
Lead	1C	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	State University of New York at Buffalo. State University of New York at Oswego. Michigan State University. University of Wisconsin—Superior. New York State Health Department. University of Illinois at Chicago. University of Illinois at Urbana-Champaign. Wisconsin Department of Health and Social Services.
Mercury	3A	Multigeneration reproductive toxicity study via oral exposure.	State University of New York at Oswego. University of Illinois at Chicago.
	3D	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	State University of New York at Buffalo. State University of New York at Oswego. Michigan State University. University of Wisconsin—Superior. New York State Health Department. University of Illinois at Chicago. University of Illinois at Urbana-Champaign. Wisconsin Department of Health and Social Services.
PCBs	3E	Potential candidate for subregistry of exposed persons.	Wisconsin Department of Health and Social Services.
	7A	Dose-response data in animals for acute- and intermediate-duration oral exposures.	University of Wisconsin—Superior.
	7E	Epidemiological studies on the health effects of PCBs (special emphasis endpoints include: immunotoxicity, gastrointestinal toxicity, liver, kidney, thyroid toxicity, reproductive/developmental toxicity).	State University of New York at Buffalo. State University of New York at Oswego. University of Wisconsin—Superior. University of Illinois at Chicago. University of Illinois at Urbana-Champaign.
PAHs	7F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	State University of New York at Buffalo. State University of New York at Oswego. Michigan State University. University of Wisconsin—Superior. New York State Health Department. University of Illinois at Chicago. University of Illinois at Urbana-Champaign. Wisconsin Department of Health and Social Services.
	9E	Epidemiological studies on the health effects of PAHs (special emphasis endpoints include: cancer, dermal, hemolympathic, and hepatic).	Wisconsin Department of Health and Social Services.
	9F	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	Wisconsin Department of Health and Social Services.
DDT	11D	Epidemiological studies on the health effects of DDT, DDD and DDE (special emphasis endpoints include: immunotoxicity, reproductive and developmental toxicity).	State University of New York at Buffalo. State University of New York at Oswego. Michigan State University. University of Illinois at Chicago. Wisconsin Department of Health and Social Services.
	11E	Exposure levels in humans living near hazardous waste sites and other populations, such as exposed workers.	State University of New York at Buffalo. State University of New York at Oswego. Michigan State University. University of Illinois at Chicago. Wisconsin Department of Health and Social Services.
	11F	Potential candidate for subregistry of exposed persons.	Wisconsin Department of Health and Social Services.

Date	Subject	Remarks
1871. 1. 10.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 11.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 12.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 13.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 14.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 15.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 16.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 17.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.
1871. 1. 18.	The Minutes of the last Assembly were read and approved.	The Minutes of the last Assembly were read and approved.

Federal Register

Thursday
March 10, 1994

Part IX

Department of Education

34 CFR Part 200 et al.
Chapter 1 Programs in Local Educational
Agencies and Migrant Education;
Proposed Rules

DEPARTMENT OF EDUCATION

34 CFR Parts 200 and 201

RIN 1810-AA70

Chapter 1 Program in Local Educational Agencies and Chapter 1—Migrant Education Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Secretary of Education (Secretary) proposes to issue regulations amending the regulations governing Part A and Part D, Subpart 1 of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965. Part A of chapter 1 provides financial assistance through State educational agencies (SEAs) to local educational agencies (LEAs) to meet the special educational needs of educationally deprived children in school attendance areas with high concentrations of children from low-income families and children in local institutions for neglected or delinquent children. Part D of chapter 1 authorizes a Migrant Education Program (MEP) that provides financial assistance to SEAs to establish and improve programs to meet the special educational needs of migratory children of migratory agricultural workers or fishermen.

These amendments are needed to afford flexibility to States that have developed assessment systems that support their systemic education reform efforts but that are inconsistent with the national evaluation standards in Subpart H of 34 CFR Part 200 and Subpart E of 34 CFR Part 201. The proposed regulations would enable States to request an exception to those national evaluation standards to use their own assessment systems to evaluate the effectiveness of their Chapter 1 and MEP programs.

DATES: Comments must be received on or before April 25, 1994.

ADDRESSES: All comments concerning the proposed Part 200 regulations should be addressed to Mary Jean LeTendre, U.S. Department of Education, 400 Maryland Avenue SW., Portals Building, Room 4400, Washington, DC 20202-6132.

All comments concerning the proposed Part 201 regulations should be addressed to Francis Corrigan, U.S. Department of Education, 400 Maryland Avenue SW., Portals Building, Room 4104, Washington, DC 20202-6135.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address

listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: For Part 200, Wendy Jo New, U.S. Department of Education, 400 Maryland Avenue SW., Portals Building, room 4400, Washington, DC 20202-6132. Telephone: (202) 260-0982. For Part 201, James English, U.S. Department of Education, 400 Maryland Avenue SW., Portals Building, room 4104, Washington, DC 20202-6135. Telephone: (202) 260-1394. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Under section 1435 of chapter 1, the Secretary is required, in consultation with SEAs and LEAs, to develop national standards for evaluation of chapter 1 programs. After enactment of this requirement in 1988, the Secretary held five regional meetings to receive input on the content of these standards and submitted draft standards for consideration in the negotiated rulemaking process required under section 1431 of the statute. After considering additional public comments on proposed regulations, the Secretary issued the final national standards that are contained in Subpart H (§§ 200.80-200.89) of Part 200 of the Chapter 1 regulations.

Under these national standards, LEAs assess, every 12 months, the achievement of each chapter 1 participant in grades 2 through 12 in reading, mathematics, and language arts, as appropriate, compared to an estimate of what his or her achievement would have been in the absence of chapter 1 services. The LEA is required to use a nationally normed test or a test equated to a nationally normed test and report to the SEA the results of student achievement using the common reporting scale established by the Secretary—i.e., normal curve equivalents. The SEA, in turn, is required to aggregate LEA student achievement data to provide a statewide average of student achievement gains resulting from participation in Chapter 1 programs. The Secretary aggregates data from each State in order to submit to Congress biennially a national report on the effectiveness of chapter 1.

Because section 1435 also applies to the MEP, regulations for that program in subpart E of part 201 contain a similar requirement to measure and report student achievement in accordance with national standards using, if possible, appropriate forms and levels of

national- or State-normed achievement tests.

Since these regulations took effect, a number of States have developed new assessment systems linked to their statewide reform efforts, to improve the quality of education. Consistent with research and practice that have identified the limitations of traditional assessments, these new systems are tied to complex skills and challenging subject matter and use multiple measures of achievement. They do not routinely use nationally normed tests and typically only assess children in certain grades. As a result, the new assessments are not consistent with the national evaluation standards in parts 200 and 201. Therefore, SEAs and LEAs in these States must operate multiple, overlapping assessment systems.

Several States have requested that the Secretary either waive the current national evaluation standards or modify the regulations to take into account new State assessment activities. The Secretary does not currently have the authority to waive the national standards. Nevertheless, the Secretary does not want chapter 1 or MEP assessment requirements to be a barrier to systemic State reforms that upgrade the quality of elementary and secondary education. The Secretary recognizes that new State assessment systems now being implemented are likely to provide more meaningful data than the current Chapter 1 testing requirements on the success of chapter 1 and MEP programs because those assessments are tied to high State standards for what children should know and be able to do and are integral to systemic State reforms to improve education quality.

To address these concerns, the Secretary proposes to add exceptions to the requirements in Subpart H of Part 200 and in Subpart E of Part 201. These exceptions would enable States that are implementing new assessment systems that support education reform to use those assessments to measure the effectiveness of Chapter 1 and MEP programs in place of the current Chapter 1 testing requirements. The proposed regulations would also permit States to request exceptions for particular LEAs that, absent State systems, have new local assessment systems in place to support their education reform efforts.

In granting an exception, the Secretary would not be waiving any statutory requirements. SEAs and LEAs would continue to evaluate the effectiveness of their Chapter 1 programs under section 1019, perform the annual review required under section 1021(a), measure sustained program gains under sections 1019(a)(3)

and 1021(a)(2), identify schools and students in need of program improvement under section 1021(b) and (f), and meet schoolwide project accountability requirements under section 1015(e), using the State assessment and any other sources of information deemed appropriate. Similarly, under the MEP, SEAs must ensure that they and their operating agencies adhere to the requirements of sections 1011(b), 1019(b) and 1202(a)(6) to use desired outcomes for evaluating performance, to collect and report demographic and performance data, and to examine sustained gains for formerly migratory children.

An exception would give SEAs and LEAs greater flexibility to carry out these provisions. For example, LEAs would no longer be required to use nationally normed tests to measure "aggregate performance" for program improvement purposes. Similarly, evaluation data would not need to be able to be aggregated beyond the LEA level.

The Secretary would review each request for an exception to ensure that it would not impair an SEA's or LEAs' ability to account for results under chapter 1 or the MEP.

The Secretary wishes to emphasize that no State is required to make any changes in its chapter 1 or MEP testing programs as a result of these proposed regulations. Rather, the proposed exceptions are intended to reduce testing burden, provide flexibility for assessment and school reforms that will help the State improve the quality of education, and enable States to align Chapter 1 and MEP assessments with their own assessment systems.

Executive Order 12866

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

The potential benefits associated with the proposed regulations are clear. Rather than continuing to operate multiple assessment systems for Federal and State purposes, States could use their State systems to evaluate their chapter 1 and MEP programs. Moreover, the potential costs associated with the proposed regulations are negligible. Because the proposed regulations would permit States to use their own assessment systems, States would incur few, if any, additional costs. To the contrary, the proposed regulations would result in reduced costs for States that would no longer need to operate multiple assessment systems.

Any burdens specifically associated with information collection requirements are identified and explained elsewhere in this preamble under the heading Paperwork Reduction Act of 1980. The Secretary has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions. The proposed regulations would actually increase States' flexibility in assessing their chapter 1 and MEP programs.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comment on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the chapter 1 and MEP programs.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these proposed regulations are small LEAs receiving Federal funds under the Chapter 1 and MEP programs. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1980

Sections 200.90 and 201.57 contain information collection requirements. As required by the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these sections to the Office of Management and Budget for its review. (44 U.S.C. 3504(h))

These proposed regulations would affect SEAs and LEAs that have developed assessment systems that support their educational reform efforts but that are inconsistent with the national evaluation standards in subpart H of part 200 or subpart E of part 201. The Department needs the information to grant exceptions to the national evaluation standards.

A one-time public reporting and recordkeeping burden for this collection of information is estimated to average two hours per response for a maximum of 52 respondents, including the time

for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, room 3002, New Executive Office Building, Washington, DC 20503; Attention: Dan Chenok.

Invitation to Comment

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

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in rooms 4400 and 4100, respectively, Portals Building, 1250 Maryland Avenue, SW., Washington, DC., between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

List of Subjects

34 CFR Part 200

Administrative practice and procedure, Education of disadvantaged, Elementary and secondary education, Grant programs—education, Juvenile delinquency, Neglected, Private schools, Reporting and recordkeeping requirements, State-administered programs.

34 CFR Part 201

Children, Coordination, Education, Eligibility, Evaluation, Grant programs—education, Identification and recruitment, Local educational agencies, Migrant student record transfer system, Migratory children, Migratory workers, Needs assessment, Priorities, Reporting and recordkeeping requirements, Special educational needs, State educational agencies, Subgrants.

Dated: February 22, 1994.

Richard W. Riley,

Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: 84.010, Chapter 1 Program in Local Educational Agencies; 84.011, Migrant Education Basic State Formula Grant Program; 84.012, Chapter 1 Programs—State Administration)

The Secretary proposes to amend parts 200 and 201 of Title 34 of the Code of Federal Regulations as follows:

PART 200—CHAPTER 1 PROGRAM IN LOCAL EDUCATIONAL AGENCIES

1. The authority citation for Part 200 is revised to read as follows:

Authority: 20 U.S.C. 2701-2731, 2821-2838, 2851-2854, 2881-2901, unless otherwise noted.

2. A heading entitled "Exception" and a new § 200.90 are added to subpart H to read as follows:

Exception

§ 200.90 May an SEA request an exception to the requirements in this subpart?

(a) An SEA may request, in writing, an exception to the requirements in this subpart if the SEA desires to use a State assessment system developed to support its education reform efforts for the purpose of evaluating the effectiveness of its Chapter 1 programs.

(b) The Secretary may grant an SEA's request if the State assessment system provides information, that can be aggregated for each LEA as a whole, about the yearly performance of each Chapter 1 school. This information must

be from at least one grade level and must be based on student achievement in basic and more advanced skills and challenging subject matter.

(c) An SEA may request an exception that covers all or some of its LEAs.

(Authority: 20 U.S.C. 2729(a), 2835)

PART 201—CHAPTER 1—MIGRANT EDUCATION PROGRAM

3. The authority citation for Part 201 continues to read as follows:

Authority: 20 U.S.C. 2781-2782, unless otherwise noted.

4. A new § 201.57 is added to subpart E to read as follows:

§ 201.57 Exception to evaluation requirements.

(a) An SEA may request, in writing, an exception to the requirements in §§ 201.51(a)(1)(ii), 201.52(b)(1), 201.53,

and 201.55 if the SEA desires to use a State assessment system, developed to support its education reform efforts, for the purpose of evaluating the effectiveness of its Chapter 1 Migrant Education Program.

(b) The Secretary may grant an SEA's request if the State assessment system provides a statewide estimate of the yearly performance of migrant children in the State. This information must be from at least one grade level and must be based on student achievement in basic and more advanced skills and challenging subject matter.

(c) An SEA may request an exception that covers all or some of its operating agencies.

(Authority: 20 U.S.C. 2722, 2729, 2782, 2835)

[FR Doc. 94-5532 Filed 3-9-94; 8:45 am]

BILLING CODE 4000-01-P

Federal Register

Thursday
March 10, 1994

Part X

Department of Education

Racial Incidents and Harassment Against
Students at Educational Institutions;
Investigative Guidance; Notice

DEPARTMENT OF EDUCATION

Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance**ACTION:** Notice of investigative guidance.

SUMMARY: The Assistant Secretary for Civil Rights announces investigative guidance, under title VI of the Civil Rights Act of 1964, that has been provided to the Office for Civil Rights (OCR) Regional Directors on the procedures and analysis that OCR staff will follow when investigating issues of racial incidents and harassment against students at educational institutions. The investigative guidance incorporates and applies existing legal standards and clarifies OCR's investigative approach in cases involving racial incidents and harassment.

EFFECTIVE DATE: March 10, 1994.

FOR FURTHER INFORMATION CONTACT:

Jeanette J. Lim, U.S. Department of Education, 400 Maryland Avenue, SW., room 5036 Switzer Building, Washington, DC 20202-1174. Telephone: (202) 205-8635. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205-9683 or 1-800-421-3481.

SUPPLEMENTARY INFORMATION: Title VI of the Civil Rights Act of 1964 (title VI), 42 U.S.C. 2000d *et seq.*, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance. The Department of Education (Department) has promulgated regulations in 34 CFR part 100 to effectuate the provisions of title VI with regard to programs and activities receiving funding from the Department. The regulations in 34 CFR 100.7(c) provide that OCR will investigate whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with title VI and the Department's implementing regulations. The Department has interpreted title VI as prohibiting racial harassment.

The existence of racial incidents and harassment on the basis of race, color, or national origin against students is disturbing and of major concern to the Department. Racial harassment denies students the right to an education free of discrimination. To enable OCR to investigate those incidents more effectively and efficiently, a memorandum of investigative guidance has been distributed to OCR staff. The substance of this memorandum and the accompanying legal compendium are being published today with this notice

to apprise recipients and students of the legal standards, rights, and responsibilities under title VI with regard to this issue.

The guidance outlines the procedures and analysis that OCR will follow when investigating possible violations of title VI based upon racial incidents and harassment. The guidance relies upon current legal standards.

Dated: March 7, 1994.

Norma V. Cantu,

Assistant Secretary for Civil Rights.

Investigative Guidance on Racial Incidents and Harassment Against Students

This notice discusses the investigative approach and analysis that the Office for Civil Rights (OCR) staff will follow when investigating issues of discrimination against students based on alleged racial incidents—including incidents involving allegations of harassment on the basis of race—that occur at educational institutions.¹ This guidance is supplemented by a corresponding compendium of legal resources for detailed legal citations and examples.

Under title VI of the Civil Rights Act of 1964 (title VI) and its implementing regulations, no individual may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the ground of race, color or national origin under any program or activity that receives Federal funds. Racially based conduct that has such an effect and that consists of different treatment of students on the basis of race by recipients' agents or employees, acting within the scope of their official duties, violates title VI. In addition, the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of title VI. These forms of race discrimination are discussed further below.²

¹ This investigative guidance is directed at conduct that constitutes race discrimination under title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (title VI), and its implementing regulations at 34 CFR Part 100, and not at the content of speech. In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters.

² For the sake of simplicity and clarity, the term "race" shall be used throughout this guidance to refer to all forms of discrimination prohibited by title VI—i.e., race, color, and national origin.

Jurisdiction

In all cases, OCR must first decide whether it has jurisdiction over claims involving racial incidents or harassment. Under the Civil Rights Restoration Act of 1987,³ OCR generally has institution-wide jurisdiction over a recipient of Federal funds.

If an institution receives Federal funds, title VI requirements apply to all of the academic, athletic, and extracurricular programs of the institution, whether conducted in facilities of the recipient or elsewhere. Title VI covers all of the uses of property that the recipient owns and all of the activities that the recipient sponsors. Title VI covers all of these operations, whether the individuals involved in a given activity are students, faculty, employees, or other participants or outsiders.

Standard Different Treatment by Agents or Employees

As with other types of discrimination claims, OCR will first apply a standard different treatment analysis to allegations involving racial incidents perpetrated by representatives of recipients. Under this analysis, a recipient violates title VI if one of its agents or employees, acting within the scope of his or her official duties, has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities or privileges provided by the recipient.⁴ In applying this standard different treatment analysis, OCR staff will address the following questions—

(1) Did an official or representative (agent or employee) of a recipient treat someone differently in a way that interfered with or limited the ability of a student to participate in or benefit from a program or activity of the recipient?

(2) Did the different treatment occur in the course of authorized or assigned duties or responsibilities of the agent or employee?⁵

³ See 42 U.S.C. 2000d-4 (1988) (amending title VI).

⁴ Note that such incidents can constitute violations of title VI even if they do not constitute "harassment," so long as they do constitute direct different treatment by agents or employees, as defined in this section, that interferes with or limits the ability of a student to participate in or benefit from the recipient's programs or activities.

⁵ As used throughout this investigative guidance, the determination as to whether an agent or employee of a recipient is acting within the scope

(3) Was the different treatment based on race, color, or national origin?

(4) Did the context or circumstances of the incident provide a legitimate, nondiscriminatory, nonpretextual basis for the different treatment?

Where, based on the evidence obtained in the investigation, questions 1-3 are answered "yes" and question 4 is answered "no," OCR will conclude that there was discrimination in violation of title VI under this standard different treatment analysis. If questions 1, 2 or 3 are answered "no," or if questions 1 through 4 are answered "yes," OCR will find no violation under this theory. If warranted by the nature and scope of the allegations or evidence, OCR will proceed to determine whether the agent's or employee's actions established or contributed to a racially hostile environment as described below. OCR also will conduct a "hostile environment" analysis where actions by individuals other than agents or employees are involved.

Hostile Environment Analysis

A violation of title VI may also be found if a recipient has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice (as discussed below).

Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment.

To establish a violation of title VI under the hostile environment theory, OCR must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment. Whether conduct constitutes a hostile environment must be determined from

of his or her official duties or employment must be made on a case-by-case basis, taking into account such factors as the relationship between the parties and the time, location and context of the alleged harassment.

the totality of the circumstances, with particular attention paid to the factors discussed below.

Severe, Pervasive or Persistent Standard

To determine whether a racially hostile environment exists, it must be determined if the racial harassment is severe, pervasive or persistent. OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved. The harassment must in most cases consist of more than casual or isolated racial incidents to establish a title VI violation. Generally, the severity of the incidents needed to establish a racially hostile environment under title VI varies inversely with their pervasiveness or persistence.

First of all, when OCR evaluates the severity of racial harassment, the unique setting and mission of an educational institution must be taken into account. An educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.

This is especially true for younger, less mature children, who are generally more impressionable than older students or adults. Thus, an incident that might not be considered extremely harmful to an older student might nevertheless be found severe and harmful to a younger student. For example, verbal harassment of a young child by fellow students that is tolerated or condoned in any way by adult authority figures is likely to have a far greater impact than similar behavior would have on an adult. Particularly for young children in their formative years of development, therefore, the severe, pervasive or persistent standard must be understood in light of the age and impressionability of the students involved and with the special nature and purposes of the educational setting in mind.

As with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim—especially the victim's race and age—when evaluating the severity of racial incidents at an educational institution. If OCR determines that the harassment was sufficiently severe that it would have adversely affected the enjoyment of some aspect of the recipient's

educational program by a reasonable person, of the same age and race as the victim, under similar circumstances, OCR will find that a hostile environment existed. The perspective of a person of the same race as the victim is necessary because race is the immutable characteristic upon which the harassment is based. The reasonable person standard as applied to a child must incorporate the age, intelligence and experience of a person under like circumstances to take into account the developmental differences in maturity and perception due to age.

To determine severity, the nature of the incidents must also be considered. Evidence may reflect whether the conduct was verbal or physical and the extent of hostility characteristic of the incident. In some cases, a racially hostile environment requiring appropriate responsive action may result from a single incident that is sufficiently severe. Such incidents may include, for example, injury to persons or property or conduct threatening injury to persons or property.

The size of the recipient and the location of the incidents also will be important. Less severe or fewer incidents may more readily create racial hostility in a smaller environment, such as an elementary school, than in a larger environment, such as a college campus. The effect of a racial incident in the private and personal environment of an individual's dormitory room may differ from the effect of the same incident in a student center or dormitory lounge.

The identity, number, and relationships of the individuals involved will also be considered on a case-by-case basis. For example, racially based conduct by a teacher, even an "off-duty" teacher, may have a greater impact on a student than the same conduct by a school maintenance worker or another student. The effect of conduct may be greater if perpetrated by a group of students rather than by an individual student.

In determining whether a hostile environment exists, OCR investigators will also be alert to the possible existence at the recipient institution of racial incidents other than those alleged in the complaint and will obtain evidence about them to determine whether they contributed to a racially hostile environment or corroborate the allegations.

Finally, racial acts need not be targeted at the complainant in order to create a racially hostile environment. The acts may be directed at anyone. The harassment need not be based on the ground of the victim's or complainant's race, so long as it is racially motivated

(e.g., it might be based on the race of a friend or associate of the victim). Additionally, the harassment need not result in tangible injury or detriment to the victims of the harassment.

If OCR finds that a hostile environment existed under these standards, then it will proceed to determine whether the recipient received notice of the harassment, and whether the recipient took reasonable steps to respond to the harassment.

Notice

Though the recipient may not be responsible directly for all harassing conduct, the recipient does have a responsibility to provide a nondiscriminatory educational environment. If discriminatory conduct causes a racially hostile environment to develop that affects the enjoyment of the educational program for the student(s) being harassed, and if the recipient has actual or constructive notice of the hostile environment, the recipient is required to take appropriate responsive action. This is the case regardless of the identity of the person(s) committing the harassment—a teacher, a student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents, or others. This is also true regardless of how the recipient received notice. So long as an agent or responsible employee of the recipient received notice, that notice will be imputed to the recipient.

A recipient can receive notice in many different ways. For example, a student may have filed a grievance or complained to a teacher about fellow students racially harassing him or her. A student, parent, or other individual may have contacted other appropriate personnel, such as a principal, campus security, an affirmative action officer, or staff in the office of student affairs. An agent or responsible employee of the institution may have witnessed the harassment. The recipient may have received notice in an indirect manner, from sources such as a member of the school staff, a member of the educational or local community, or the media. The recipient also may have received notice from flyers about the incident(s) posted around the school.

In cases where the recipient did not have actual notice, the recipient may have had constructive notice. A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In other words, if the recipient could have found out about the harassment had it

made a proper inquiry, and if the recipient should have made such an inquiry, knowledge of the harassment will be imputed to the recipient. A recipient also may be charged with constructive notice if it has notice of some, but not all, of the incidents involved in a particular complaint.

In some cases, the pervasiveness, persistence, or severity of the racial harassment may be enough to infer that the recipient had notice of the hostile environment (e.g., a racially motivated assault on a group of students). A finding that a recipient had constructive notice of a hostile environment meets the notice requirement of the analysis.

If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties (i.e., such that the individual has actual or apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment. If the recipient does not have a policy that prohibits the conduct of racial harassment, or does not have an accessible procedure by which victims of harassment can make their complaints known to appropriate officials, agency capacity—and thus constructive notice—is established.

The existence of both a policy and grievance procedure applicable to racial harassment (depending upon their scope, accessibility and clarity, and upon the acts of harassment) is relevant in the determination of agency capacity. A policy or grievance procedure applicable to harassment must be clear in the types of conduct prohibited in order for students to know and understand their rights and responsibilities. As discussed above, in the education context, the person from whose perspective the apparent authority of an agent or employee of a recipient must be evaluated is a reasonable student of the same age, intelligence and experience as the alleged victim of the harassment.

Finally, in order to find that the recipient had a duty to respond to notice of a racially hostile environment, OCR must examine the facts and circumstances to establish that the recipient knew or should have known that the conduct was of a racial nature or had sufficient information to conclude that it may have been racially based. OCR will consider whether the incident involved explicitly racial conduct or whether the circumstances indicate that, through symbols or other persuasive factors, the recipient should have recognized that the conduct was in fact, or was reasonably likely to have

been, racial (e.g., the hanging of nooses, random violence against minorities, etc.).

Recipient's Response

Once a recipient has notice of a racially hostile environment, the recipient has a legal duty to take reasonable steps to eliminate it.⁶ Thus, if OCR finds that the recipient took responsive action, OCR will evaluate the appropriateness of the responsive action by examining reasonableness, timeliness, and effectiveness. The appropriate response to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment. In addition, the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment created by students or nonemployees.

In evaluating a recipient's response to a racially hostile environment, OCR will examine disciplinary policies, grievance policies, and any applicable anti-harassment policies.⁷ OCR also will determine whether the responsive action was consistent with any established institutional policies or with responsive action taken with respect to similar incidents.

Examples of possible elements of appropriate responsive action include imposition of disciplinary measures, development and dissemination of a policy prohibiting racial harassment, provision of grievance or complaint procedures, implementation of racial awareness training, and provision of counseling for the victims of racial harassment.

Conclusion

OCR will investigate allegations of racial incidents where the incidents fall within its jurisdiction. Based on the facts and circumstances of each case, OCR will use either or both the standard different treatment analysis and the hostile environment analysis to determine whether title VI has been violated.

⁶Of course, a recipient can and should investigate and respond to individual racial incidents if and as they arise—regardless of whether any particular incident is severe enough by itself to establish a racially hostile environment under Title VI. By doing so in a timely and thorough manner, the recipient might prevent the development of a racially hostile environment.

⁷Of course, OCR cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment to the United States Constitution.

If OCR determines that an agent or employee, acting within the scope of his or her employment, treated someone differently on the basis of race, color, or national origin without a legitimate, nondiscriminatory reason for the treatment (i.e., direct different treatment), then OCR will conclude that Title VI was violated. If OCR determines that a racially hostile environment exists at a recipient, the recipient had notice of it, and the recipient failed to take adequate action in response to the hostile environment, OCR will also find a violation. If OCR determines that a hostile environment was not established, or that a hostile environment was established but that the recipient either (1) did not have notice of it; or (2) had notice of it and took adequate action in response, OCR will find no violation.

Appendix—Racial Incidents and Harassment Against Students—Compendium of Legal Resources

This compendium provides an outline summarizing key legal resources (including statutes, regulations, cases, and letters of findings) to serve as a reference for the Office for Civil Rights (OCR) staff in investigating possible discrimination against students based on racial incidents—including incidents involving allegations of harassment on the basis of race—that occur at educational institutions. It is intended to be used in conjunction with the investigative guidance on racial incidents and harassment, and follows the same general outline as that guidance.¹

The investigation and analysis of cases under title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, (title VI) relies, to a large extent, on case law developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, which prohibits discrimination on the basis of race, color, national origin, sex, and religion in employment.² See *Dillon*

¹ The investigation guidance is directed at conduct that constitutes race discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., (Title VI), and not at the content of speech. In cases in which verbal statements or other forms of expression are involved, consideration will be given to any implication of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters.

The term "race" shall be used throughout this compendium to refer to all forms of discrimination prohibited by Title VI—i.e., race, color, and national origin.

² Note that in addition to racial incidents/harassment cases, many sexual harassment cases are cited throughout this compendium—because the legal standards and theories applicable to these two different types of discrimination are similar. See *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 859–60 (3d Cir. 1990) (both racial and sexual

County District No. 1 and South Carolina State Department of Education, No. 84–VI–16 (Civil Rights Reviewing Auth. 1987); *United States v. LULAC*, 793 F.2d 636, 648–49 (5th Cir. 1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); and *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981). See also, generally, EEOC Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, No. N–915.002 (July 14, 1992).³

I. Jurisdiction

OCR must first decide whether it has jurisdiction over a claim involving racial incidents or harassment. OCR has jurisdiction if the complaint alleges that the racially based conduct occurred in the context of an operation of an elementary, secondary, or postsecondary school or institution, or other entity that is a recipient of Federal funds.

A. Title VI Prohibits Race Discrimination in Federally Funded Programs and Activities

Title VI prohibits race discrimination in programs and activities that receive Federal financial assistance. See also 34 CFR part 100 (regulations effectuating provisions of title VI).

B. OCR Has Institution-Wide Jurisdiction

Under the Civil Rights Restoration Act of 1987,⁴ OCR generally has institution-wide jurisdiction over a recipient of Federal funds.⁵

C. Allegation Must Relate to an "Operation" of Recipient

Discrimination must be alleged in an "operation" of a recipient. See 42 U.S.C. 2000d–4a.

D. Specific Discriminatory Actions Prohibited

The regulations implementing Title VI include provisions prohibiting discrimination based on race in terms of:

- (1) Services: Provision of services or other benefits. 34 CFR 100.3(b)(1)(iii).

harassment are actionable based on right to nondiscriminatory environment).

³ Of course, OCR will consider the differences between the contexts of employment and education.

⁴ See 42 U.S.C. 2000d–4 (1988) (the section which amends Title VI).

⁵ Note, however, that the Waggoner Amendment, 20 U.S.C. 1144(b), prohibits Federal agencies from directing or controlling the membership activities or internal operations of privately funded fraternities and sororities whose facilities are not owned by the recipient. This provision does not bar OCR from regulating recipients with respect to other activities of these groups.

(2) Privileges: Restriction of an individual's enjoyment of an advantage or privilege enjoyed by others. 34 CFR 100.3(b)(1)(iv).

(3) Participation: Opportunities to participate. 34 CFR 100.3(b)(1)(vi).

The regulations also include a general, catchall provision prohibiting race discrimination. See 34 CFR 100.3(b)(5).

II. Standard Different Treatment by Agents or Employees

As with other claims of race discrimination under Title VI, OCR should first apply a standard different (disparate) treatment analysis to allegations involving racial incidents perpetrated by representatives of recipients. In doing so, OCR must determine whether a student was treated differently than other students on the basis of race without a legitimate, nondiscriminatory, nonpretextual reason.

The basic elements of a different treatment case were set out by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (focusing on indirect evidence of such treatment), a Title VII employment case. See also *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

A. Prima Facie Case

(1) Identify the racial group to which the complainant belongs for purposes of differential treatment analysis.

(2) Determine whether the complainant was treated differently than similarly situated members of other racial groups with regard to a service, benefit, privilege, etc., from the recipient. See, e.g., *University of Pittsburgh*, OCR Case No. 03–89–2035 (campus police treated black students more severely than white students); *Roosevelt Warm Springs Institute for Rehabilitation*, OCR Case No. 04–89–3003 (similar).

B. Rebuttal of Prima Facie Case by Showing Legitimate, Nondiscriminatory Reason for Treatment

After a prima facie case of race discrimination has been established against the recipient, OCR must then determine whether the recipient had a legitimate, nondiscriminatory reason for its action(s) which would rebut the prima facie case against it.

C. Recipient's Rebuttal Overcome With Showing of Pretext

If the prima facie case of discrimination is rebutted, OCR must

next determine whether the recipient's asserted reason for its action(s) is a mere pretext for discrimination. Ultimately, however, the weight of the evidence must convince OCR that actual discrimination occurred. See *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993) (under title VII disparate treatment analysis, ultimate burden of persuasion regarding intentional discrimination remains at all times with plaintiff).

III. Hostile Environment Analysis

A violation of Title VI may be found if racial harassment is severe, pervasive, or persistent so as to constitute a hostile or abusive educational environment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sets similar standard for sexual harassment under title VII) (relying on *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (race discrimination can consist of an "environment heavily charged with ethnic or racial discrimination"), cert. denied, 406 U.S. 957 (1972)); *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) (reiterating *Meritor* standard). Accord, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412 (10th Cir. 1987); *Snell v. Suffolk County*, 782 F.2d 1094, 1102 (2d Cir. 1986); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (noting with approval that EEOC has consistently held that title VII gives employee right to "a working environment free of racial intimidation"). See also, e.g., *Defiance College*, OCR Case No. 05-90-2024 (violation where college was aware of "repeated" and "patently offensive" verbal and physical racial harassment committed by students).

Whether conduct constitutes a hostile environment must be determined from the totality of the circumstances. See *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) (under title VII, factors to consider may include frequency and severity of discriminatory conduct, whether it is physically threatening or humiliating or merely offensive, and whether it interferes with work performance; psychological harm is not required but may be taken into account like any other relevant factor); *Johnson v. Bunny Bread*, 646 F.2d 1250, 1257 (8th Cir. 1981) (court examined nature, frequency, and content of racial harassment, as well as identities of perpetrators and victims). See also *Snell*, 782 F.2d at 1103 (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (same standard for sexual harassment).

A. Harassment Must Be Severe, Pervasive or Persistent

1. Pervasive or Persistent

Where the harassment is not sufficiently severe, it must consist of more than casual or isolated racial incidents to create a racially hostile environment. Compare *Trenton Junior College*, OCR Case No. 07-87-6006 (title VI violated where college failed to provide adequate security for black basketball players who were subjected to a break-in, cross-burning, and placement of raccoon skins at their campus residences) with *University of California, Santa Cruz*, OCR Case No. 09-91-6002 (no finding of racial harassment where OCR found only isolated individual incidents over three-year period). See also, e.g., *Snell*, 782 F.2d at 1103 ("To establish a hostile atmosphere, * * * plaintiffs must prove more than a few isolated incidents of racial enmity * * *. Casual comments, or accidental or sporadic conversation, will not trigger equitable relief"); *Gates Rubber Co.*, 833 F.2d 1406; *Powell v. Missouri State Highway and Transportation Department*, 822 F.2d 798 (8th Cir. 1986); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986); *Henson*, 682 F.2d at 904 (quoting *Rogers*, 454 F.2d at 238).

OCR and Federal courts have found a hostile environment where there was a pattern or practice of harassment, or where the harassment was sustained and nontrivial. See, e.g., *Wapato School District No. 207*, OCR Case No. 10-82-1039 (Title VI violated where teacher repeatedly treated minority students in racially derogatory manner). Compare *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (hostile environment where use of derogatory terms was "repeated, continuous, and prolonged") with *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983) (hostile environment not created by isolated and allegedly unrelated racial slurs), cert. denied, 466 U.S. 972 (1984).

2. Severe

The severity of individual incidents must also be considered. See, e.g., *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, 1510-11 (11th Cir. 1989) (determination whether conduct is "severe and pervasive" does not turn solely on number of incidents; fact-finder must examine gravity as well as frequency) (decided under 42 U.S.C. 1981); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 578 (2d Cir. 1989) ("It is not how long the * * * obnoxious course of conduct lasts. The offensiveness of the individual actions

* * * is also a factor to be considered.").

Generally, the severity of the incidents needed to establish a racially hostile environment varies inversely with their pervasiveness or persistence. See EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.050 (Mar. 19, 1990) ("the more severe the harassment, the less need to show a repetitive series of incidents").

a. *Special mission and duties of educational institutions.* The unique setting and mission of an educational institution must be taken into account when OCR evaluates the severity of racial harassment under title VI. School officials have a duty to provide a nondiscriminatory environment conducive to learning. See generally 34 CFR part 100 (regulations prohibiting any form of race discrimination which interferes with educational programs or activities under title VI).

b. *Characteristics and circumstances of victim—especially race and age.* OCR must take into account the characteristics and circumstances of the victim on a case-by-case basis—particularly the victim's race and age—when evaluating the severity of racial incidents at an educational institution. See *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515-16 (D. Me. 1991) (the appropriate standard to apply in a "hostile environment racial harassment case is that of a 'reasonable black person'"). See also, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (discussing differences in perspectives of men and women toward sexual harassment, and need to examine harassment from perspective of reasonable victim with characteristic upon which harassment was based).

The reasonable person standard as applied to children is "that of a reasonable person of like age, intelligence, and experience under like circumstances." Restatement (2d), Torts, Section 283A (1965) (Comment b: "The special standard to be applied in the case of children arises out of the public interest in their welfare and protection * * *"). See also, e.g., *Honeycutt v. City of Wichita*, 247 Kan. 250, 796 P.2d 549 (Kan. 1990) (adopting Restatement standard); *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (S.C. 1982) (same); *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (Neb. 1981) (same).

c. *Nature of incident.* The nature of the incident(s) should also be considered. See, e.g., *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d at 1506-10 (hostile environment created where noose was hung twice at employee's workstation); *Watts v. New York City Police Department*, 724 F.

Supp. 99, 105 (S.D.N.Y. 1989) (same, based on two sexual assaults).

A single incident that is sufficiently severe may establish a racially hostile environment. See EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915.050 (Mar. 19, 1990) and cases cited therein; *Barrett v. Omaha National Bank*, 584 F. Supp. 22 (D. Neb. 1983), aff'd, 726 F.2d 424 (8th Cir. 1984) (sexually hostile environment established by sexual assault).

d. Size of recipient and location of incidents. The size of the recipient and the location of the incidents also may be important.

e. Identity of individuals involved. The identity, number, and relationships of the individuals involved will also be considered on a case-by-case basis. See, e.g., *Wapato School District No. 207*, OCR Case No. 10-82-1039 (racial harassment of students by teacher was particularly opprobrious).

f. Other incidents at the recipient. OCR will also consider other racial incidents at the institution. See, e.g., *Midwest City-Del City Public Schools*, OCR Case No. 06-92-1012 (finding of racially hostile environment based in part on several racial incidents at school which occurred shortly before incidents in complaint).

g. Harassment need not be directed specifically at complainant or tangibly harm complainant or victim. The regulations implementing Title VI provide that a complaint may be filed by "[a]ny person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part." 34 CFR 100.7(b). Thus, in hostile environment cases, the harassment need not be targeted specifically at the individual complainant. See *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (all sexual graffiti in office, not just that directed at plaintiff, was relevant to plaintiff's claim); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988) (evidence of sexual harassment directed at others is relevant to show hostile environment); *Gates Rubber Co.*, 833 F.2d at 1415 ("one of the critical inquiries in a hostile environment claim must be the environment" as a whole) (emphasis in original); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-59 (11th Cir. 1982) (hostile environment established where racial harassment made plaintiff "feel unwanted and uncomfortable in his surroundings," even though it was not directed at him).

The harassment need not be based on the ground of the complainant's or victim's race, so long as it is racially motivated. See, e.g., *Center Grove*

Community School, OCR Case No. 15-91-1168 (title VI violated where white girl was forced to withdraw from all-white school, as result of harassment by classmates which included note criticizing her association with black student at another school).

To establish a hostile environment, harassment need not result in a tangible injury or detriment to the complainant or the victim of the harassment. *Vinson*, 477 U.S. at 64. See also, e.g., *Harris v. Forklift Systems, Inc.*, 114 S.Ct. at 371 (under title VII several factors are considered including whether behaviors interfere with work performance; psychological harm is not required but may be taken into account like any other relevant factor); *Gilbert*, 722 F.2d at 1394 (environment "which significantly and adversely affects the psychological well-being of an employee because of his or her race" is enough to constitute title VII violation); *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981) (protection against race and sex discrimination extends to "psychological and emotional work environment").

B. Notice

A recipient has a duty to provide a nondiscriminatory educational environment, but it must somehow receive notice of racial harassment in order to be found responsible for it. See *Vinson*, 477 U.S. at 72; see also *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

1. Actual Notice

A recipient may be found liable for racial harassment if it has actual knowledge of the racially offensive behavior or actions. See, e.g., *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (liability exists if management-level employees were aware of barrage of offensive conduct); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (actual knowledge where victim complains of harassment to appropriate authorities); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

2. Constructive Notice

A recipient may be found liable where it reasonably should have known of the harassment—e.g., because the harassment was so pervasive that its awareness may be inferred. See *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) (liability may be imputed where employer knew or should have known about prior conduct of harasser toward other women), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990);

Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (constructive notice where employee harassed women on a daily basis); *Waltman*, 875 F.2d 468 (possibility of constructive notice where sexual graffiti existed in numerous locations); *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d at 1510-11; *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987).

If the alleged harasser is an agent or employee of a recipient, acting within the scope of his or her official duties (i.e., such that the individual has actual or apparent authority over the students involved), then the individual will be considered to be acting in an agency capacity and the recipient will be deemed to have constructive notice of the harassment. See, e.g., *Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.2d 178 (6th Cir.) ("scope of employment" standard for holding employers liable for supervisory harassment is based on traditional agency principles, such as when and where harassment took place, and whether it was foreseeable), cert. denied, 113 S.Ct. 831 (1992). See also EEOC Policy Guidance on Current Issues of Sexual Harassment, N-915.050 (Mar. 19, 1990) (apparent authority exists where third parties reasonably believe that actions of supervisor represent exercise of authority possessed by virtue of employer's conduct).⁶

In evaluating whether constructive notice should be imputed to a recipient, the availability, coverage and public dissemination of antidiscrimination policies and grievance procedures for students will be considered in determining whether the recipient has made a sufficient effort to become aware of racial incidents if and when they occur. See *Meritor Savings Bank*, 477 U.S. at 72-73 (existence of uninvoked grievance procedures and policies against discrimination is relevant to issue of employer liability for sexual harassment, but not dispositive).

C. Recipient's Response

1. Duty to Take Reasonable Steps to End Harassment

Once a recipient has notice of a racially hostile environment, it has a duty to take reasonable steps to eliminate it. If it fails to respond adequately to the hostile environment, then the recipient may be found to have

⁶ As discussed supra, in the education context, the person from whose perspective the apparent authority of an agent or employee of a recipient must be evaluated is a reasonable student of the same age, intelligence and experience as the alleged victim of the harassment.

violated title VI. See, e.g., *California State University, Chico*, OCR Case No. 09-89-2106 (inadequate response to racial harassment where university had no written grievance procedure and failed to interview most of the individuals involved); *Township High School District No. 214*, OCR Case No. 05-82-1097 (OCR found violation where school district failed to take adequate steps to correct repeated racial harassment by students, of which employees were aware). See also, e.g., *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (responsibility depends on gravity of harm, nature of work environment, and resources available); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988) (employer will be liable for failing to discover what is going on and to take remedial steps when actions are so numerous, egregious, and concentrated as to add up to campaign of harassment); *Paroline*, 879 F.2d 100 (4th Cir. 1989);

Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

2. Response or Remedy Should Redress Actual Problems

The appropriate response or remedy for a hostile environment should be tailored to redress the specific problems experienced at the institution. See, e.g., *Trenton Junior College*, OCR Case No. 07-87-6006 (region developed remedial plan with college that included staff training on racial harassment, payment of compensation to harassed students and individuals who assisted the students in arranging for their safety, implementation of special efforts—including financial aid—to recruit black students, and development of plan for handling future harassment complaints).

3. Response Must Reasonably Attempt to Prevent Recurrence

The responsive action taken by a recipient must be reasonably calculated to prevent recurrence and ensure that individuals are not restricted in their

participation or benefits as a result of a racially hostile environment created by students or non-employees. See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (response must be reasonably calculated to prevent further harassment under particular facts and circumstances of case at time allegations are made; courts should not focus solely on whether remedial activity ultimately succeeded, but should determine whether total response was reasonable); *Waltman v. International Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989) (response must be reasonably calculated to halt harassment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (employer liable where supervisor had full notice of harassment and did nothing to stop or investigate practice; employer must take all necessary steps to investigate and correct harassment—including warnings, appropriate discipline, and other means of preventing harassment).

[FR Doc. 94-5531 Filed 3-9-94; 8:45 am]

BILLING CODE 4000-01-P

Federal Register

Thursday
March 10, 1994

Part XI

Department of Agriculture

Cooperative State Research Service

Committee of Nine; Meeting; Notice

DEPARTMENT OF AGRICULTURE**Cooperative State Research Service****Committee of Nine; Meeting**

In accordance with the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92-463, 86 Stat. 770-776), the Cooperative State Research Service announces the following meeting:

Name: Committee of Nine.

Date: May 10-11, 1994, May 12, 1994.

Time: 8 a.m. to 5 p.m., 8 a.m.-Noon.

Place: Room 1066 South Building, 14th and Independence Avenue SW., USDA, CSRS, Washington, DC 20250.

Type of Meeting: Open to the public. Persons may participate in the meeting as time and space permit.

Comments: The public may file written comments before or after the meeting with the contact person listed below.

Purpose: To evaluate and recommend proposals for cooperative research on problems that concern agriculture in two or more States, and to make recommendations for allocation of regional research funds appropriated by Congress under the Hatch Act for research at the State Agricultural Experiment Stations.

Contact Person for Agenda and More Information: Dr. Walter R. Woods, Executive Secretary, U.S. Department of Agriculture, Cooperative State Research Service, room 346, Aerospace Building, Ag Box 2230, Washington, DC 20250-2230, Telephone: 202-401-6040.

Done at Washington, DC, this 2nd day of March 1994.

John Patrick Jordan,

Administrator, Cooperative State Research Service.

[FR Doc. 94-5576 Filed 3-9-94; 8:45 am]

BILLING CODE 3410-22-M

Thursday
March 10, 1994

Part XII

**Delaware River
Basin Commission**

18 CFR Part 401

Amendments to Administrative Manual—
Rules of Practice and Procedure;
Nonpoint Sources of Pollution; Special
Protection Waters; Final Rule and Notice

**DELAWARE RIVER BASIN
COMMISSION****18 CFR Part 401****Amendments to Administrative
Manual—Rules of Practice and
Procedure**

AGENCY: Delaware River Basin
Commission.

ACTION: Final rule.

SUMMARY: At its February 23, 1994 business meeting, the Delaware River Basin Commission amended its Administrative Manual—Rules of Practice and Procedure relating to the control of nonpoint sources of pollution in the drainage area to classified Special Protection Waters.

By the same action, the Commission amended its Comprehensive Plan, Water Code of the Delaware River Basin and Administrative Manual—Part III Water Quality Regulations. Supplementary background information and a summary of the amendments to the Comprehensive Plan, Water Code and Water Quality Regulations are published elsewhere in this issue of the **Federal Register**. Those amendments address new nonpoint sources on a project-by-project basis through the Commission's project review process under section 3.8 of the Delaware River Basin Compact as well as any other activities the Commission believes may generate increased nonpoint source pollution loads which could have a substantial impact on Special Protection Waters. In addition, the amendments address new and existing nonpoint sources on a priority watershed basis. For priority

watersheds, watershed nonpoint source management plans will be developed and implemented. Finally, the amendments encourage the development of watershed management plans prepared voluntarily and independently from these regulations. Processes to identify priority watersheds and develop watershed nonpoint source management plans are included in the amendments, as are implementation policies and exceptions.

The amendments to the Rules of Practice and Procedure add a new category to those now required to be submitted to the Commission for review and approval under section 3.8 of the Compact: Any project that the Executive Director may specially direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

EFFECTIVE DATE: June 1, 1994.

ADDRESSES: Copies of the Commission's Administrative Manual—Rules of Practice and Procedure are available from the Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628.

FOR FURTHER INFORMATION CONTACT: Susan M. Weisman, Commission Secretary, Delaware River Basin Commission: Telephone (609) 883-9500 X203.

SUPPLEMENTARY INFORMATION: The Commission held public hearings on the proposed amendments on June 16, 1993 and June 22, 1993 as noticed in the April 9, 1993 and June 16, 1993 issues of the **Federal Register** (Vol. 58, No. 67 and Vol. 58, No. 114). Based upon testimony received and considerable

deliberation, the Commission has amended its Administrative Manual—Rules of Practice and Procedure.

List of Subjects in 18 CFR Part 401

Administrative practice and procedure, Environmental impact statements, Freedom of information, Water pollution control, Water resources.

18 CFR Part 401 is amended as follows:

**SUBCHAPTER A—ADMINISTRATIVE
MANUAL****PART 401—RULES OF PRACTICE AND
PROCEDURE**

1. The authority citation for Part 401 continues to read as follows:

Authority: Delaware River Basin Compact, 75 Stat. 688.

2. Section 401.35(b)(18) is added to read as follows:

**§ 401.35 Classification of projects for
review under section 3.8 of the Compact.**

(b) * * *

(18) Any other project that the Executive Director may specially direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.

* * * * *

Delaware River Basin Compact, 75 Stat. 688.

Dated: February 25, 1994.

Susan M. Weisman,
Secretary.

[FR Doc. 94-5608 Filed 3-9-94; 8:45 am]

BILLING CODE 8360-01-P