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34 CFR Part 222
Impact Aid Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 222

RIN 1810–AB24

[Docket ID ED–2015–OESE–0109]

Impact Aid Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Impact Aid Program (IAP) regulations issued under title VII of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA or the Act). These regulations govern Impact Aid payments to local educational agencies (LEAs). The program, in general, provides assistance for maintenance and operations costs to LEAs that are affected by Federal activities. These regulations update, clarify, and improve the current regulations.

DATES: These regulations are effective January 31, 2017. For more information, see SUPPLEMENTARY INFORMATION.

FOR FURTHER INFORMATION CONTACT: Kristen Walls, U.S. Department of Education, 400 Maryland Avenue SW., room 3C103 LBJ, Washington, DC 20202. Telephone: (202) 260–3858 or by email: *Kristen.walls@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: January 31, 2017 is the due date for Impact Aid applications for fiscal year (FY) 2018, and these regulations will apply to our review of those and subsequent fiscal year applications. We will allow for early implementation of these regulations. For example, if before January 31, 2017, an applicant submits an application and can establish eligibility under these regulations (but not the prior regulations), we would consider the request as one for early implementation of these regulations and deem the applicant eligible.

Additionally, affected parties do not have to comply with the new information collection requirements in 34 CFR part 222 until the Department of Education (Department) publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) to this information collection requirement. Publication of the control number notifies the public that OMB has approved this information collection requirement under the Paperwork Reduction Act of 1995.

In the preamble of the NPRM, we discussed (pages 81481 through 81487) the major changes proposed in that document to improve, clarify, and update the regulations governing the IAP.

Under the ESEA, prior to amendment by the Every Student Succeeds Act (ESSA) (Pub. L. 114–95), the IAP statutory provisions were contained in title VIII. Payments for Federal Property were under section 8002 of the Act and Payments for Federally Connected Children were under section 8003 of the Act. Under the ESEA, as amended by ESSA, all IAP statutory provisions are now in title VII and references in this document are to the new statutory citations, *i.e.,* section 7002 for Payments for Federal Property, and section 7003 for Payments for Federally Connected Children. While comments received from the public may refer to either ''section 8003'' or ''section 7003,'' these regulations reference the current statutory sections.

The Department recognizes that there are changes to the statute under ESSA that may require additional regulatory action. However, the amendments in this regulatory action are related exclusively to the proposed changes in the NPRM that was published on December 30, 2015, in the **Federal Register** (80 FR 81477), which do not relate to the ESSA revisions. Any regulatory changes resulting from the passage of ESSA would be proposed in a separate NPRM.

Tribal Consultation: On December 30, 2015, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the **Federal Register** (80 FR 81477). The NPRM followed a process of consultation under Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments'') that began with a request for tribal input that we announced via the Office of Indian Education's listserv on July 2, 2015, and July 14, 2015, and continued with two nationally accessible tribal consultation teleconferences on July 15, 2015, and July 28, 2015. In the NPRM, we discussed this process in detail (80 FR 81477).

Public Comment: In response to our invitation to comment in the NPRM, 66 parties submitted comments. Twenty five comments encouraged consultation with teachers during the implementation of ESSA and two comments addressed appropriation levels for the Impact Aid Programs. We do not discuss these comments as they are not related to the regulations proposed in the NPRM. Thirty nine comments related directly to the proposed regulations. We discuss the substantive issues under the section numbers to which the comments pertain. Several comments did not pertain to a specific section of the proposed regulations. We discuss these comments based on the general topic area. In addition, the Department solicited comments on three topics, as follows:

- What are some alternative methods for counting federally connected children besides the parent-pupil survey form or source check collection tools?
- As these regulations would require source checks for children residing on Indian lands and eligible low rent housing, what types of technical assistance would you like the Department to provide to properly educate and inform LEAs on the source check process?
- As the Department is beginning to look at alternative sources for data collection, can you propose ways in which online data collection might be used to facilitate the data collection process? This may include but is not limited to the online collection of parent-pupil survey forms and the use of student information systems for data collection.

The comments received related to these questions will be discussed in the related general topic area in the following section. Generally, we do not address comments unrelated to the IAP, and we do not discuss technical and other minor changes.

Analysis of Comments and Changes: An analysis of the comments and any changes from the regulations as proposed in the NPRM follows.

Methods of Data Collection

Comments: Many commenters supported the addition of an electronic method to the approved systems of application data collection in § 222.35, specifically one that would leverage existing student information systems (SISs). In general, the commenters felt that the use of paper data collection is antiquated and costly as LEAs must support two different reporting systems for data collection and warehousing. One commenter stated that the use of an electronic student count would significantly reduce the burden of the Impact Aid application process, would be more cost-effective, reduce staff time for LEAs that choose to use this method, and would potentially improve the accuracy of the count. The commenter also stated that an electronic count would make the audit process and

general oversight of the program less burdensome for Department staff.

Two commenters requested increased flexibility around the requirement that source check and parent-pupil survey forms be signed on or after the LEA's chosen survey date, to allow LEAs to use electronic information collected during the school registration process. One commenter proposed allowing forms that have been signed within 60 days of the survey date. Another commenter proposed using registration data in lieu of the parent-pupil survey form.

A few commenters suggested that electronic methods be explicitly identified as allowable in the regulations. One commenter requested that electronic signatures be added as a valid form of certification and one commenter requested that references to written records be removed from the regulations.

Multiple commenters suggested the Department find ways to use the new military student identifier, required by title I of the ESEA, as amended by the ESSA, to streamline data collection for Impact Aid.

One commenter suggested that the source check document be revised to add a column to document the number of children who reside on Federal property or whose parents work on Federal property. The commenter stated that this might require collaboration with certifying officials; however, it would be helpful to the LEAs counting federally connected children.

Discussion: We support methods of electronic data collection that decrease burden for school districts while still providing required evidence of the connection between students and Federal properties on a specific survey date. To that end, we are investigating various SISs and their capabilities as they relate to the IAP requirements for data collection. To provide more flexibility on data collection methods, including electronic systems or hybrids of parent-pupil surveys and source checks, we are adding a paragraph to § 222.35 that allows an LEA to use an alternate method of data collection with the Secretary's approval. Thus, an LEA's SIS could be one such method, if an LEA can demonstrate that its SIS is capable of collecting and generating data in a manner that provides all of the information needed by IAP to verify student eligibility.

The membership count, both total membership and federally connected membership, is a snapshot of the LEA's student composition on a particular date. It allows analysis of correlated data at a particular point in time. To ensure accuracy of student count numbers submitted on an application, an LEA must verify annually the parent's military duty status or employment location and student's residence location to confirm the student's federally-connected eligibility. Under the current regulations, unchanged by these final regulations, the LEA may select as a survey date any day between the fourth day of the school year and January 30 (§ 222.34(a)(2)). Although registration data may provide a baseline to identify children the LEA believes to be federally connected, information obtained during registration, including a student's residence or a parent's place of employment, can change at any time and may be outdated by the survey date. For example, an LEA must have a mechanism, electronic or otherwise, for parents and/or certifying officials to update the information or confirm that there have been no changes since registration, to ensure that the district is only claiming eligible students whom the district is actually educating as of a specific date during the school year, and to ensure that those students meet all eligibility requirements as of that date. The current regulations did not specify that the parent must sign a parent-pupil survey form on or after the survey date; as a result, these final regulations clarify this requirement. With the addition of a third option for data collection, a district, for example, may be able to have a housing, Indian lands official, or military official verify data, which could eliminate the burden of having parents re-confirm data or sign a parent-pupil survey form.

With regard to electronic signatures, there is nothing in the current regulations that prevents an LEA from using an electronically signed parent-pupil survey form or source check form. The Department's interpretation of the word ''written'' does not preclude the use of electronic records.

As the Department works with States and LEAs to implement the new military identifier required by the ESEA, as amended by the ESSA, it may become appropriate to use the identifier in lieu of, or as a component of, the count of eligible children under the IAP. The Department may issue guidance to LEAs on this issue in the future.

With regard to the suggestion for revising the source check document, there is no required source check form that districts must use. Rather, the Department provides sample source check templates for the convenience of the LEA. The LEA may add information to enhance the value of the document as long as the information needed to verify the child's residence location or the parents' place of employment is included.

Changes: Section 222.35 is revised by adding a new paragraph (c) that allows an LEA to use an alternate method of data collection with the Department's approval. In addition, in paragraph (a)(4), language is added to clarify that the parent's signature on a survey form must be dated on or after the LEA's survey date.

Technical Assistance

Comments: Several commenters suggested making available recorded Webinars and an annual handbook to educate LEAs on the required methods of data collection.

One commenter appreciated efforts to keep LEAs informed through the use of listservs and Webinars. The commenter recommended, however, that changes to the application or the accompanying forms should be posted to the Department's Web site and sent to each LEA. The commenter recommended that the Department also distribute the documents to LEAs because Webinar participation is limited and many LEAs cannot participate.

The commenter also recommended that an automatic verification system for application submissions, including for signature and assurance pages, be implemented. The commenter also requested that the application system not be shut down during the application period. Finally, the commenter requested additional clarification about who may sign a source check document.

Discussion: We appreciate the suggestions to improve technical assistance to grantees. The Department continues to review ways to increase and improve communication. With regard to the request for additional technical assistance for source check documents, we will work to improve our technical assistance and outreach on all aspects of the Impact Aid Program including this and related regulatory matters.

Changes: None.

Definitions—Membership (§ 222.2)

Comment: One organization expressed support for the clarification of the definition of membership, in particular, that a student must reside in the State in which the LEA is located except when there is a formal agreement between States.

Discussion: On occasion, certain LEAs have reported in membership children who reside in another State. Children who reside in one State and attend school in a different State are generally excluded from Impact Aid. Under the

current regulations, eligible students must be supported by State aid. States typically do not provide State education aid for children who reside in other States. The amended regulation clarifies the rule and provides two exceptions to it: one is statutory (section 8010(c)) and the other is for children who are covered under a formal tuition or enrollment agreement between two States.

Changes: None.

Definitions—Parent Employed on Federal Property (§ 222.2)

Comment: Two organizations supported updating § 222.2 to include the circumstance of telework. One commenter stated that the updated regulation makes sense, given how technology has changed the way people work. One commenter discussed telework in relation to distance learning, using the example of a school district on eligible Indian lands that hires a teacher who may sometimes work on the eligible property, from home, or on a non-tribal or non-Federal property.

Discussion: As telework is becoming more common among Federal workers, it is necessary to recognize this change. With respect to non-Federal employees who telework, the LEA should use the definition of ''Parent employed on Federal property,'' in paragraphs (1)(ii), and (2) of § 222.2(c). The amended definition of ''Parent employed on Federal property'' in paragraph (1)(i) addresses telework only for Federal employees, and provides that the eligibility of the child depends on the location of the parent's regular duty station, and not physical working location, on the survey date.

Changes: None.

Comment: Numerous commenters expressed concerns over the proposed changes to the exception in the definition of a ''parent who is employed on Federal property,'' specifically a parent who is not employed by the Federal government and reports to work at a location not on Federal property. Several commenters asked the Department to reword the regulation to improve the clarity of the provision.

One commenter stated that the proposed regulation would exclude parents whose job is providing services on Federal property, but who are not Federal employees and whose duty station is not on Federal property. The commenter urged the Department to refrain from excluding these parents.

Discussion: The change in this definition is intended to clarify, but not change the definition of a parent employed on Federal property. Under this definition, as the current regulation has been implemented and under this clarification, simply performing a service on a Federal property does not demonstrate that a person is employed on Federal property. This definition will not be applied differently than it has in the past.

In response to the commenter who stated the regulation would exclude parents whose job is providing services on Federal property, but who are not Federal employees and whose duty station is not on Federal property, the Department clarifies that such parents are currently excluded from the definition of a ''parent employed on Federal property.'' These individuals would continue to be excluded from that definition under the amended regulation.

The Department acknowledges the complexity of the regulation and the concerns of the commenters. To better illustrate the rule, the Department added examples of eligibility and ineligibility under the regulation, depending on the parent's employment situation.

Changes: We have added examples of when parents meet the definition of a ''parent employed on Federal property,'' and when they do not.

Amendment Deadline (§§ 222.3(b)(2) and 222.5(a)(2) and (b)(2))

Comments: Many comments were submitted regarding the change in the amendment deadline from September 30 to June 30 in both § 222.3 and § 222.5. Most comments recognized that the shortened amendment period would facilitate prompt payments, and supported the change. Two commenters were concerned that some LEAs that amend their applications in September may have difficulty with the change. One commenter suggested that the Department increase communications about this change clearly and regularly so that LEAs that have typically amended their applications in September can properly prepare for the change. One commenter opposed shortening the deadline as it would pose a problem for LEAs with large memberships. The commenter stated that because the shortened timeframe and the amendment date fall at the end of most LEAs' fiscal year, the change poses significant problems for LEAs with large memberships.

Discussion: Each year many LEAs submit applications in January showing incomplete counts of eligible children and provide complete and accurate information through amendments submitted as late as September 30. This practice impedes the Department's ability to review the applications and prepare initial payments in a timely fashion. The Department is expected to make Impact Aid payments generally no later than two years after funds are appropriated (ESEA section 7010(d), codifying a provision previously in the National Defense Authorization Act (NDAA) of 2013)). A June 30th amendment deadline will ensure that the Department receives complete application information that can be reviewed in a timelier manner. LEAs with large membership may need to revise their business processes to accommodate the change. The Department appreciates that many commenters support this change and the Department will take measures to provide technical assistance and inform LEAs of changes included in this final rule.

Changes: None.

Second Membership Count § 222.5(b)(1)

Comment: Numerous commenters opposed the proposal to remove the second membership count provisions in current § 222.34.

Discussion: The Department appreciates the comments advocating against the proposed change, and retains the second membership count provisions in current § 222.34. The proposed regulation that would have updated § 222.5(b)(1) to be consistent with this proposed change is no longer necessary. A more complete discussion related to the second membership count can be found in the subsequent discussion of § 222.34.

Changes: The proposed revisions in §§ 222.33, 222.34 and § 222.5(b)(1) to remove the second membership count provisions in the current regulations are not included in these final regulations.

Section 7002 (§§ 222.22–222.24)

Comments: Several commenters opposed the inclusion of all payments in lieu of taxes (PILTs) in the calculation of other Federal revenue, as described in § 222.22. The commenters stated that including PILTs in the payment calculation would cause some current grantees to become ineligible for funding. One commenter argued that the current payment formula may artificially depress an LEA's maximum payment, so that an LEA with PILTs included as other Federal revenue would be considered substantially compensated. One commenter noted that payments for PILTs can be inconsistent, and including them in the payment calculation could cause budgetary turmoil for grantees.

Discussion: Comments related to PILTs informed the Department's further research into the issues of PILTs

and how they are categorized and disbursed. PILTs that are made by the Department of Interior (DOI) under the authority of Chapter 69 of Title 31 of the U.S. Code are made based only on the presence of tax-exempt Federal property regardless of whether activities are taking place on the Federal property. See ''PILT (Payments in Lieu of Taxes): Somewhat Simplified,'' Congressional Research Service (2015), available at *www.fas.org/sgp/crs/misc/RL31392.pdf.* In fact, in calculating the amount of PILT payments, the DOI subtracts payments from Federal activities, including payments from the Forest Service under the Bankhead-Jones Farm Tenant Act, the Secure Rural Schools and Community Self-Determination Act, and others; payments from Bureau of Land Management (BLM) under the Taylor Grazing Act, Mineral Lands Leasing Act, and others; payments from the Fish and Wildlife Service, and payments from the Federal Energy Regulatory Commission. While those payments from other Federal agencies are due to activities on the Federal property, the DOI PILTs are not. Section 7002 of the Act specifically requires revenues deriving from activities on Federal property to be taken into account, but not other revenues. This further analysis of PILTs indicates that PILTs from DOI should not be considered as revenue generated from activities on the Federal property, and, we have revised the regulation to clarify this. Such DOI PILTs will not affect an LEA's eligibility for section 7002 Impact Aid payments, or the maximum amount of such payments. This interpretation is consistent with our current policy. Applicants will continue to report all revenues deriving from activities on the Federal property (*e.g.,* from mining, forestry, grazing etc.), but need not report the DOI PILT revenues.

Changes: The final regulation clarifies that only payments for activities conducted on Federal property will be included as other Federal revenue in the ESEA section 7002 eligibility and payment calculations. The final regulation also gives examples of the types of Federal revenue that must be reported, and stipulates that Impact Aid and other Department payments should not be reported as Federal revenue.

Comments: Two commenters supported the proposed changes regarding the eligibility requirements for consolidated LEAs and calculating a single real property tax rate at §§ 222.23 and 222.24.

Discussion: We finalize these regulations as proposed.

Changes: None.

Definition of Free Public Education—Exclusion of Charter School Start Up Funds (§ 222.30)

Comments: Two commenters raised concerns about the eligibility of charter schools in general. The Department received three comments in support of the provision that would exclude charter school startup funds from the calculation of determining whether an LEA receives a substantial portion of Federal funds under § 222.30(2)(ii). Another commenter suggested that the regulations specify the types of charter school funds to be excluded, and the process by which the Secretary determines whether Federal funds provide a substantial portion of the LEA's educational program in relation to other LEAs in the State. All commenters agreed that the provision is consistent with the intent of the statute.

Discussion: Some charter schools are eligible for Impact Aid because they qualify as an ''LEA'' under State law and meet the other eligibility requirements. In order for any LEA to be eligible for Impact Aid, it must demonstrate that its funding comes primarily from non-Federal revenue sources. Under the current statute, when determining Federal revenue amounts, the Impact Aid Program does not include Title I Part A funds.

Under section 7003(a) of the Act, an LEA can only claim students for Impact Aid if the LEA provides a free public education to those students. Section 7003 Impact Aid funds are intended to replace local revenues lost due to Federal activity. Under the current regulations, if Federal funds are providing for the educational program (*e.g.,* schools funded by DOI), that Federal source already compensates for the lack of local tax revenue. As a result, the LEA is not eligible for Impact Aid for those students.

The amended regulation would exclude Federal charter school startup funds from the calculation of whether Federal funds provide a substantial portion of an LEA's program. These funds are generally available in the first two years of a charter school's operations; the funds can be used for a host of purposes other than current expenditures, and are not long-term funding sources.

Under the amended regulation, in analyzing the share of the education program funded by Federal sources, the Department would compare the LEA's finances to other LEAs in the State to account for circumstances unique to the State. After considering whether to specify the exact Federal grant program funds that may be excluded under this provision, we decline to do so in these regulations, because those programs may change over time. Program staff will coordinate with the Charter Schools Program to ensure that the appropriate funds are excluded.

While the calculation of a substantial portion of Federal funds is not changing under these regulations, we also decline to state a specific formula for that analysis, to be able to fairly analyze the portion of Federal funding for LEAs in different States. The Department compares an LEA's portion of Federal funding to other LEAs in that State to avoid funding disparities among States that may skew or create a disadvantage for an LEA. The amount of Federal funding that an LEA receives, as a percentage of all revenues, can vary greatly from State to State. For example, for the FY 2016 Impact Aid application year, State X LEAs had a Federal contribution average of 12.13 percent whereas State Y LEAs had a Federal contribution average of 6.33 percent. Comparing the percentage of Federal funds to all LEA revenues for State Y LEAs and State X LEAs could disadvantage State X LEAs. For that reason, we continue to resolve these questions on a case-by-case basis comparing LEAs only to other LEAs in the State.

Changes: None.

Timely and Complete Applications (§§ 222.32 and 222.33)

Comments: Many commenters opposed the proposed language in § 222.32 that clarifies that an LEA's submission of its membership count of federally connected students must be part of the LEA's timely and complete application. No commenters favored this change. Commenters interpreted this change to mean that an LEA may not amend its membership count.

Discussion: This regulatory change does not prohibit an LEA from amending its application under the conditions specified in § 222.5(b), including when data become available that were not available at the time of the application.

The current regulations require that an applicant submit a complete and signed application by the deadline (34 CFR 222.3(a)(1)). The Department's longstanding policy requires an accurate membership count as of the application deadline. The LEA's authorized representative certifies, by signing the application cover page, that the statements contained in the application and the data included are, to the best of the authorized representative's knowledge, true, complete, and correct.

Recent application reviews revealed that some LEAs have estimated the number of eligible federally connected students at the time of application, and then used the amendment process to gain time to complete the membership count. This is contrary to the attestation of the authorized representative who signs the application and is contrary to current program rules. This practice delays reviews and payments for all LEA applicants.

Under § 222.5(b)(1), an LEA may amend its application based on actual data regarding eligible Federal properties or federally connected children if the data were not available at the time the LEA filed its application and are acceptable to the Secretary. The survey data should be complete and should reflect data available before the application is submitted. The LEA may report verified data counted through a parent-pupil survey form or a source check document or an approved alternate method (see § 222.35). For example, if an LEA has 1,000 federally connected children in membership, but, at the time of application, has only received 100 parent-pupil survey forms, the LEA may claim those 100 federally connected children; that is the data available when the LEA files the application. If the LEA received 900 additional forms after the application was submitted, or if an additional source check document post-application shows 900 students, the LEA may amend its application to include the newly-documented federally connected children.

The amended regulation in § 222.32 is intended to underscore the importance of accurate applications. Complete and accurate application data supports timely processing of all applications and speeds payments to all LEAs. To further explain that the student count data submitted with an application must be verified data and not an estimate, in § 222.33(c) we revised the proposed language that the data be ''complete by the application deadline'' to requiring that it be ''accurate and verifiable'' by the deadline.

Changes: In section 222.33(c) we change ''complete'' to ''accurate and verifiable'' in describing the student count data to be submitted with an application.

Second Membership Count (§ 222.33–222.34)

Comments: Numerous commenters opposed the proposed elimination of a second membership count. Commenters generally stated that eliminating the second membership count might unfairly penalize an LEA that experiences an influx of federally connected children between February and May. Commenters asked to retain this provision as it is important for LEAs located near military installations whose student enrollment may increase unexpectedly due to military activities. In these instances eliminating the option to submit a second membership count would delay increased Impact Aid funding for a full school year.

Discussion: While this provision is seldom used, the Department recognizes the provision's importance to certain applicants whose student enrollment may increase unexpectedly during the school year.

Changes: The proposed changes to eliminate the second membership count in §§ 222.5(b)(1), 222.33, and 222.34 are not included in the final regulations.

Parent-Pupil Survey Forms and Source Checks (§§ 222.33–222.35)

Comments: The comments to the proposed changes generally supported the clarification of information required on a parent-pupil survey form. The commenters did, however, request that the Department allow an applicant to report multiple children from one family on the same form, to reduce burden on parents with multiple children.

Commenters also universally opposed the requirement that LEAs document children residing on eligible Indian lands and in eligible low-rent housing with a source check form. The commenters stated that requiring the source check could increase the administrative burden for some LEAs and force a duplicative process, particularly for large LEAs. Others argued that some LEAs have sophisticated operations in place to collect data through a parent-pupil survey; it could be burdensome for those districts to change their methods. Further, commenters stated that there are only two current data-collection methods; the authority over which method to use should remain a local decision.

A few commenters asked for flexibility in requiring a complete address or legal description for certain Federal properties. The commenters stated that certain Federal agencies prohibit employees from sharing their work location. These commenters contend that funding for many federally connected children is being lost due to the national security concerns of other Federal agencies.

Discussion: The Department appreciates the support for the clarification of the information required on a parent-pupil survey form. With regard to the issue of whether multiple children can be reported on one form, there is no regulatory prohibition against this practice, either in the current or these final regulations. The Department will permit this practice; however, the forms must indicate if the children are to be split among different application tables. For example, if one military family resides on a military installation with three children claimed on one survey form, and one of the three children has a disability and an active Individualized Education Plan (IEP), then that child should be reported on one application table, while the other two children should be claimed on another application table. When more than one child is listed on one form, the LEA is responsible for clearly documenting the application table on which the children were reported. The LEA also ensures the form shows all required information for each child listed.

The opposition to requiring source checks for children residing on eligible Indian lands and children residing on eligible low rent housing was uniform. The Department will not finalize the proposed amendment to § 222.35, and will continue to allow LEAs to use parent-pupil survey forms for all children. However, if there is no evidence establishing the eligibility of the Federal properties for children who reside on Indian lands or in low-rent housing, additional certifications may be required. The LEA is responsible for ensuring that the properties where the children reside are eligible Federal properties, and must be able to provide the supporting documentation establishing the eligibility of the property. For example, an LEA may document 50 children residing on Indian lands through the use of parent-pupil survey forms. The LEA must also have on file documentation establishing that the Indian lands claimed meet the statutory definition of ''Indian lands.'' The LEA may be required to have the Bureau of Indian Affairs (BIA) or a delegated tribal official (with access to the property records) certify that the lands meet one of the categories of eligible Indian lands under the definition. To meet this requirement the LEA could send to the appropriate official the legal descriptions of the lands where the children reside, to have the list certified as eligible Indian lands.

The Department appreciates the concerns expressed regarding lost funds for federally connected children whose parents are prohibited from releasing their work locations. Impact Aid funding is based on the identification of eligible Federal properties, with the

exception of payments for children described in sections 7003(a)(1)(D)(i) and 7003(a)(1)(D)(ii) of the Act. The Department is responsible for ensuring that payments are made correctly and within the limits of the statute. Many Federal government employees do not work on an eligible Federal property. The Department will work with other Federal agencies and LEAs to try to obtain an approved method to identify the Federal property. The current regulations in §§ 222.35(a)(1)(ii)(A) and (C) allow for alternative location information for a child's residence or a parent's place of employment, and this flexibility is retained in these final regulations (paragraphs 222.35(a)(2)(ii)(A) and (a)(3)(i)(B)). For example, alternative location information may be the name of a widely recognized military installation or Federal site for which the name and location are commonly known but typically not represented by a street address, such as the Pentagon or Jewel Cave National Monument.

To further assist LEAs who have difficulty obtaining information for students residing with a parent on Federal property, and for parents working on Federal property, and for the reasons stated above in the discussion of ''Methods of Data Collection,'' we have added paragraph (c) to § 222.35 to permit an LEA to propose a third option for collection of data.

Changes: In § 222.35 we add paragraph (c) to permit a third data collection option. The proposed change to require a source check for children residing on eligible Indian lands and children residing on eligible low rent housing in proposed § 222.35(b)(1) is not included in the final rule.

State Average Attendance Ratios (§ 222.37)

Comments: Uniformly, all comments on this section supported the Department's proposal to allow any State to use a State average daily attendance (ADA) ratio. Commenters stated that the proposed regulation will expedite the payment process by allowing the Secretary to calculate an ADA ratio for the 15 States that do not currently use a ratio.

Discussion: The Department appreciates the support for this amended regulation.

Changes: None.

Rationale for the Use of Special Additional Factors for Determining Generally Comparable LEAs (§ 222.40)

Comments: One commenter read the proposed regulation to mean that an LEA would be required to submit generally comparable district (GCD) data at the time of application, which would shift the data collection burden from the Department to the LEA.

One commenter said that a rationale for the use of special additional factors is unnecessary, as the use of factors is already outlined in the regulations. Two commenters proposed that an SEA submit an overarching policy statement on the use of additional factors in the State, and not be required to submit a rationale for each individual LEA. The policy statement would only need to be updated if the policy changed.

Two commenters mentioned that the Department has recently rejected the data provided by the SEA, or has asked for it in a manner or format that is inconsistent with the States' policies.

Discussion: This regulatory change does not affect the process by which the SEA annually submits the GCD data, at the request of the Department; the LEA is not required under this provision to submit the information. The Department sends a memo to the SEAs each year asking for GCD data and provides the regulations that specify how the data should be presented. The LEA does not normally play a role in the collection or submission of GCD data. The proposed regulation would not have changed this process; however, we have revised § 222.40(d)(1)(iii) to clarify that the SEA, not the LEA, must submit the GCD data at the request of the Department.

Section 222.40(d)(1) includes examples of special additional factors that can be used in determining GCDs, used for both the local contribution rate determined under § 222.40, and for heavily impacted districts under the limited circumstances in § 222.74. Consistent with the ESEA (7703(b)(1)(C)(iii)), regulations (§ 222.40(d)), and longstanding program policy, we require an SEA that uses a special additional factor or factors in selecting GCDs to submit the resulting local contribution rates and a description of the additional factor or factors of general comparability and the data used to identify the new group of generally comparable LEAs. The current regulations in § 222.40(d) contain the rules for what type of additional factors may be considered, and require that the factors be objectively defined and must ''affect the applicant's cost of educating its children.'' The Secretary analyzes the data to ensure that it meets the purposes and requirements of the statute and regulations. In order to make this determination, the SEA submission must include a description of how the selected factors increase the education costs for the LEA.

In response to the commenter that argued that the rationale for the use of special additional factors is unnecessary because examples of special additional factors are outlined in the regulations, the Department notes that the presence of an example does not suggest that it would be an acceptable factor for every LEA; the regulations require that the factor must increase costs for that particular LEA. Thus each LEA's individual characteristics will dictate the suitable cost factors for selecting its GCDs. For the reasons stated above, an SEA cannot submit one overarching memo to explain the use of special additional factors for all the LEAs in the State.

With regard to the comment concerning SEA data that IAP rejected, the regulations in § 222.39 specifically describe how the data must be sorted to identify GCDs. If a State submits data that is not organized in such a way that the analysis can be conducted under § 222.39, the Department may ask the SEA to produce the data in a manner that is consistent with § 222.39.

Changes: Proposed § 222.40(d)(1)(iii) is revised to clarify that the SEA, not the LEA, submits the GCD data at the request of the Department, and to specifically require that an SEA that uses any additional factor will be required to submit a rationale for its use with its annual submission of generally comparable district data.

Eligibility for Heavily Impacted LEAs (§ 222.62)

Comments: The majority of respondents opposed the proposed regulation that would require LEAs to submit heavily impacted data with the application. They claimed that this will place an additional burden on LEAs applying under section 7003(b)(2) of the Act. One commenter appreciated the need to speed the processing of applications for these LEAs; however, the commenter opposed shifting the data collection burden by requiring LEAs applying for section 7003(b)(2) funding to provide the tax rate, per-pupil expenditure, and federally connected membership percentage data with the application. The commenter contended that LEAs—even continuing LEAs—may not have access to this information, and if they do, they may not have access to this information by the application deadline. The commenter was concerned that LEAs applying for consideration under section 7003(b)(2) of the Act would have to rely on the State to provide this information in a timely manner. With limited resources at the State level, an LEA may not be able to obtain the data

by the application deadline, thereby losing its ability to be considered for funding under this provision. The commenter was further concerned that this proposal would shift the collection of this data from the Department to LEAs, and increases the administrative burden for LEAs. The commenter encouraged the Department to consider clearly stating the eligibility requirements on the application form as that might reduce the number of ineligible districts that apply.

A few commenters had concerns about the Department using data other than that submitted by the SEA. One commenter stated that the SEA was better equipped to make calculations with its data than the Department. Another commenter suggested that the Department provide technical assistance to the heavily impacted LEAs, including the name of the SEA contact. The commenter said that LEAs feel ''out of the loop'' and some LEAs have different tax rates than what the SEA provides to the Department.

One commenter noted that the timing involved with SEAs and LEAs reporting tax rates may not allow for changes in the tax rates. The commenter was concerned that any changes may not be reported to the Department to reflect the current rates.

One commenter stated that asking an LEA to submit data with the application may give the false impression that the LEA is eligible before an eligibility determination is made by the IAP.

The Department received two comments in support of this provision. The commenters noted that the provision of tax rate data at the time of application would speed the processing of heavily impacted applications.

Discussion: The proposed regulation should have specified that the LEA will be required to provide only its tax rate and the State average tax rate for the third preceding year with the IAP application. The application uses tax rate data from the third preceding year, as required by the statute, and that data should be readily available at the time of application. In providing these data the applicant LEA will demonstrate its understanding of the eligibility requirements for these payments and preliminary evidence that it meets the requirements. Currently, many applicants request consideration for payment under section 7003(b)(2) of the Act without evaluating whether they meet the tax rate requirement. Requiring the tax rate data with the application will allow the Department to more quickly determine initial eligibility and focus on making timely and accurate payments to LEAs that are eligible for funding under this provision. Most SEAs or State Departments of Revenues have this data available on their respective Web sites.

The tax rate data submitted by the LEA with the application will not be used to make final heavily impacted eligibility determinations; rather, the certified tax rate submitted by the SEA under § 222.73 will be used to determine the LEA's final tax rate eligibility and the category under which the LEA will be paid. Thus, if the tax rate data initially submitted by an LEA was obtained from the SEA and is confirmed by IAP to be accurately calculated and the final State tax rate data for the third preceding fiscal year, no further tax rate data will be needed to complete the program's eligibility determinations related to average tax rate. However, if the tax rate submitted with the application does not match the data submitted by the SEA under § 222.73, IAP may need to further evaluate the tax rate data provided. For example, if the SEA amends its tax rate data after the LEA's initial submission but before the LEA's application is reviewed, IAP may need to conduct an additional review of the tax rate data. If the LEA provides initial tax rate data or the SEA provides later final State tax rate data that shows that the LEA does not meet the tax rate requirement, then the LEA will not receive heavily impacted funding.

The Department is constantly reviewing its internal process for consistency and efficiency. The Department welcomes any suggestions for improvements for communicating with LEAs. If an SEA submits data that the LEA believes is incorrect, the LEA should discuss this with the SEA and the Department. Our Web site contains a list of SEA representatives for each State located at *http://www2.ed.gov/about/offices/list/oese/impactaid/searl.html.* If an SEA presents data that is not organized in such a way that the Department can conduct the heavily impacted eligibility determination, the Department may ask the SEA to produce the data in a manner that is consistent with the requirements in the statute. For example, if an SEA submits a total tax rate instead of a tax rate for current expenditures only, as required by the statute, the Department requires the SEA to submit corrected data.

With regard to the comment about the timing of the reporting of tax rates, the statute requires the Program to use third preceding year tax rates, so that accurate final data will be available for completing heavily impacted LEA eligibility determinations.

With regard to whether the requirement to submit data with the application will generate confusion about eligibility status, the Department will work with LEAs to make sure that the heavily impacted eligibility status is clear.

Changes: The final regulation adds language to specify that the LEA must provide its tax rate data with the annual application, and that the SEA will verify final tax rate data under the process in § 222.73.

Indian Policies and Procedures (IPPs)(§ 222.91–95)

Comments: Most commenters made the point that the majority of the relationships between tribal entities and LEAs are strong and that both parties work to ensure a positive relationship that provides equal participation of Indian lands children in the educational program. There was general support for the extension of time that an LEA has to amend its IPPs from 60 days to 90 days. The majority of all comments on this part of the proposed regulations opposed any regulatory action that would increase burden on LEAs; however, they did not specify which provisions might constitute an additional burden.

One commenter suggested that if an LEA's total student population residing on Indian lands exceeds 70 percent, the Department should reasonably be able to assume that students residing on Indian lands are receiving an education on an equal basis with other children. In these situations, the commenter suggested that an automatic waiver of the requirements for Indian Policies and Procedures (IPPs) should be considered for these LEAs. The commenter suggested that this rule might lessen the administrative burden on the Department by reducing the number of IPP reviews that are conducted annually.

Two entities representing Impact Aid LEAs that have children residing on Indian lands favored the regulation requiring the LEA to provide a written response to the comments, recommendations and concerns brought to the LEA by the parents of Indian children and tribes regarding the educational services the LEA is providing to Indian children. One commenter encouraged open communication between LEAs and tribes and parents of Indian children throughout the year, and not just during the consultation process.

One commenter also supported the requirement that, when a tribe supports an LEA's request to waive the IPP requirements, the tribe must attest that

it has received a copy of the IPPs and is aware of the rights the tribe is waiving.

A few commenters stated that there is a fundamental lack of understanding about the purpose of Impact Aid funds and how they can be used, which is at the discretion of the school board. One commenter suggested that requiring a tribe to sign off on the Impact Aid application would provide the tribe unintended and unauthorized power to disrupt a payment. The commenter argued that the written notification to tribal officials from the LEA should be more than adequate. This commenter also stated that adding burdensome requirements to a subjective process will not provide clarity and order.

A few commenters requested that the Department define what constitutes a ''reasonable'' request from parents of children residing on Indian lands and tribal officials. The commenters stated that factors such as budget constraints may prevent a district from agreeing to certain requests.

Several commenters supported the Department's proposal to increase flexibility within the withholding of payments provision in § 222.95. Under the new language, in case of a violation, the Department would be able to withhold part of an LEA's payment or the entire payment.

Several commenters stated that there is a need for intermediary steps between filing a complaint with the Department, and the penalty that the Department withholds a payment to an LEA as a result of the complaint. Specifically, one commenter suggested the Department provide technical assistance or mediation at the request of either party, establish positive incentives rather than punishment, and issue non-regulatory guidance to advance the shared goal of better communication, rather than imposing additional requirements for LEAs. The commenter was concerned that the regulations will add additional steps to the application process and require additional time and burden for LEAs, particularly when noncompliance may lead to withholding Impact Aid funds.

One commenter was concerned that the proposed requirements could lead to a hostile situation between the LEA and the tribes and parents of children residing on Indian lands. The commenter urged the Department to better explain to tribes and parents that Impact Aid grant funds are treated like local revenues and can be expended at the discretion of the LEA.

One commenter urged the Department to refrain from using the term ''Indian'' as it is viewed as a derogatory reference. Instead, the commenter urges the Department to replace the term with ''Native American.''

Discussion: The Department recognizes that the majority of relationships between LEAs, tribal leaders, and the parents of children residing on Indian lands are strong and that the entities work together to provide the best educational services to children residing on Indian lands. However, due to IPP issues that have arisen during Program oversight of the IPP requirements, as well as from comments received during the Department's tribal consultations on the proposed regulations (see NPRM, 80 FR 81477, 81478), we believe that changes to the regulations are needed to effectuate the intent of the statutory IPP requirements.

The Department does not have the authority under the statute to grant blanket waivers through the regulatory process. Moreover, because LEAs receive additional IAP funding for each student residing on Indian lands, and those funds are not required to be spent on those specific students, Congress enacted the IPP requirements to ensure that those students participate on an equal basis with other students and that their parents and their tribe have input into the LEA's general educational program and activities (ESEA section 7004, as amended by ESSA). The process is about more than simply equal access; it is also about ensuring that the tribes and parents of children residing on Indian lands have a mechanism for providing input into the educational program.

One of the concerns that arose during the Department's tribal consultation was the lack of LEA communication back to the parents or the tribe that have made recommendations or comments to the LEA. As recognized by several of the commenters, requiring LEAs to provide a response to the tribes and parents of children residing on Indian lands is important to ensure that the input receives meaningful consideration; written response to all comments is a standard business practice when consultation or public input has occurred. In the Federal government, for example, the rulemaking process ensures the public is allowed to comment on and make recommendations for changes in regulations. Once the comments are received, the Federal government is required to respond to the comments in its final regulatory document.

Although we do not wish to impose additional and unnecessary burden on IAP applicants, we do not think it is unreasonable or overly burdensome for LEAs to provide feedback by notifying the tribes and parents of children residing on Indian lands how their recommendations, comments, or concerns were addressed. The vast majority of these consultations occur in a public forum in which minutes are taken. Assembling the comments, concerns, and recommendations and explaining how or why they are or are not implemented is a significant part of ensuring meaningful consultation.

The Department appreciates support for the amended regulation that would require a tribe to attest that it has received a copy of the IPPs before the tribe provides the LEA with a waiver of the rights afforded the tribe under the IPP consultation process. The IAP's tribal consultation (see NPRM (80 FR 81477) revealed that some tribal officials are not receiving copies of the IPPs and were being asked to waive their rights without being informed of those rights. Informed consent is imperative in the waiver process. To ask for a waiver to expedite the application process without providing the tribe with the information it needs to make an informed decision goes against the intent of the IPP consultation process.

With regard to the comment that giving the tribes the authority to sign off on the application provides the tribe with unintended and unauthorized power, the Department would like to clarify that the tribe does not sign off on the Impact Aid application before it can be submitted, and would not be required to do so under the proposed or final regulations. Under these final regulations, the LEA will be required to sign an assurance indicating that it has replied in writing to the tribes' and parents' comments, concerns, and recommendations before submitting the application. The LEA should retain documentation to demonstrate that the LEA has complied with this communication requirement. For example, if the LEA's communication is emailed or faxed to the tribe, the LEA should retain the fax transmission document or a ''read receipt'' for an email to demonstrate that the document was sent and received by the appropriate tribal officials. If an LEA sends home with children who reside on Indian lands a copy of that communication for the parents, the LEA should retain a copy of the memo to demonstrate that the LEA has made a good faith effort to inform parents of such children about how the LEA has or has not implemented recommendations or rectified concerns identified during the IPP process.

With regard to the suggestion that the Department provide guidance on what

constitutes a reasonable request by a tribe or parent of a child residing on Indian lands relating to improving the LEA's educational program or activities, it is not appropriate for the Department to set guidelines around what recommendations may or may not be appropriate for an LEA to adopt. This is a matter that varies by the local situation. As we clarify in these amended regulations, the legal responsibility of the LEA is to ensure that tribes and parents have an opportunity to give meaningful input, and to thoroughly consider any comments and recommendations in its decision-making process.

We appreciate the support for the option in § 222.95 under which the Department may withhold part of a payment to an LEA for an IPP violation in addition to having the authority to withhold the entire payment. Through both the tribal consultation and the comments received in response to this NPRM, the Department has heard that the withholding of all funds can severely disrupt the provision of educational services. Under the amended regulation, the Department could, for example, elect to withhold only the part of the Impact Aid payment associated with the .25 additional weight afforded to children residing on Indian lands until a dispute is resolved or an IPP is corrected. If an LEA is noncompliant, each case at the stage of the proceeding referenced in the regulation will be reviewed on its own merits, and the Department will fully explain what the LEA needs to do to become compliant and receive the withheld funds.

In response to comments about the need for ways to resolve disputes other than a tribe filing a formal complaint and the Department withholding payment to an LEA for a violation of the IPP requirements, these are statutory steps that will continue to be available. However, the Department encourages the use of third-party mediation to resolve issues and can suspend a complaint upon request of the complainant to allow for such a process. The Department can provide technical assistance on the IPP consultation process, but cannot act as a mediator to resolve issues between the parties. The Department is open to suggestions on how it can provide non-regulatory guidance as a method to advance the shared goal of better communication.

The Department appreciates the comment about providing positive incentives to comply with the IPP process and the need for technical assistance and possibly non-regulatory guidance to all parties for the IPP consultation process. Although the Department must respond to complaints pursuant to the procedure required by the statute, we welcome any ideas for how to inject positive incentives or specific technical assistance from any person or organization with an interest in this process.

The Department is aware that certain tribal officials and parents of children who reside on Indian lands believe that they should be able to dictate to the LEA how Impact Aid funds are used. This is an issue outside the scope of these regulations and the statute, as the Impact Aid statute generally imposes no restrictions on the use of basic support funds (State or local restrictions may apply) provided for students residing on Indian lands; however, the Program will make an effort to clarify this when providing technical assistance to LEAs.

The Department appreciates the concerns related to the use of the term ''Indian.'' IAP uses this term to reflect the statutory definition of ''Indian lands'' and related provisions. IAP does not use the term ''Native American'' as it is too broad to fit the scope of the statute and these regulations, which are limited in relevant part to school districts that claim students who reside on ''Indian lands'' regardless of their ethnicity. For these reasons, we retain the use of the term ''Indian Policies and Procedures.''

Changes: None.

Section 7009 (§§ 222.161–222.164)

Comment: Several commenters supported the changes to the equalization regulations. One commenter specifically supported the provision that provides a process by which, if IAP's determination is delayed, States can get permission from the IAP to make estimated State aid payments that take into account Impact Aid receipts. The commenter stated that this process would prevent LEAs from having to pay back the State if the IAP eventually certifies the State as equalized. Another commenter, however, stated that allowing a State to withhold an LEA's aid without an equalization certification from the Department is inexcusable. The commenter further contended that allowing SEAs to withhold State aid while the determination process is ongoing could result in inaccurate State aid payments that may take months or years to correct.

Discussion: Section 7009(d)(2) of the Act prohibits States from taking Impact Aid into consideration as local revenues when making State aid payments before the Secretary certifies that the State's program of aid is equalized. Section 222.161(a)(6) will give States undergoing the section 7009 certification process the option, with the Department's permission, to make estimated State aid payments that count Impact Aid as local effort in cases where we have not been able to determine whether the State meets the equalization requirements before the start of the State's fiscal year. This may happen when an LEA requests a pre-determination hearing, which, due to the timeline required, is held just two to three months before the State's fiscal year begins. When the issues presented at that hearing are complex, it can take time for us to work through the legal issues and make a determination.

Currently, States do not request permission to make estimated payments that take Impact Aid into account as local effort when the determination process in ongoing, and there is no timeframe for when States must correct payments if we decline to certify that the State's program is equalized. While we agree that allowing States to make estimated aid payments that account for Impact Aid before we have certified the State to do so may result in incorrect estimated payments, the regulation is intended to reduce budgetary uncertainty for States as well as LEAs. If a State is prohibited from reducing estimated payments when a determination is delayed, LEAs could have to pay back to the State large sums if the IAP ultimately certifies the State. The new provision allows us to consider the State's past record, and any changes to its State aid formula, before we give permission to make estimated State aid payments. It also ensures that, in cases where we decline to certify, estimated payments that the State reduced for Impact Aid funds will be corrected within 60 days. However, upon further analysis of the possible scenarios under this provision, we have deleted the proposed 30-day time limit for States to request permission to make estimated payments that take into account Impact Aid, to allow more flexibility.

Changes: None.

Comment: One commenter requested that the Department provide an example in § 222.162 of how it accounts for special cost differentials in the disparity test using the four methods outlined in the proposed regulation.

Discussion: Every State's funding formula is different, which makes it difficult to provide practical, instructive examples. We will provide technical assistance, including examples of actual approved disparity test data submissions, to anyone interested in the section 7009 process. Every State certified in recent years has accounted

for special cost differentials using one of the four methods.

Changes: None.

Comment: One commenter requested that the Department provide examples of cost differentials.

Discussion: Cost differentials are discussed at length in § 222.162(c)(2), including examples.

Changes: None.

Comments: Two commenters favored the proposed regulation at § 222.164 which requires the Department to inform the State and LEAs of the right to request a pre-determination hearing when a proceeding is initiated under section 7009.

Discussion: We finalize this regulation as proposed.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing these final regulations only on a reasoned determination that their benefits would justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Discussion of Costs and Benefits: In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. Upon review of the costs to the LEA, we have determined there is minimal financial or resource burden associated with these changes, and that the net impact of the changes would be a reduction in burden hours. Certain affected LEAs would need to respond in writing to comments from tribes and parents of Indian students, but this time burden would be balanced by other proposed regulatory changes, which result in a net decrease of both burden hours and cost associated with these regulations.

Elsewhere in this section, under *Paperwork Reduction Act of 1995,* we identify and explain burdens specifically associated with information collection requirements.

Paperwork Reduction Act of 1995

In the **Federal Register** (80 FR 81487–81489), the NPRM identified the sections of the proposed regulations that would impact the burden and costs associated with the information collection package. Sections 222.35, 222.37, 222.40, 222.62, and 222.91 contain information collection requirements. Under the PRA the Department submitted a copy of these sections to OMB for its review.

In the NPRM (80 FR 81487–81489), we estimated the total burden for the collection of information through the application package to be 104,720 hours. This estimation was based largely on a decrease in hours resulting from proposed changes related to the requirement for source check documents for children residing on Indian lands and low rent housing in § 222.35. This proposed change would have significantly reduced the number of parent pupil survey forms collected annually. After consideration of the public comments, we have decided to not include the proposed changes to § 222.35 in the final rule. The changes to the burden estimates from the proposed rule are summarized below.

Collection of Information

Revised Burden Hours for Section 222.35

The proposed regulations would have required that LEAs claiming children who reside on Indian lands and children who reside in low-rent housing use a source check document to obtain the data required to determine the children's eligibility. This change would have significantly decreased the burden hours for the collection of parent-pupil survey forms and increased the burden hours for the use of source check forms. The proposed regulation would have reduced the number of respondents for parent-pupil survey forms from 500,000 to 355,000, which would have resulted in a decrease of burden hours from

125,000 to 88,750 burden hours. Based on strong public opposition to this change the Department has decided not to include this change in the final rule. Since this change is no longer being revised, the burden hours for this provision remain 125,000. The total number of respondents for parent-pupil survey forms remains 500,000.

The proposed change that would have mandated the use of source check forms for children residing on Indian lands or children residing in low-rent housing would have doubled the number of source checks being collected annually. The Department, therefore, increased the burden associated with source check forms from 1,500 hours to 3,000 hours in the NPRM (80 FR 81487). As this change is not included in the final rule, the burden hours for completing a source check remain 1,500 total burden hours. The average number of burden hours for an LEA to complete the application was reduced from 10 hours to 9 hours due to system enhancements that have streamlined the process. This estimated change resulted in an overall decrease in burden hours of 1,264. The dollar amount of this change is estimated to be a decrease of $23,352.

The revised burden for this information collection package is depicted in the following tables. Table 3 (80 FR 81489) remains unchanged, but is included here for reference.

TABLE 1—SUMMARY OF BURDEN HOURS TO SUBMIT A COMPLETE IMPACT AID APPLICATION PACKAGE

By regulatory section or subsection	Total annual burden hours under current regulations	Estimated total annual burden hours under the final regulations
34 CFR 222.35, 34 CFR 222.50–52 IAP Application Tables 1–5	139,140	137,876
34 CFR 222.37, IAP Application IAP Application Table 6	1,264	100
34 CFR 222.53 IAP Application Table 7	217	217
34 CFR 222.141–143 IAP Application Table 8	5	5
Reporting Construction Expenditures	40	40
Housing Official Certification Form	13	5
Indian Policies and Procedures (IPPs)	0	187
IPP Responses*	0	1,040
TOTAL	140,679	139,470
Number of LEAs	1,265	1,264
Average Hours Per LEA (total divided by number of LEAs)	111.2	110.3

* Denotes changes directly associated with the final regulatory changes

TABLE 2—REPORTING NUMBERS OF FEDERALLY-CONNECTED CHILDREN ON TABLES 1–5 OF THE IMPACT AID APPLICATION

Task	Current estimated number	Estimated number under final rule	Average hours	Total hours	Explanation
Parent-pupil surveys	500,000	500,000	0.25	125,000	Assumes 500,000 federally-connected children identified through a survey form completed by a parent.
Source check with Federal official to document children living on Federal property (LEAs).	500	500	3	1,500	Assumes 3 hours to verify information on a source check.
Collecting and organizing data to report on Tables 1–5 in the Application (LEAs).	1,265	1,264	9	11,376	Assumes time to complete and organize survey/source check data on federally-connected children averages nine hours
Total Current				137,876	
Total Previous				139,140	
Change				−1,264	

TABLE 3—ADDITIONAL REPORTING TASKS AND SUPPLEMENTAL INFORMATION ON TABLES 6–10 OF THE IMPACT AID APPLICATION

Task	Current estimated number	Estimated number under final rule	Average hours	Total hours	Explanation
Reporting enrollment and attendance data on Table 6 (LEAs).*	1,264	100	1	100	The final regulations would reduce the number even further to approximately 100 LEAs who will have a higher attendance rate than the State average.

TABLE 3—ADDITIONAL REPORTING TASKS AND SUPPLEMENTAL INFORMATION ON TABLES 6–10 OF THE IMPACT AID APPLICATION—Continued

Task	Current estimated number	Estimated number under final rule	Average hours	Total hours	Explanation
Collecting and reporting expenditure data for federally-connected children with disabilities on Table 7(LEAs).	869	868	.25	217	This assumes that an average of 868 LEAs received a payment for children with disabilities in the previous year and is required by law to report expenditures for children with disabilities for the prior year.
Reporting children educated in federally-owned school buildings on Table 8 (LEAs).	5	5	1	5	Assumes LEAs maintain data on children housed in the small number of schools owned by ED but operated by LEAs
Reporting expenditures of Section 7007 funds on Table 10 (LEAs).	159	159	0.25	40	Assumes that the LEAs eligible to receive these funds have ready access to financial reports to retrieve and report these data.
Indian Policies and Procedures (IPPs).	625	625	0.3	187	The LEA does not have to collect any new information to meet this requirement.
IPP Response *	0	800	1.3	1,040	This assumes some LEAs may have to respond to more than one tribe.
Contact Form for Housing Undergoing Renovation or Rebuilding.	10	10	0	0	The time associated is too small to calculate (<5 minutes per applicant).
Housing Official Certification Form	10	10	.50	5	Amount of time for the housing official to estimate the number of school-age children that would have resided in the housing had it not been unavailable due to renovation or rebuilding.
Total Current				1,594	
Total Previous				1,529	
Change				65	

* Denotes changes directly associated with the final regulatory changes.

TABLE 4—ESTIMATION OF ANNUALIZED COST TO APPLICANTS

Respondent	Hours per response	Rate ($/hour)	Number of respondents	Cost
Parent Respondents	.25	10	500,000	$1,250,000
LEA Respondents	9	15	1,264	170,640
Total Cost				1,420,640
Prior Cost Estimate				1,443,992
Cost Change				−23,352

The Department has also added a provision to § 222.35(c) that allows LEAs to propose alternative methods of data collection and the Department's intention to allow for electronic data collection and submission. We anticipate that this will yield significant time savings for LEAs who elect to use these options. This savings cannot yet be quantified, but we expect to revise the burden hours and costs once we have more data.

The Paperwork Reduction Act of 1995 does not require you to respond to a collection of information unless it displays a valid OMB control number. We display the valid OMB control number assigned to the collection of information in these final regulations at the end of the affected section of the regulations.

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(Catalog of Federal Domestic Assistance Number 84.041 Impact Aid)

List of Subjects in 34 CFR Part 222

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Federally affected areas, Grant programs, education, Indians, education, Reporting and recordkeeping requirements.

Dated: September 13, 2016.

Ann Whalen,

Senior Advisor to the Secretary, Delegated the Duties of the Assistant Secretary of Elementary and Secondary Education.

For the reasons discussed in the preamble, the Assistant Secretary for Elementary and Secondary Education amends part 222 of title 34 of the Code of Federal Regulations as follows:

PART 222—IMPACT AID PROGRAM

■ 1. The authority citation for part 222 continues to read as follows:

Authority: 20 U.S.C. 7701–7714, unless otherwise noted.

■ 2. Section 222.2(c) is amended:
■ A. In the definition of ''Membership'' by revising paragraph (3)(iv) and adding paragraph (3)(v).
■ B. By revising the definition of ''Parent employed on Federal property''.

The revisions read as follows:

§ 222.2 What definitions apply to this part?

* * * * *

(c) * * *

Membership * * *

(3) * * *

(iv) Attend the schools of the applicant LEA under a tuition arrangement with another LEA that is responsible for providing them a free public education; or

(v) Reside in a State other than the State in which the LEA is located, unless the student is covered by the provisions of—

(A) Section 7010(c) of the Act; or

(B) A formal State tuition or enrollment agreement.

* * * * *

Parent employed on Federal property. (1) The term means:

(i) An employee of the Federal government who reports to work on, or whose place of work is located on, Federal property, including a Federal employee who reports to an alternative duty station on the survey date, but whose regular duty station is on Federal property.

Example 1: Lauren, a Virginia resident, is an employee of the U.S. Department of Defense. Her physical duty station is in the Pentagon in Arlington, Virginia, and her children attend LEA A in Virginia. Lauren meets the definition of a ''parent employed on Federal property'' as she is both a Federal employee and her duty station is on eligible Federal property in the same State as LEA A. Thus LEA A may claim Lauren's children on its Impact Aid application.

Example 2: Alex, a Virginia resident, is an employee of the U.S. Department of Defense. His physical duty station is in the Pentagon in Arlington, Virginia, and his children attend LEA B in Virginia. On the survey date, Alex was teleworking from his home. For purposes of LEA B's Impact Aid application, Alex meets the definition of a ''parent employed on Federal property,'' as he is both a Federal employee and his duty station is on eligible Federal property in the same State as LEA B, even though Alex was at an alternative duty station on the survey date because he teleworked. LEA B may claim Alex's children on its Impact Aid application.

Example 3: Elroy is an employee of the U.S. Department of Education. His normal duty station is on eligible Federal property located in Washington, DC. Elroy's place of residence is in Virginia, and his children attend LEA C in Virginia. Elroy, a Federal employee, does not meet the definition of a ''parent employed on Federal property.'' The statute requires that the Federal property on which a parent is employed be in the same State as the LEA (ESEA section 7003(a)(1)(G)), and because the Federal property where Elroy works is not in the same State as LEA C, LEA C may not claim Elroy's children.

(ii) A person not employed by the Federal government but who spends more than 50 percent of his or her working time on Federal property (whether as an employee or self-employed) when engaged in farming, grazing, lumbering, mining, or other operations that are authorized by the Federal government, through a lease or other arrangement, to be carried out entirely or partly on Federal property.

Example 1: Xavier, a dealer at a casino on eligible Indian lands in Utah, reports to work at the casino as his normal duty station and works his eight hour shift at the casino. Xavier's child attends school in LEA D in Utah. For purposes of Impact Aid, Xavier meets the definition of a ''parent employed on Federal property'' because, although Xavier is not a Federal employee, his duty station is the casino, which is located on an eligible Federal property within the same State as LEA D. LEA D may claim Xavier's children on its Impact Aid application.

Example 2: Becca works at a privately owned convenience store on leased property on a military installation in Maine. Becca's children attend school at a LEA E, a Maine public school district. On a daily basis, including on the survey date, Becca reports to work at the convenience store where she works her entire shift. Becca meets the definition of a ''parent employed on Federal property'' for LEA E because, although Becca is not a Federal employee, her duty station is the convenience store, which is located on an eligible Federal property within the same State as LEA E. LEA E may claim Becca's children on its Impact Aid application.

Example 3: Zoe leases Federal property in Massachusetts to grow lima beans. Zoe's daughter attends LEA F, a Massachusetts public school. On the survey date, Zoe has a valid lease agreement to carry out farming operations that are authorized by the Federal government. Zoe also has a crop of corn on an adjacent field that is not on Federal property. On the survey date, Zoe spent 75 percent of her day harvesting lima beans and 25 percent of her day harvesting corn. Because Zoe spent more than 50 percent of her day working on farming operations that are authorized by the Federal government on leased Federal property in the same State her daughter attends school, Zoe meets the definition of a ''parent employed on Federal property,'' and LEA F can claim her daughter on its Impact Aid application.

Example 4: Frank is a private contractor with an office on a military installation and an office on private property, both of which are located in Maryland. His time is split between the two offices. Frank's children attend public school in Maryland in LEA G. On the survey date, Frank reported to his office on the military installation. He spent 4 of his 8 hours at the office on the military installation and 4 hours at the privately owned office facility. Frank's children attend LEA G, a Maryland public school. Frank meets the definition of a ''parent employed on Federal property'' because he reported to work on the military installation and he spent at least 50 percent of his time on Federal property conducting operations that are authorized by the Federal government on eligible Federal property in the same State as LEA G. LEA G may claim Frank's children on its Impact Aid application.

(2) Except as provided in paragraph (1)(ii) of this definition, the term does not include a person who is not employed by the Federal government and reports to work at a location not on Federal property, even though the individual provides services to operations or activities authorized to be carried out on Federal property.

Example 1: Maria delivers bread to the convenience store and the commissary, which are both eligible Federal properties located on a military installation in Florida. Maria's son attends school in LEA H, a Florida public school district. On a daily basis, including the survey date, Maria reports to a privately owned warehouse on private property to get her inventory for delivery. Maria is not a Federal employee and her duty station is the warehouse located on private property. She therefore does not meet the definition of a ''parent employed on Federal property'' for purposes of Impact Aid. LEA H may not claim Maria's children on its Impact Aid application.

Example 2: Lorenzo is a construction worker who is working on an eligible Federal property in Arizona, but each day he reports to his construction office located on private

property to get his daily assignments and meet with the crew before going to the jobsite. Lorenzo's twins attend LEA I, in Arizona. Lorenzo is not a Federal employee and his duty station is the construction office and not the Federal property. Lorenzo therefore does not meet the definition of a ''parent employed on Federal property.'' LEA I may not claim Lorenzo's children on its Impact Aid application.

Example 3: Aubrey, a defense contractor, routinely reports to work at her duty station on private property in California. Aubrey's children attend LEA J in California. On the survey date, Aubrey attends an all-day meeting on a military installation. Aubrey is not a Federal employee and she does not normally report to work on eligible Federal property; as a result, Aubrey is not an eligible parent employed on Federal property, and LEA J cannot claim her children on its Impact Aid application.

(Authority: 20 U.S.C. 7703)

* * * * *

§ 222.3 [Amended]

■ 3. Section 222.3 is amended in paragraph (b)(2) introductory text by removing the phrase ''September 30'' and adding in its place ''June 30''.

§ 222.5 [Amended]

■ 4. Section 222.5 is amended in paragraph (a)(2) by removing ''the end'' and adding in its place ''June 30''.

■ 5. Section 222.22 is amended by revising paragraphs (b)(1) and (d) to read as follows:

§ 222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?

* * * * *

(b) * * *

(1) The LEA received revenue during the preceding fiscal year that is generated from activities in or on the eligible Federal property; and

* * * * *

(d) For purposes of this section, the amount of revenue that an LEA receives during the previous fiscal year from activities conducted on Federal property includes payments received by any Federal agency due to activities on Federal property, including forestry, mining, and grazing, but does not include revenue from:

(1) Payments received by the LEA from the Secretary of Defense to support—

(i) The operation of a domestic dependent elementary or secondary school; or

(ii) The provision of a free public education to dependents of members of the Armed Forces residing on or near a military installation;

(2) Payments from the Department; or

(3) Payments in Lieu of Taxes from the Department of Interior under 31 U.S.C. 6901 *et seq.*

* * * * *

■ 6. Section 222.23 is revised to read as follows:

§ 222.23 How are consolidated LEAs treated for the purposes of eligibility and payment under section 7002?

(a) *Eligibility.* An LEA formed by the consolidation of one or more LEAs is eligible for section 7002 funds, notwithstanding section 222.21(a)(1), if—

(1) The consolidation occurred prior to fiscal year 1995 or after fiscal year 2005; and

(2) At least one of the former LEAs included in the consolidation:

(i) Was eligible for section 7002 funds in the fiscal year prior to the consolidation; and

(ii) Currently contains Federal property that meets the requirements of § 222.21(a) within the boundaries of the former LEA or LEAs.

(b) *Documentation required.* In the first year of application following the consolidation, an LEA that meets the requirements of paragraph (a) of this section must submit evidence that it meets the requirements of paragraphs (a)(1) and (a)(2)(ii) of this section.

(c) *Basis for foundation payment.* (1) The foundation payment for a consolidated district is based on the total section 7002 payment for the last fiscal year for which the former LEA received payment. When more than one former LEA qualifies under paragraph (a)(2) of this section, the payments for the last fiscal year for which the former LEAs received payment are added together to calculate the foundation basis.

(2) Consolidated LEAs receive only a foundation payment and do not receive a payment from any remaining funds.

(Authority: 20 U.S.C. 7702(g))

■ 7. Section 222.24 is added to read as follows:

§ 222.24 How does a local educational agency that has multiple tax rates for real property classifications derive a single real property tax rate?

An LEA that has multiple tax rates for real property classifications derives a single tax rate for the purposes of determining its Section 7002 maximum payment by dividing the total revenues for current expenditures it received from local real property taxes by the total taxable value of real property located within the boundaries of the LEA. These data are from the fiscal year prior to the fiscal year in which the applicant seeks assistance.

(Authority: 20 U.S.C. 7702)

■ 8. Section 222.30 is amended in the definition of ''Free public education'' by revising paragraph (2)(ii) to read as follows:

§ 222.30 What is ''free public education''?

* * * * *

Free public education. * * *

(2) * * *

(ii) Federal funds, other than Impact Aid funds and charter school startup funds, do not provide a substantial portion of the educational program, in relation to other LEAs in the State, as determined by the Secretary.

* * * * *

§ 222.32 [Amended]

■ 9. Section 222.32 is amended in paragraph (b) by adding the phrase ''timely and complete'' after the first instance of ''its''.

■ 10. Section 222.33 is amended by adding paragraph (c) to read as follows:

§ 222.33 When must an applicant make its membership count?

* * * * *

(c) The data on the application resulting from the count in paragraph (b) of this section must be accurate and verifiable by the application deadline.

* * * * *

■ 11. Section 222.35 is revised to read as follows:

§ 222.35 How does a local educational agency count the membership of its federally connected children?

An applicant counts the membership of its federally connected children using one of the following methods:

(a) Parent-pupil survey. An applicant may conduct a parent-pupil survey to count the membership of its federally connected children, which must be counted as of the survey date.

(1) The applicant shall conduct a parent-pupil survey by providing a form to a parent of each pupil enrolled in the LEA to substantiate the pupil's place of residence and the parent's place of employment.

(2) A parent-pupil survey form must include the following:

(i) Pupil enrollment information (this information may also be obtained from school records), including—

(A) Name of pupil;

(B) Date of birth of the pupil; and

(C) Name of public school and grade of the pupil.

(ii) Pupil residence information, including:

(A) The complete address of the pupil's residence, or other acceptable location information for that residence, such as a complete legal description, a

complete U.S. Geological Survey number, or complete property tract or parcel number, or acceptable certification by a Federal agency official with access to data or records to verify the location of the Federal property; and

(B) If the pupil's residence is on Federal property, the name of the Federal facility.

(3) If any of the following circumstances apply, the parent-pupil survey form must also include the following:

(i) If the parent is employed on Federal property, except for a parent who is a member of the uniformed services on active duty, parent employment information, including—

(A) Name (as it appears on the employer's payroll record) of the parent (mother, father, legal guardian or other person standing *in loco parentis*) who is employed on Federal property and with whom the pupil resides; and

(B) Name of employer, name and complete address of the Federal property on which the parent is employed (or other acceptable location information, such as a complete legal description or acceptable certification by a Federal agency).

(ii) If the parent is a member of the uniformed services on active duty, the name, rank, and branch of service of that parent.

(iii) If the parent is both an official of, and accredited by a foreign government, and a foreign military officer, the name, rank, and country of service.

(iv) If the parent is a civilian employed on a Federal vessel, the name of the vessel, hull number, homeport, and name of the controlling agency.

(4)(i) Every parent-pupil survey form must include the signature of the parent supplying the information, except as provided in paragraph (a)(4)(ii) of this section, and the date of such signature, which must be on or after the survey date.

(ii) An LEA may accept an unsigned parent-pupil survey form, or a parent-pupil survey form that is signed by a person other than a parent, only under unusual circumstances. In those instances, the parent-pupil survey form must show why the parent did not sign the survey form, and when, how, and from whom the residence and employment information was obtained. Unusual circumstances may include, but are not limited to:

(A) A pupil who, on the survey date, resided with a person without full legal guardianship of the child while the pupil's parent or parents were deployed for military duty. In this case, the person with whom the child is residing may sign the parent-pupil survey form.

(B) A pupil who, on the survey date, was a ward of the juvenile justice system. In this case, an administrator of the institution where the pupil was held on the survey date may sign the parent-pupil survey form.

(C) A pupil who, on the survey date, was an emancipated youth may sign his or her own parent-pupil survey form.

(D) A pupil who, on the survey date, was at least 18 years old but who was not past the 12th grade may sign his or her own parent-pupil survey form.

(iii) The Department does not accept a parent-pupil survey form signed by an employee of the school district who is not the student's mother, father, legal guardian or other person standing *in loco parentis.*

(b) Source check. A source check is a type of survey tool that groups children being claimed on the Impact Aid application by Federal property. This form is used in lieu of the parent-pupil survey form to substantiate a pupil's place of residence or parent's place of employment on the survey date.

(1) The source check must include sufficient information to determine the eligibility of the Federal property and the individual children claimed on the form.

(2) A source check may also include:

(i) Certification by a parent's employer regarding the parent's place of employment;

(ii) Certification by a military or other Federal housing official as to the residence of each pupil claimed;

(iii) Certification by a military personnel official regarding the military active duty status of the parent of each pupil claimed as active duty uniformed services; or

(iv) Certification by the Bureau of Indian Affairs (BIA) or authorized tribal official regarding the eligibility of Indian lands.

(c) Another method approved by the Secretary.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703)

■ 12. Section 222.37 is revised to read as follows:

§ 222.37 How does the Secretary calculate the average daily attendance of federally connected children?

(a) This section describes how the Secretary computes the ADA of federally connected children for each category in section 8003 to determine an applicant's payment.

(b)(1) For purposes of this section, actual ADA means raw ADA data that have not been weighted or adjusted to reflect higher costs for specific types of students for purposes of distributing State aid for education.

(2) If an LEA provides a program of free public summer school, attendance data for the summer session are included in the LEA's ADA figure in accordance with State law or practice.

(3) An LEA's ADA count includes attendance data for children who do not attend the LEA's schools, but for whom it makes tuition arrangements with other educational entities.

(4) Data are not counted for any child—

(i) Who is not physically present at school for the daily minimum time period required by the State, unless the child is—

(A) Participating via telecommunication or correspondence course programs that meet State standards; or

(B) Being served by a State-approved homebound instruction program for the daily minimum time period appropriate for the child; or

(ii) Attending the applicant's schools under a tuition arrangement with another LEA.

(c) An LEA may determine its average daily attendance calculation in one of the following ways:

(1) If an LEA is in a State that collects actual ADA data for purposes of distributing State aid for education, the Secretary calculates the ADA of that LEA's federally connected children for the current fiscal year payment as follows:

(i) By dividing the ADA of all the LEA's children for the second preceding fiscal year by the LEA's total membership on its survey date for the second preceding fiscal year (or, in the case of an LEA that conducted two membership counts in the second preceding fiscal year, by the average of the LEA's total membership on the two survey dates); and

(ii) By multiplying the figure determined in paragraph (c)(1)(i) of this section by the LEA's total membership of federally connected children in each subcategory described in section 7003 and claimed in the LEA's application for the current fiscal year payment.

(2) An LEA may submit its total preceding year ADA data. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(i) Dividing the LEA's preceding year's total ADA data by the preceding year's total membership data; and

(ii) Multiplying the figure determined in paragraph (c)(2)(i) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i) of this section.

(3) An LEA may submit attendance data based on sampling conducted during the previous fiscal year.

(i) The sampling must include attendance data for all children for at least 30 school days.

(ii) The data must be collected during at least three periods evenly distributed throughout the school year.

(iii) Each collection period must consist of at least five consecutive school days.

(iv) The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(A) Determining the ADA of all children in the sample;

(B) Dividing the figure obtained in paragraph (c)(3)(iv)(A) of this section by the LEA's total membership for the previous fiscal year; and

(C) Multiplying the figure determined in paragraph (c)(3)(iv)(B) of this section by the LEA's total membership of federally connected children for the current fiscal year, as described in paragraph (c)(1)(i) of this section.

(d) An SEA may submit data to calculate the average daily attendance calculation for the LEAs in that State in one of the following ways:

(1) If the SEA distributes State aid for education based on data similar to attendance data, the SEA may request that the Secretary use those data to calculate the ADA of each LEA's federally connected children. If the Secretary determines that those data are, in effect, equivalent to attendance data, the Secretary allows use of the requested data and determines the method by which the ADA for all of the LEA's federally connected children will be calculated.

(2) An SEA may submit data necessary for the Secretary to calculate a State average attendance ratio for all LEAs in the State by submitting the total ADA and total membership data for the State for each of the last three most recent fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the federally connected children for each LEA in the State by—

(i)(A) Dividing the total ADA data by the total membership data for each of the three fiscal years and averaging the results; and

(B) Multiplying the average determined in paragraph (d)(2)(i)(A) of this section by the LEA's total membership of federally connected children as described in paragraph (c)(1)(i) of this section.

(e) The Secretary may calculate a State average attendance ratio in States with LEAs that would benefit from such calculation by using the methodology in paragraph (d)(2)(i) of this section.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703, 7706, 7713)

■ 13. Section 222.40 is amended as follows:

■ A. In paragraph (d)(1)(i) by adding the phrase ''or density'' after the word ''sparsity''.

■ B. By adding paragraph (d)(1)(iii).

The addition reads as follows:

§ 222.40 What procedures does a State educational agency use for certain local educational agencies to determine generally comparable local educational agencies using additional factors, for local contribution rate purposes?

* * * * *

(d) * * *

(1) * * *

(iii) If an SEA proposes to use one or more special additional factors to determine generally comparable LEAs, the SEA must submit, with its annual submission of generally comparable data to the Department, its rationale for selecting the additional factor or factors and describe how they affect the cost of education in the LEA.

* * * * *

■ 14. Section 222.62 is amended by:

■ A. Redesignating paragraphs (a) and (b) and paragraphs (b) and (c), respectively.

■ B. Adding a new paragraph (a).

■ C. Removing the phrase ''an additional assistance payment under section 8003(f)'' from newly redesignated paragraph (b) and adding in its place ''a heavily impacted LEA payment''.

■ D. Removing the phrase ''an additional assistance payment under section 8003(f)'' from newly redesignated paragraph (c) and adding in its place ''see above and throughout the section''.

The addition reads as follows:

§ 222.62 How are local educational agencies determined eligible under section 7003(b)(2)?

(a) An applicant that wishes to be considered to receive a heavily impacted payment must submit the required information indicating tax rate eligibility under §§ 222.63 or 222.64 with the annual section 7003 Impact Aid application. Final LEA tax rate eligibility must be verified by the SEA under the process described in § 222.73.

* * * * *

■ 15. Section 222.91 is revised to read as follows:

§ 222.91 What requirements must a local educational agency meet to receive a payment under section 7003 of the Act for children residing on Indian lands?

(a) To receive a payment under section 7003 of the Act for children residing on Indian lands, an LEA must—

(1) Meet the application and eligibility requirements in section 7003 and subparts A and C of these regulations;

(2) Except as provided in paragraph (b) of this section, develop and implement policies and procedures in accordance with § 222.94; and

(3) Include in its application for payments under section 7003—

(i) An assurance that the LEA established these policies and procedures in consultation with and based on information from tribal officials and parents of those children residing on Indian lands who are Indian children, except as provided in paragraph (b) of this section;

(ii) An assurance that the LEA has provided a written response to the comments, concerns and recommendations received through the Indian policies and procedures consultation process, except as provided in paragraph (b) of this section; and

(iii) Either a copy of the policies and procedures, or documentation that the LEA has received a waiver in accordance with the provisions of paragraph (b) of this section.

(b) An LEA is not required to comply with § 222.94 with respect to students from a tribe that has provided the LEA with a waiver that meets the requirements of this paragraph.

(1) A waiver must contain a voluntary written statement from an appropriate tribal official or tribal governing body that—

(i) The LEA need not comply with § 222.94 because the tribe is satisfied with the LEA's provision of educational services to the tribe's students; and

(ii) The tribe was provided a copy of the requirements in § 222.91 and § 222.94, and understands the requirements that are being waived.

(2) The LEA must submit the waiver at the time of application.

(3) The LEA must obtain a waiver from each tribe that has Indian children living on Indian lands claimed by the LEA on its application under section 7003 of the Act. If the LEA only obtains waivers from some, but not all, applicable tribes, the LEA must comply with the requirements of § 222.94 with respect to those tribes that did not agree to waive these requirements.

(Approved by the Office of Management and Budget under control number 1810–0036)

(Authority: 20 U.S.C. 7703(a), 7704)

■ 16. Section 222.94 is revised to read as follows:

§ 222.94 What are the responsibilities of the LEA with regard to Indian policies and procedures?

(a) An LEA that is subject to the requirements of § 222.91(a) must consult with and involve local tribal officials and parents of Indian children in the planning and development of:

(1) Its Indian policies and procedures (IPPs), and

(2) The LEA's general educational program and activities.

(b) An LEA's IPPs must include a description of the specific procedures for how the LEA will:

(1) Disseminate relevant applications, evaluations, program plans and information related to the LEA's education program and activities with sufficient advance notice to allow tribes and parents of Indian children the opportunity to review and make recommendations.

(2) Provide an opportunity for tribes and parents of Indian children to provide their views on the LEA's educational program and activities, including recommendations on the needs of their children and on how the LEA may help those children realize the benefits of the LEA's education programs and activities. As part of this requirement, the LEA will—

(i) Notify tribes and the parents of Indian children of the opportunity to submit comments and recommendations, considering the tribe's preference for method of communication, and

(ii) Modify the method of and time for soliciting Indian views, if necessary, to ensure the maximum participation of tribes and parents of Indian children.

(3) At least annually, assess the extent to which Indian children participate on an equal basis with non-Indian children in the LEA's education program and activities. As part of this requirement, the LEA will:

(i) Share relevant information related to Indian children's participation in the LEA's education program and activities with tribes and parents of Indian children; and

(ii) Allow tribes and parents of Indian children the opportunity and time to review and comment on whether Indian children participate on an equal basis with non-Indian children.

(4) Modify the IPPs if necessary, based upon the results of any assessment or input described in paragraph (b) of this section.

(5) Respond at least annually in writing to comments and recommendations made by tribes or parents of Indian children, and disseminate the responses to the tribe and parents of Indian children prior to the submission of the IPPs by the LEA.

(6) Provide a copy of the IPPs annually to the affected tribe or tribes.

(c)(1) An LEA that is subject to the requirements of § 222.91(a) must implement the IPPs described in paragraph (b) of this section.

(2) Each LEA that has developed IPPs shall review those IPPs annually to ensure that they comply with the provisions of this section, and are implemented by the LEA in accordance with this section.

(3) If an LEA determines, after input from the tribe and parents of Indian children, that its IPPs do not meet the requirements of this section, the LEA shall amend its IPPs to conform to those requirements within 90 days of its determination.

(4) An LEA that amends its IPPs shall, within 30 days, send a copy of the amended IPPs to—

(i) The Impact Aid Program Director for approval; and

(ii) The affected tribe or tribes.

(Authority: 20 U.S.C. 7704)

■ 17. Section 222.95 is amended:

■ A. In paragraph (c), by removing the number ''60'' and adding in its place ''90''.

■ B. In paragraph (d), by adding the phrase ''or part of the'' after the word ''all''.

■ C. By removing paragraphs (e), (f), and (g).

■ 18. Section 222.161 is amended:

■ A. In the section heading, by removing ''section 8009'' and adding in its place ''section 7009''.

■ B. By revising paragraph (a)(5).

■ C. By adding paragraphs (a)(6) and (b)(3).

■ D. By revising paragraph (c).

The additions and revisions read as follows:

§ 222.161 How is State aid treated under section 7009 of the Act?

(a) * * *

(5) Except as provided in paragraph (a)(6), a State may not take into consideration payments under the Act in making estimated or final State aid payments before its State aid program has been certified by the Secretary.

(6)(i) If the Secretary has not made a determination under section 7009 of the Act for a fiscal year, the State may request permission from the Secretary to make estimated or preliminary State aid payments for that fiscal year, that consider a portion of Impact Aid payments as local resources in accordance with this section.

(ii) The State must include with its request an assurance that if the Secretary determines that the State does not meet the requirements of section 222.162 for that State fiscal year, the State must pay to each affected LEA, within 60 days of the Secretary's determination, the amount by which the State reduced State aid to the LEA.

(iii) In determining whether to grant permission, the Secretary may consider factors including whether—

(A) The Secretary certified the State under § 222.162 in the prior State fiscal year; and

(B) Substantially the same State aid program is in effect since the date of the last certification.

(b) * * *

(3) For a State that has not previously been certified by the Secretary under § 222.162, or if the last certification was more than two years prior, the State submits projected data showing whether it meets the disparity standard in § 222.162. The projected data must show the resulting amounts of State aid as if the State were certified to consider Impact Aid in making State aid payments.

(c) *Definitions.* The following definition applies to this subpart:

Current expenditures is defined in section 7013(4) of the Act. Additionally, for the purposes of this section it does not include expenditures of funds received by the agency under sections 7002 and 7003(b) (including hold harmless payments calculated under section 7003(e)) that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.162.

* * * * *

■ 19. Section 222.162 is amended:

■ A. In paragraph (c)(2) introductory text, by removing the phrase ''on those bases'' in the first sentence and adding in its place ''using one of the methods in paragraph (d) of this section''.

■ B. By revising paragraph (d).

The revision reads as follows:

§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

* * * * *

(d) *Accounting for special cost differentials.* In computing per-pupil figures under paragraph (c) of this section, the State accounts for special cost differentials that meet the

requirements of paragraph (c)(2) of this section in one of four ways:

(1) *The inclusion method on a revenue basis.* The State divides total revenues by a weighted pupil count that includes only those weights associated with the special cost differentials.

(2) *The inclusion method on an expenditure basis.* The State divides total current expenditures by a weighted pupil count that includes only those weights associated with the special cost differentials.

(3) *The exclusion method on a revenue basis.* The State subtracts revenues associated with the special cost differentials from total revenues, and divides this net amount by an unweighted pupil count.

(4) *The exclusion method on an expenditure basis.* The State subtracts current expenditures from revenues associated with the special cost differentials from total current expenditures, and divides this net amount by an unweighted pupil count.

* * * * *

■ 20. Section 222.164 is amended:

■ A. In the section heading, by removing ''section 8009'' and adding in its place ''section 7009''.

■ B. By revising paragraph (a)(2).

The revision reads as follows:

§ 222.164 What procedures does the Secretary follow in making a determination under section 7009?

(a) * * *

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall provide either the State or all LEAs with a complete copy of the submission required in paragraph (b) of this section. Following receipt of the submission, the Secretary shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

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