

IMPACT AID REGULATIONS

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Title 34: Education

PART 222—IMPACT AID PROGRAMS

Contents

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

Source: 60 FR 50778, Sept. 29, 1995, unless otherwise noted.

Subpart A—General

§222.1 What is the scope of this part?

The regulations in this part govern the provision of financial assistance under title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) to local educational agencies (LEAs) in areas affected by Federal activities.

(Authority: 20 U.S.C. 7701-7714)

§222.2 What definitions apply to this part?

(a)(1) The following terms defined in section 8013 of the Act apply to this part:

Armed forces
Average per-pupil expenditure
Construction
Current expenditures
Indian lands
Local contribution percentage
Low-rent housing
Modernization
School facilities

(2) The following term defined in §222.30 applies to this part:

Free public education

(b) The following terms defined in section 9101 of the ESEA (General Provisions) also apply to this part:

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Average daily attendance (ADA)

Child

County

Department

Outlying area

Parent

Secretary

State

State educational agency (SEA)

(c) In addition, the following definitions apply to this part:

Act means title VIII of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

Applicant means any LEA that files an application for financial assistance under section 8002 or section 8003 of the Act and the regulations in this part implementing those provisions. Except as provided in section 8005(d)(4) of the Act, an SEA may be an applicant for assistance under section 8003 only if the SEA directly operates and maintains facilities for providing free public education for the children it claims in its application.

(Authority: 20 U.S.C. 7705 and 7713(9))

Application means a complete and signed application in the form approved by the Secretary, filed by an applicant.

(Authority: 20 U.S.C. 7705)

Federally connected children means children described in section 8003 or section 8010(c)(2) of the Act.

(Authority: 20 U.S.C. 7703(a)(1) and 7710(c); 37 U.S.C. 101)

Federal property. (1) The term means—

(i) Federal property described in section 8013; and

(ii) Ships that are owned by the United States and whose home ports are located upon Federal property described in this definition.

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(2) Notwithstanding paragraph (1) of this definition, for the purpose of section 8002 the term does not include—

(i) Any real property that the United States does not own in fee simple, except for Indian lands described in section 8013(7), and transferred property described in section 8002(d); and

(ii) Real property described in section 8002(c) (real property with respect to which payments are being made under section 13 of the Tennessee Valley Authority Act of 1933).

(Authority: 20 U.S.C. 7702(c) and (d), and 7713(5) and (7))

Fiscally dependent LEA means an LEA that does not have the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes.

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Fiscally independent LEA means an LEA that has the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes within the limits established by State law.

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Local educational agency (LEA) is defined in section 8013(9). Except for an SEA qualifying under section 8005(d)(4), the term includes an SEA only so long as—

(1) The SEA directly operates and maintains the facilities for providing free public education for the children it claims in its application;

(2) The children claimed by the SEA actually are attending those State-operated facilities; and

(3) The SEA does not, through a tuition arrangement, contract, or by any other means, pay another entity to operate and maintain facilities for those children.

(Authority: 20 U.S.C. 7705(d)(4) and 7713(9))

Local real property tax rate for current expenditure purposes. (1) For a fiscally independent LEA, the term means the entire tax levied on real property within the LEA, if all but a *de minimis* amount of the total proceeds from the tax levy are available to that LEA for current expenditures (as defined in section 8013).

(2) For a fiscally dependent LEA, the term means the following:

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(i) The entire tax levied by the general government on real property if all but a *de minimis* amount of the total proceeds from that tax levy are available to the LEA for current expenditures (as defined in section 8013);

(ii) That portion of a local real property tax rate designated by the general government for current expenditure purposes (as defined in section 8013); or

(iii) If no real property tax levied by the general government meets the criteria in paragraphs (2)(i) or (ii) of this definition, an imputed tax rate that the Secretary determines by—

(A) Dividing the total local real property tax revenue available for current expenditures of the general government by the total revenue from all local sources available for current expenditures of the general government;

(B) Multiplying the figure obtained in paragraph (2)(iii)(A) of this definition by the revenue received by the LEA for current expenditures (as defined in section 8013) from the general government; and

(C) Dividing the figure obtained in paragraph (2)(iii)(B) of this definition by the total current actual assessed value of all real property in the district.

(3) The term does not include any portion of a tax or revenue that is restricted to or dedicated for any specific purpose other than current expenditures (as defined in section 8013).

(Authority: 20 U.S.C. 7702(b)(2) and 7703(f))

Membership means the following:

(1)(i) The definition given to the term by State law; or

(ii) If State law does not define the term, the number of children listed on an LEA's current enrollment records on its survey date(s).

(2) The term includes children for whom the applicant is responsible for providing a free public education, but who are attending schools other than those operated by the applicant under a tuition arrangement described in paragraph (4) of the definition of “free public education” in §222.30.

(3) The term does not include children who—

(i) Have never attended classes in schools of the LEA or of another educational entity with which the LEA has a tuition arrangement;

(ii) Have permanently left the LEA;

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(iii) Otherwise have become ineligible to attend classes there; or

(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.

(Authority: 20 U.S.C. 7703 and 8801(1))

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

(i) An employee of the Federal Government who reports to work on, or whose place of work is located on, Federal property.

(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.

(iii) A proportion, to be determined by the Secretary, based on persons working on commingled Federal and non-Federal properties other than those persons covered under paragraph (1)(ii) of this definition.

(2) The term does not include a person who reports to work at a work station not on Federal property but spends more than 50 percent of his working time on Federal property providing services to operations or activities authorized to be carried out on Federal property.

(Authority: 20 U.S.C. 7701 and 7703)

Real property. (1) The term means—

(i) Land; and

(ii) Improvements (such as buildings and appurtenances to those buildings, railroad lines, utility lines, pipelines, and other permanent fixtures), except as provided in paragraph (2).

(2) The term does not include—

(i) Improvements that are classified as personal property under State law; or

(ii) Equipment and movable machinery, such as motor vehicles, movable house trailers, farm machinery, rolling railroad stock, and floating dry docks, unless that equipment or movable machinery is classified as real property or subject to local real property taxation under State law.

(Authority: 20 U.S.C. 7702 and 7713(5))

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Revenues derived from local sources. (1) The term means—

(i) Tax funds derived from real estate; and

(ii) Other taxes or receipts that are received from the county, and any other local tax or miscellaneous receipts.

(2)(i) For the purpose of paragraph (1)(i) of this definition, the term *tax funds derived from real estate* means—

(A) Locally received funds that are derived from local taxation of real property;

(B) Tax funds that are received on account of Wherry-Spence housing projects (12 U.S.C. 1702 *et seq.*) located on private property; and

(C) All local real property tax funds that are received from either the county or the State, serving as a collecting agency, and that are returned to the LEA for expenditure by that agency.

(ii) The term does not include—

(A) Any payments under this Act or the Johnson-O'Malley Act (25 U.S.C. 452);

(B) Tax payments that are received on account of Wherry-Spence housing projects located on federally owned property; or

(C) Local real property tax funds that are received by the State and distributed to LEAs on a per-pupil or formula basis.

(Authority: 20 U.S.C. 7713(11))

State aid means any contribution, no repayment of which is expected, made by a State to or on behalf of an LEA within the State for the support of free public education.

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

Uniformed services means the United States Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service.

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

(Authority: 20 U.S.C. 7703(a)(1); 37 U.S.C. 101)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33161, June 11, 2015]

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§222.3 How does a local educational agency apply for assistance under section 8002 or 8003 of the Act?

An LEA must meet the following application requirements to be considered for a payment under section 8002 or 8003:

(a) Except as provided in paragraphs (b) and (d) of this section, on or before January 31 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003, the LEA must—

(1) File with the Secretary a complete and signed application for payment under section 8002 or section 8003; and

(2) Certify to the Secretary that it will file, and file, a copy of the application referred to in paragraph (a) of this section with its SEA.

(b)(1) If any of the following events that give rise to eligibility for payment occur after the filing deadline in paragraph (a)(1) of this section, an LEA must file a complete and signed application within the time limits required by paragraph (b)(2) of this section:

(i) The United States Government initiates or reactivates a Federal activity, or acquires real property.

(ii) The United States Congress enacts new legislation.

(iii) A reorganization of school districts takes place.

(iv) Property, previously determined by the Secretary not to be Federal property, is determined in writing by the Secretary to be Federal property.

(2) Except as provided in paragraph (d) of this section, within 60 days after the applicable event occurs but not later than September 30 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003, the LEA must—

(i) File an application with the Secretary as permitted by paragraph (b)(1) of this section; and

(ii) File a copy of that application with its SEA.

(c)(1) If the SEA wishes to notify the Secretary of any inconsistencies or other concerns with an LEA's application, the SEA must do so—

(i) For an application subject to the filing deadlines in paragraph (a)(1) of this section, on or before February 15 of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8002 or section 8003; and

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(ii) On or before fifteen days following the date by which an application subject to the filing deadlines in paragraph (b) of this section must be filed.

(2) The Secretary does not process for payment a timely filed application until any concerns timely raised by the SEA are resolved. If the Secretary does not receive comments or notification from the SEA by the applicable deadline set forth in paragraph (c)(1) of this section, the Secretary assumes that the data and statements in the application are, to the best of the SEA's knowledge, true, complete, and correct.

(d) If a filing date in this section falls on a Saturday, Sunday, or Federal holiday, the deadline for filing is the next succeeding business day.

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

(Authority: 20 U.S.C. 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

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§222.4 How does the Secretary determine when an application is timely filed?

To be timely filed under §222.3, an application must be received by the Secretary on or before the applicable filing date.

[62 FR 35412, July 1, 1997, as amended at 80 FR 33162, June 11, 2015]

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§222.5 When may a local educational agency amend its application?

(a) An LEA may amend its application following any of the events described in §222.3(b)(1) by submitting a written request to the Secretary and a copy to its SEA no later than the earlier of the following events:

(1) The 60th day following the applicable event.

(2) By the end of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(b) The LEA also may amend its application based on actual data regarding eligible Federal properties or federally connected children if—

(1) Those data were not available at the time the LEA filed its application (*e.g.*, due to a second membership count of students) and are acceptable to the Secretary; and

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(2) The LEA submits a written request to the Secretary with a copy to its SEA no later than the end of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(Authority: 20 U.S.C. 7705)

[80 FR 33162, June 11, 2015]

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§222.6 Which applications does the Secretary accept?

(a) The Secretary accepts or approves for payment any otherwise approvable application under section 8002 or section 8003 that is timely filed with the Secretary in accordance with §§222.3, 222.4, and 222.5, as applicable.

(b) The Secretary does not accept or approve for payment any section 8002 or section 8003 application that is not timely filed with the Secretary as described in paragraph (a) of this section, except as follows:

(1) The Secretary accepts and approves for payment any otherwise approvable application filed within—

(i) 60 days from the application deadline established in §222.3; or

(ii) 60 days from the date of the Secretary's written notice of an LEA's failure to comply with the applicable filing date.

(2) The Secretary reduces the payment for applications described in paragraph (b)(1) of this section by 10 percent of the amount that would have been paid if the LEA had timely filed the application.

(Authority: 20 U.S.C. 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

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§222.7 What information may a local educational agency submit after the application deadline?

(a) *General.* Except as indicated in paragraph (b) of this section, the Secretary does not consider information submitted by an applicant after the deadlines prescribed in this subpart for submission of applications and amendments to applications.

(b) *Information solicited by the Secretary.* The Secretary may solicit from an applicant at any time additional information to process an application.

(Authority: 20 U.S.C. 7702, 7703, 7705, 7706)

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§222.8 What action must an applicant take upon a change in its boundary, classification, control, governing authority, or identity?

(a) Any applicant that is a party to an annexation, consolidation, deconsolidation, merger, or other similar action affecting its boundaries, classification, control, governing authority, or identity must provide the following information to the Secretary as soon as practicable:

- (1) A description of the character and extent of the change.
- (2) The effective date of the change.
- (3) Full identification of all predecessor and successor LEAs.
- (4) Full information regarding the disposition of the assets and liabilities of all predecessor LEAs.
- (5) Identification of the governing body of all successor LEAs.
- (6) The name and address of each authorized representative officially designated by the governing body of each successor LEA for purposes of the Act.

(b) If a payment is made under section 8002 or 8003 to an LEA that has ceased to be a legally constituted entity during the regular school term due to an action described in paragraph (a) of this section, the LEA may retain that payment if—

- (1) An adjustment is made in the payment of a successor LEA to account for the payment to the predecessor LEA; or
- (2)(i) The payment amount does not exceed the amount the predecessor LEA would have been eligible to receive if the change in boundaries or organization had not taken place; and
- (ii) A successor LEA is not an eligible applicant.

(c) A predecessor LEA receiving any portion of a payment under section 8002 or 8003 that exceeds the amount allowed by paragraph (b)(2)(i) of this section must return the excessive portion to the Secretary, unless the Secretary determines otherwise under section 8012 of the Act.

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

(Authority: 20 U.S.C. 7702 and 7703)

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§222.9 What records must a local educational agency maintain?

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Except as otherwise provided in §222.10—

- (a) An LEA must maintain adequate written records to support the amount of payment it received under the Act for any fiscal year;
- (b) On request, the LEA must make its records available to the Secretary for the purpose of examination or audit; and
- (c) Each applicant must submit such reports and information as the Secretary may require to determine the amount that the applicant may be paid under the Act.

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

(Authority: 20 U.S.C. 1232f, 7702, 7703, 7704, 7706)

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§222.10 How long must a local educational agency retain records?

An LEA must retain the records described in §222.9 until the later of—

- (a) Three years after the last payment for a fiscal year; or
- (b) If the records have been questioned on Federal audit or review, until the question is finally resolved and any necessary adjustments to payments have been made.

(Authority: 20 U.S.C. 1232f, 7702, 7703, 7704, 7706)

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§222.11 How does the Secretary recover overpayments?

Except as otherwise provided in §§222.12-222.18, the Secretary adjusts for and recovers overpayments as follows:

- (a) If the Secretary determines that an LEA has received a payment in excess of what it should have received under the Act and this part, the Secretary deducts the amount of the overpayment from subsequent payments for which the LEA is eligible under the Act.
- (b)(1) If the LEA is not eligible for subsequent payments under the Act, the LEA must promptly refund the amount of the overpayment to the Secretary.
- (2) If the LEA does not promptly repay the amount of the overpayment or promptly enter into a repayment agreement with the Secretary, the Secretary may use the procedures in 34 CFR part 30 to offset that amount against payments from other Department programs or, under the circumstances permitted in part 30, to request that another agency offset the debt.

(Authority: 20 U.S.C. 1226a-1, 7702, 7703, 7706, 7712)

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[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35412, July 1, 1997]

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§222.12 What overpayments are eligible for forgiveness under section 8012 of the Act?

(a) The Secretary considers as eligible for forgiveness under section 8012 of the Act (“eligible overpayment”) any amount that is more than an LEA was eligible to receive for a particular fiscal year under the Act, except for the types of overpayments listed in §222.13.

(b) The Secretary applies §§222.14-222.18 in forgiving, in whole or part, an LEA's obligation to repay an eligible overpayment that resulted from error either by the LEA or the Secretary.

(Authority: 20 U.S.C. 7712)

[62 FR 35412, July 1, 1997]

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33162, June 11, 2015]

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§222.13 What overpayments are not eligible for forgiveness under section 8012 of the Act?

The Secretary does not consider as eligible for forgiveness under section 8012 of the Act any overpayment caused by an LEA's failure to expend or account for funds properly under the following laws and regulations:

(a) Section 8003(d) of the Act (implemented in subpart D of this part) for certain federally connected children with disabilities.

(b) Section 8007 of the Act for construction.

(Authority: 20 U.S.C. 7712)

[80 FR 33162, June 11, 2015]

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§222.14 What requirements must a local educational agency meet for an eligible overpayment to be forgiven in whole or part?

The Secretary forgives an eligible overpayment, in whole or part as described in §222.18, if—

(a) An LEA submits to the Department's Impact Aid Program office a written request for forgiveness by the later of—

(1) Thirty days from the LEA's initial receipt of a written notice of the overpayment; or

(2) September 2, 1997;

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(b) The LEA submits to the Department's Impact Aid Program office the information and documentation described in §222.16 by the deadlines described in paragraph (a) of this section, or other time limit established in writing by the Secretary due to lack of availability of the information and documentation; and

(c) The Secretary determines under §222.17 that—

(1) In the case either of an LEA's or the Department's error, repayment of the LEA's total eligible overpayments will result in an undue financial hardship on the LEA and seriously harm the LEA's educational program; or

(2) In the case of the Department's error, determined on a case-by-case basis, repayment would be manifestly unjust (“manifestly unjust repayment exception”).

[62 FR 35413, July 1, 1997]

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§222.15 How are the filing deadlines affected by requests for other forms of relief?

Unless the Secretary (or the Secretary's delegatee) extends the applicable time limit in writing—

(a) A request for forgiveness of an overpayment under §222.14 does not extend the time within which an applicant must file a request for an administrative hearing under §222.151; and

(b) A request for an administrative hearing under §222.151, or for reconsideration under §222.152, does not extend the time within which an applicant must file a request for forgiveness under §222.14.

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

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§222.16 What information and documentation must a local educational agency submit for an eligible overpayment to be considered for forgiveness?

(a) Every LEA requesting forgiveness must submit, within the time limits established under §222.14(b), the following information and documentation for the fiscal year immediately preceding the date of the forgiveness request (“preceding fiscal year”):

(1) A copy of the LEA's annual financial report to the State.

(2) The LEA's local real property tax rate for current expenditure purposes, as described in §222.17(b).

(3) The average local real property tax rate of all LEAs in the State.

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(4) The average per pupil expenditure (APPE) of the LEA, calculated by dividing the LEA's aggregate current expenditures by the total number of children in average daily attendance for whom the LEA provided a free public education.

(5) The APPE of the State, as defined in section 8013 of the ESEA.

(b) An LEA requesting forgiveness under §222.14(c)(2) (manifestly unjust repayment exception), or §222.17(a)(3) (no present or prospective ability to repay), also must submit written information and documentation in specific support of its forgiveness request under those provisions within the time limits established under §222.14(b).

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

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§222.17 How does the Secretary determine undue financial hardship and serious harm to a local educational agency's educational program?

(a) The Secretary determines that repayment of an eligible overpayment will result in undue financial hardship on an LEA and seriously harm its educational program if the LEA meets the requirements in paragraph (a)(1), (2), or (3) of this section.

(1) An LEA other than an LEA described in paragraphs (a)(2) and (3) of this section meets the requirements of paragraph (a) of this section if—

(i) The LEA's eligible overpayments on the date of its request total at least \$10,000;

(ii) The LEA's local real property tax rate for current expenditure purposes, for the preceding fiscal year, is equal to or higher than the State average local real property tax rate for that preceding fiscal year; and

(iii) The LEA's average per pupil expenditure (APPE) (as described in §222.16(a)(4)) for the preceding fiscal year is lower than the State APPE (as described in §222.16(a)(5)) for that preceding fiscal year.

(2) The following LEAs qualify under paragraph (a) of this section if they meet the requirements in paragraph (a)(1)(i) of this section and their APPE (as described in §222.16(a)(4)) for the preceding fiscal year does not exceed 125 percent of the State APPE (as described in §222.16(a)(5)) for that preceding fiscal year:

(i) An LEA with boundaries that are the same as a Federal military installation.

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(ii) Other LEAs with no local real property tax revenues, or with minimal local real property tax revenues per pupil due to substantial amounts of Federal property in the LEA as compared with the average amount of those revenues per pupil for all LEAs in the State.

(3) An LEA qualifies under paragraph (a) of this section if neither the successor nor the predecessor LEA has the present or prospective ability to repay the eligible overpayment.

(b) The Secretary uses the following methods to determine a tax rate for the purposes of paragraph (a)(1)(ii) of this section:

(1) If an LEA is fiscally independent, the Secretary uses actual tax rates if all the real property in the taxing jurisdiction of the LEA is assessed at the same percentage of true value. In the alternative, the Secretary computes a tax rate for fiscally independent LEAs by using the methods described in §§222.67-222.69.

(2) If an LEA is fiscally dependent, the Secretary imputes a tax rate using the method described in §222.70(b).

(Authority: 20 U.S.C. 7712)

[62 FR 35413, July 1, 1997]

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§222.18 What amount does the Secretary forgive?

For an LEA that meets the requirements of §222.14(a) (timely filed forgiveness request) and §222.14(b) (timely filed information and documentation), the Secretary forgives an eligible overpayment as follows:

(a) *Forgiveness in whole.* The Secretary forgives the eligible overpayment in whole if the Secretary determines that the LEA meets—

(1) The requirements of §222.17 (undue financial hardship), and the LEA's current expenditure closing balance for the LEA's fiscal year immediately preceding the date of its forgiveness request ("preceding fiscal year") is ten percent or less of its total current expenditures (TCE) for that year; or

(2) The manifestly unjust repayment exception in §222.14(c)(2).

(b) *Forgiveness in part.* (1) The Secretary forgives the eligible overpayment in part if the Secretary determines that the LEA meets the requirements of §222.17 (undue financial hardship), and the LEA's preceding fiscal year's current expenditure closing balance is more than ten percent of its TCE for that year.

(2) For an eligible overpayment that is forgiven in part, the Secretary—

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(i) Requires the LEA to repay the amount by which the LEA's preceding fiscal year's current expenditure closing balance exceeded ten percent of its preceding fiscal year's TCE (“calculated repayment amount”); and

(ii) Forgives the difference between the calculated repayment amount and the LEA's total overpayments.

(3) For the purposes of this section, “current expenditure closing balance” means an LEA's closing balance before any revocable transfers to non-current expenditure accounts, such as capital outlay or debt service accounts.

Example: An LEA that timely requests forgiveness has two overpayments of which portions remain owing on the date of its request—one of \$200,000 and one of \$300,000. Its preceding fiscal year's closing balance is \$250,000 (before a revocable transfer to a capital outlay or debt service account); and 10 percent of its TCE for the preceding fiscal year is \$150,000.

The Secretary calculates the amount that the LEA must repay by determining the amount by which the preceding fiscal year's closing balance exceeds 10 percent of the preceding year's TCE. This calculation is made by subtracting 10 percent of the LEA's TCE (\$150,000) from the closing balance (\$250,000), resulting in a difference of \$100,000 that the LEA must repay. The Secretary then totals the eligible overpayment amounts (\$200,000 + \$300,000), resulting in a total amount of \$500,000. The Secretary subtracts the calculated repayment amount (\$100,000) from the total of the two overpayment balances (\$500,000), resulting in \$400,000 that the Secretary forgives.

(Authority: 20 U.S.C. 7712)

[62 FR 35414, July 1, 1997]

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§222.19 What other statutes and regulations apply to this part?

(a) The following Federal statutes and regulations on nondiscrimination apply to assistance under this part:

(1) The provisions of title VI of the Civil Rights Act of 1964 (Pub. L. 88-352) (prohibition of discrimination on the basis of race, color or national origin), and the implementing regulations (34 CFR part 100).

(Authority: 42 U.S.C. 2000d—2000d-4)

(2) The provisions of title IX of the Education Amendments of 1972 (Pub. L. 92-318) (prohibition of discrimination on the basis of sex), and the implementing regulations (34 CFR part 106).

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(Authority: 20 U.S.C. 1681-1683)

(3) The provisions of section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112) (prohibition of discrimination on the basis of disability), and the implementing regulations (34 CFR part 104).

(Authority: 29 U.S.C. 794)

(4) The provisions of title II of the Americans with Disabilities Act of 1990 (Pub. L. 101-336) (prohibition of discrimination on basis of disability), and any implementing regulations.

(Authority: 42 U.S.C. 12101-12213)

(5) The provisions of the Age Discrimination Act of 1975 (Pub. L. 94-135) (prohibition of age discrimination), and any implementing regulations.

(Authority: 42 U.S.C. 6101)

(b) The following Education Department General Administrative Regulations (EDGAR):

(1) Subparts A, E, F, and §§75.900 and 75.910 of 34 CFR part 75 (Direct Grant Programs) for payments under sections 8003(d) (payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities), except for the following:

(i) Section 75.603 does not apply to payments under section 8007 (construction) or section 8008 (school facilities).

(ii) Section 75.605 does not apply to payments under section 8007 (construction).

(iii) Sections 75.600-602, 75.604, and 75.606-617 apply to payments under section 8007 (construction) only to the extent that funds received under that section are used for major renovations or to construct new school facilities.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 82 (New Restrictions on Lobbying).

(4) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(c) 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)).

(d) 2 CFR part 200, as adopted in 2 CFR part 3474 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards), for payments under sections 8003(d)

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(payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities).

(Authority: 20 U.S.C. 1221e-3)

[60 FR 50778, Sept. 29, 1995. Redesignated at 62 FR 35412, July 1, 1997; 79 FR 76095, Dec. 19, 2014; 80 FR 33162, June 11, 2015]

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Subpart B—Payments for Federal Property Under Section 8002 of the Act

§222.20 What definitions apply to this subpart?

In addition to the terms referenced or defined in §222.2, the following definitions apply to this subpart:

Acquisition or acquired by the United States. (1) The term means—

(i) The receipt or taking by the United States of ownership in fee simple of real property by condemnation, exchange, gift, purchase, transfer, or other arrangement;

(ii) The receipt by the United States of real property as trustee for the benefit of individual Indians or Indian tribes; or

(iii) The imposition by the United States of restrictions on sale, transfer, or exchange of real property held by individual Indians or Indian tribes.

(2) The definition of “acquisition” in 34 CFR 77.1(c) (Definitions that Apply to Department Regulations) of this title does not apply to this subpart.

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

Assessed value. For the purpose of determining eligibility under section 8002(a)(1) and §222.21, the following definition applies:

(1) The term means the value that is assigned to real property, for the purpose of generating local real property tax revenues for current expenditures (as defined in section 8013 of the Act), by a State or local official who is legally authorized to determine that assessed value.

(2) The term does not include—

(i) A value assigned to tax-exempt real property;

(ii) A value assigned to real property for the purpose of generating other types of revenues, such as payments in lieu of taxes (PILOTs);

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(iii) Fair market value, or a percentage of fair market value, of real property unless that value was actually used to generate local real property tax revenues for current expenditures (as defined in section 8013); or

(iv) A value assigned to real property in a condemnation or other court proceeding, or a percentage of that value, unless that value was actually used to generate local real property tax revenues for current expenditures (as defined in section 8013).

(Authority: 20 U.S.C. 7702(a)(1))

Eligible Federal property. (1) The term means “Federal property” as defined in §222.2(c) for section 8002, which meets the following additional requirements:

(i) The United States has acquired the Federal property since 1938; and

(ii) The Federal property was not acquired by exchange for other Federal property that the United States owned within the school district before 1939.

(2) In addition, for local educational agencies (LEAs) that are eligible under §222.21(a)(2), the term also means land acquired by the United States Forest Service between 1915 and 1990.

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

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§222.21 What requirements must a local educational agency meet concerning Federal acquisition of real property within the local educational agency?

(a) For an LEA with an otherwise approvable application to be eligible to receive financial assistance under section 8002 of the Act, the LEA must meet the requirements in subpart A of this part and §222.22. In addition, unless otherwise provided by statute as meeting the requirements in section 8002(a)(1)(C), the LEA must document—

(1) That the United States owns or has acquired “eligible Federal property” within the LEA, that has an aggregate assessed value of 10 percent or more of the assessed value of—

(i) All real property in that LEA, based upon the assessed values of the eligible Federal property and of all real property (including that Federal property) on the date or dates of acquisition of the eligible Federal property; or

(ii) All real property in the LEA as assessed in the first year preceding or succeeding acquisition, whichever is greater, only if—

(A) The assessment of all real property in the LEA is not made at the same time or times that the Federal property was so acquired and assessed; and

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(B) State law requires an assessment be made of property so acquired; or

(2)(i) That, as demonstrated by written evidence from the United States Forest Service satisfactory to the Secretary, the LEA contains between 20,000 and 60,000 acres of land that has been acquired by the United States Forest Service between 1915 and 1990; and

(ii) That the LEA serves a county chartered by State law in 1875 or 1890.

(b) “Federal property” described in section 8002(d) (certain transferred property) is considered to be owned by the United States for the purpose of paragraph (a) of this section.

(c) If, during any fiscal year, the United States sells, transfers, is otherwise divested of ownership of, or relinquishes an interest in or restriction on, eligible Federal property, the Secretary redetermines the LEA's eligibility for the following fiscal year, based upon the remaining eligible Federal property, in accordance with paragraph (a) of this section. This paragraph does not apply to a transfer of real property by the United States described in section 8002(d).

(d) Except as provided under paragraph (a)(2) of this section, the Secretary's determinations and redeterminations of eligibility under this section are based on the following documents:

(1) For a new section 8002 applicant or newly acquired eligible Federal property, only upon—

(i) Original records as of the time(s) of Federal acquisition of real property, prepared by a legally authorized official, documenting the assessed value of that real property;

(ii) Facsimiles, such as microfilm, or other reproductions of those records; or

(iii) If the documents specified in paragraphs (d)(1)(i) and (ii) are unavailable, other records that the Secretary determines to be appropriate and reliable for establishing eligibility under section 8002(a)(1) of the Act, such as Federal agency records or local historical records.

(2) For a redetermination of an LEA's eligibility under section 8002(a)(1), only upon—

(i) Records described in paragraph (d)(1) of this section; or

(ii) Department records.

(e) The Secretary does not base the determination or redetermination of an LEA's eligibility under this section upon secondary documentation that is in the nature of an opinion, such as estimates, certifications, or appraisals.

(Authority: 20 U.S.C. 7702(a)(1))

[60 FR 50778, Sept. 29, 1995, as amended at 73 FR 70575, Nov. 20, 2008]

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

(a) An LEA with an otherwise approvable application is eligible to receive assistance under section 8002 for a fiscal year only if the LEA meets the requirements in subpart A of these regulations and §222.21, and is not substantially compensated, for the loss in revenue resulting from Federal ownership of real property by increases in revenue accruing to the LEA during the previous fiscal year from Federal activities with respect to the eligible Federal property in the LEA.

(b) The Secretary considers that an LEA is substantially compensated by increases in revenue from Federal activities with respect to the eligible Federal property if—

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

(2) The revenue described in paragraph (b)(1) of this section equals or exceeds the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance.

(c) If an LEA described in paragraph (a) of this section received revenue described in paragraph (b)(1) of this section during the preceding fiscal year that, when added to the LEA's projected total section 8002 payment for the fiscal year for which the LEA seeks assistance, exceeds the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance, the Secretary reduces the LEA's projected section 8002 payment by an amount equal to that excess amount.

(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 does not include payments received by the agency from the Secretary of Defense to support—

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

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

(Authority: 20 U.S.C. 7702(a)(2) and (b)(1)(A))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35414, July 1, 1997; 80 FR 33162, June 11, 2015]

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§222.23 How does a local educational agency determine the aggregate assessed value of its eligible Federal property for its section 8002 payment?

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(a) *General.* A local educational agency (LEA) determines the aggregate assessed value of its eligible Federal property for its section 8002 payment as follows:

(1) A local official who is responsible for assessing the value of real property located in the jurisdiction of the LEA in order to levy a property tax makes the determination of the section 8002 aggregate assessed value, based on estimated assessed values (EAVs) for the eligible Federal property in the jurisdiction.

(2) The local official first categorizes the types of expected uses of the eligible Federal property in each Federal installation or area (*e.g.*, Federal forest) based on the highest and best uses of taxable properties adjacent to the eligible Federal property (adjacent properties), and allocates a portion of the acres of the eligible Federal property to each of those expected uses, in accordance with paragraph (b) of this section.

(3) For each category of expected use of the eligible Federal property identified in accordance with paragraph (a)(2) of this section for each Federal installation or area, the local official then determines a base value in accordance with paragraphs (c) and (d) of this section.

(4) The local official next determines a section 8002 EAV for each category of expected use of the eligible Federal property in each Federal installation or area. The official determines that EAV by adjusting the base value for that category established in accordance with paragraph (a)(3) of this section, by any percentage, ratio, index, or other factor that the official would use to determine the assessed value (as defined in §222.20) of the eligible Federal property to generate local real property tax revenues for current expenditures if that eligible Federal property were taxable. (This process is illustrated in Example 8 and Table 8-2 at the end of this section.)

(5) The local official then determines a total section 8002 EAV for each Federal installation or area in the LEA by adding together the assessed values determined pursuant to paragraph (a)(4) of this section for all property use categories of eligible Federal property in that Federal installation or area.

(6) The local official determines a section 8002 aggregate assessed value for the LEA as follows:

(i) If the LEA contains a single Federal installation or area with eligible Federal property, the total section 8002 EAV determined pursuant to paragraph (a)(5) of this section constitutes the section 8002 aggregate assessed value for the LEA.

(ii) If the LEA contains more than one Federal installation or area with eligible Federal property, the local official calculates the section 8002 aggregate assessed value for all of the eligible Federal property in the LEA by adding together the section 8002 total EAVs determined pursuant to paragraph (a)(5) of this section for all Federal installations and areas containing eligible Federal property within the LEA. (This process is illustrated in Example 8 and Table 8-2 at the end of this section.)

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(b) *Categorizing expected uses.* (1) The local official categorizes the expected uses of the eligible Federal property, in accordance with paragraph (a)(2) of this section, by—

(i) Identifying the tax assessment classifications that represent the highest and best uses of the taxable adjacent property (*e.g.*, residential, commercial, agricultural); and

(ii) Determining the relative proportions of taxable adjacent properties, based on acreage, that are devoted to each of those tax assessment classifications that represent the highest and best uses of the taxable adjacent property (*e.g.*, agricultural—50 percent; residential—40 percent; commercial—10 percent).

(2) The local official then determines the allocation of each of those expected uses to the eligible Federal property acres by multiplying each of the proportions determined under paragraph (b)(1)(ii) of this section by the total acres of the eligible Federal property in that Federal installation or area.

(c) *Determining the base value for expected use categories.* The local official determines a base value for each category of expected use of the eligible Federal property in accordance with paragraph (a)(3) of this section as follows:

(1) The local official first identifies the taxable-use portion of the eligible Federal property acres in each expected use category as follows:

(i) The local official allocates a proportion (percentage) of the eligible Federal property acres identified for each expected use category under paragraph (b)(2) of this section to expected non-assessed or tax-exempt uses, such as public open space, schools, churches, and roads. The local official bases these proportions on the actual non-assessed or tax-exempt uses for each category of taxable property in the entire tax jurisdiction(s) where the selected taxable adjacent properties are located.

(ii) The local official then determines the number of acres attributable to non-assessed or tax-exempt uses for each expected use category by multiplying the non-assessed or tax-exempt proportions identified in paragraph (c)(1)(i) of this section by the number of acres in each expected-use category determined pursuant to paragraph (b)(2) of this section.

Example 1 (Allocation of Proportion of Eligible Federal Property to Non-Assessed or Tax-exempt Uses): The eligible Federal property (1,000 acres) is surrounded by properties that are classified for tax purposes according to their highest and best uses as residential (40 percent) and agricultural (60 percent) property. For the residential category (400 acres), the local official determines that approximately 20 percent would be devoted to non-assessed or tax-exempt uses, such as roads, parks, churches, and schools. The local official multiplies that proportion (.20) by the number of eligible Federal acres allocated to the residential category (400 acres) to determine the number of eligible Federal acres (80 acres) that likely would not be assessed for taxation or

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would be tax-exempt if the Federal Government no longer owned that property, as illustrated in the chart at the end of this example (Table 1-1). The local official follows a similar process for the proportion of the eligible Federal property the official allocated to agricultural use.

Table 1-1—Proportion of Residential Category of Section 8002 Eligible Federal Property Allocated to Non-Assessed or Tax-exempt Uses

	Allocated proportion (percent)	Eligible Federal acres allocated to expected use category (Col. 2 × acres in expected use category)
(1)	(2)	(3)
Residential portion of eligible Federal property (400 acres)		
Allocated by local official for non-assessed or tax-exempt uses	20	80
Allocated for taxable residential use	80	320
Total	100	400

(iii) The local official then calculates the number of acres attributable to taxable use for each expected use category by subtracting the number of acres attributable to non-assessed or tax-exempt uses determined under paragraph (c)(1)(ii) of this section from the total number of acres of eligible Federal property in that use category identified in paragraph (b)(2) of this section.

(2) For the taxable use portion determined under paragraph (c)(1)(iii) of this section for each expected use category, the local official then calculates a base value as follows:

(i) The local official selects from each expected use category identified pursuant to paragraph (b)(1)(i) of this section a minimum sample size of 10 taxable adjacent properties that represent the highest and best uses of the taxable adjacent properties. The official identifies the value that is recorded on the assessment records for each selected taxable adjacent property before any adjustment, ratio, percentage, or other factor is applied to establish a taxable (assessed) value. If at least three but fewer than 10 taxable adjacent properties are selected in an identified use category, the local official calculates a per acre value for each adjacent property and then identifies which of those properties has the lowest per-acre value. The official replicates that adjacent property's value and acreage as many times as needed until the combination of actual and replicated adjacent properties reaches ten in number. In extremely rare circumstances, the Secretary may permit the local official to select fewer than three parcels in a tax classification if

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doing so is determined by the Secretary to be necessary and reasonable and there is an insufficient number of adjacent taxable properties to replicate. In those extremely rare circumstances, the local official establishes the base value of the eligible Federal property using the average per acre value of the selected adjacent property or properties.

Example 2a (Minimum Sample Size of Adjacent Properties): The eligible Federal property is surrounded by properties that are classified for tax purposes as residential, commercial, and agricultural property. The local official selects at least 10 taxable adjacent parcels from each of the residential and agricultural property classifications as the basis for valuing the eligible Federal property.

In the commercial classification, however, only six taxable adjacent properties are selected. The lowest per-acre-valued parcel, Parcel A, is valued at \$6,000 per acre. As illustrated in Table 2-1, the local official selects all six of the commercial taxable adjacent properties, and then replicates Parcel A's value and acreage four more times to reach the minimum number of ten properties for that classification.

Example 2b (Use of Fewer Than Three Adjacent Taxable Properties in Extremely Rare Circumstances): There are three golf courses in an LEA, one on eligible Federal property and the other two on taxable property adjacent to the eligible Federal property. Under the local tax classification scheme, there is a separate tax category for golf courses. Since there are only two adjacent taxable properties in that tax classification in the taxing jurisdiction, the LEA seeks permission to establish the base value for the golf course on the eligible Federal property using the average per-acre value of the two adjacent taxable golf courses. After verifying the facts, the Secretary determines that extremely rare circumstances exist within the meaning of §222.23(c)(2)(i) and grants the LEA's request.

(ii) The local official then calculates an average per-acre value for the taxable portion of each expected use category by totaling the values (following application of any adjustment factors, if relevant) and acres of the actual and any replicated adjacent properties and then dividing the total value by the total number of acres in those properties, as illustrated in the following chart (Table 2-1).

Table 2-1—Average Per-Acre Value of Minimum Sample Size of Adjacent Properties

	Selected adjacent properties—commercial classification	Value	Acres	Value per acre
	(1)	(2)	(3)	(4)
1	Parcel A	\$150,000	25	\$6,000

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2	Parcel B	1,200,000	30	40,000
3	Parcel C	750,000	.25	3,000,000
4	Parcel D	1,000,000	40	25,000
5	Parcel E	500,000	5	100,000
6	Parcel F	250,000	.5	500,000
7	Replicated Parcel A	150,000	25	6,000
8	Replicated Parcel A	150,000	25	6,000
9	Replicated Parcel A	150,000	25	6,000
10	Replicated Parcel A	150,000	25	6,000
	Total	4,450,000	200.75	NA
	Average value/acre			
	(TOTAL Col. 2/TOTAL Col. 3)			22,166.87

(iii) The local official then multiplies the average per-acre value calculated under paragraph (c)(2)(ii) of this section by the number of acres of eligible Federal property in the taxable portion of that expected-use category, determined in accordance with paragraph (b)(2) of this section to calculate the base value for that category.

(d) *Additional procedures for determining base values.* The local official applies the following additional procedures in determining a base value for each category of expected use of the eligible Federal property, in accordance with paragraph (a)(3) of this section:

(1) The local official determines base values on a three-year cycle, as follows:

(i) The local official allocates expected uses to the eligible Federal property in accordance with paragraph (b)(2) of this section and selects taxable adjacent properties in accordance with paragraph (c)(2)(i) of this section once every three years (base year).

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(ii) For each of the following two application years, the local official uses the same allocation of expected uses of the eligible Federal property and the same taxable adjacent parcels selected for the base year, but updates the values and acreages of the selected taxable adjacent parcels.

(iii) If a previously selected taxable adjacent property becomes unsuitable for determining the base value for the expected-use category because that property has changed assessment classification, become tax-exempt, or undergone a change in character from the time that the property was selected for the base year, the local official substitutes a similar taxable adjacent property from the same expected-use category (assessment classification) in accordance with the requirements in paragraph (c)(2)(i) of this section.

Example 3 (Three-Year Cycle for Selected Adjacent Properties): For the fiscal year (FY) 2010 section 8002 application, the local official selects 15 residential taxable adjacent properties to use as the basis for valuing a portion of the eligible Federal property, and provides the value and acreages of each of those properties for the previous year (2009). The local official must use those same properties for the following two application years (2011 and 2012), assuming that those properties retain the same assessment classification, remain taxable, and do not undergo a change in the original character upon which their selection was based. For each of those following two years, the local official updates the values and acreages of each selected residential taxable adjacent property based on the preceding year's tax data (2010 and 2011, respectively).

However, during that two-year period, one of the residential taxable adjacent properties changes in character because the residential improvement is destroyed. That change to the original character makes the property unsuitable to include in the selected group of residential taxable adjacent properties for the remaining two years of the three-year period. Accordingly, the local official substitutes a residential taxable adjacent property that is similar to the originally selected property (*i.e.*, an improved residential adjacent property of similar value and size) to retain the same number and variety of taxable adjacent properties in that expected-use category as originally selected.

(2)(i) When selecting taxable adjacent properties for the base year in accordance with paragraph (c)(2)(i) of this section, the local official may include taxable adjacent properties that are recent sales (as defined in paragraph (e)(3) of this section), among other taxable adjacent properties, up to the following proportion:

$$\frac{\text{number of recent sales in the tax jurisdiction(s) in each expected use category for the three most recent years for which data are available}}{\text{total number of taxable properties in the tax jurisdiction(s) in the expected use category for the most recent year for which data are available}}$$

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Example 4 (Proportion of Recent Sales in Assessment Classification): Beginning with the most recent year for which data are available (2007), the local official determines that 40 taxable agricultural properties sold or otherwise transferred ownership in that tax jurisdiction during the three most recent years for which data are available (2005 through 2007) and that there were 500 taxable agricultural properties during 2007 (the most recent year for which data are available). (If a particular property sold more than once during the three most recent years for which data are available, the local official counts each sale.) The local official determines the proportion of sales

$$\frac{\text{number of agricultural sales in last three years for which data are available (40)}}{\text{total number of agricultural properties in most recent year for which data are available (500)}} = \text{proportion of recent sales (.08 or 8 percent)}$$

for taxable agricultural property as follows:

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(ii) The local official determines the number of recent sales the official may include with other selected taxable adjacent properties for that expected use category as follows:

$$\text{proportion (percentage) of recent sales for the expected use category (calculated under paragraph (d)(2)(i) of this section)} \times \text{total number of taxable adjacent properties selected for that expected use category}$$

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If the resulting number is a fraction, the local official rounds down to the next smaller whole number to determine the maximum number of recent sales that the official may include for that expected use category.

Example 5 (Number of Recent Sales Local Official May Use To Determine the Base Value for Each Expected Use Category of Eligible Federal Property): The eligible section 8002 Federal property in the LEA is a federally owned forest. Based on the highest and best uses of taxable adjacent properties, three expected use categories (assessment classifications) of properties surround that forest: Residential, commercial, and agricultural. After identifying and excluding a non-assessed or tax-exempt proportion for each expected use category of the eligible Federal property, in accordance with paragraphs (a)(3) and (c)(1) of this section, the local official selects 10 taxable adjacent properties each for the residential and commercial use categories, and 20 taxable adjacent properties for the agricultural use category to determine the base value for the taxable portion of each expected use category of the eligible Federal property.

During the three most recent years for which data are available, 10 percent of the residential properties in the tax jurisdiction were sold, six percent of the commercial properties were sold, and eight percent of the agricultural properties were sold. As illustrated in the following chart, of the 10 residential adjacent properties selected, the local official may select only one recent sale (10 percent (.10) × 10 residential adjacent properties = one) to use in determining the base value for that expected use category of the eligible Federal property.

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For the commercial classification, six percent of the taxable properties in the tax jurisdiction were recent sales. As illustrated in the following chart, the local official may not select any recent sales for that expected-use category because six percent (.06) of the 10 selected commercial adjacent properties is less than one whole number, and rounding down therefore results in 0 (six percent (.06) × 10 commercial adjacent properties = .6 of a property).

Finally, as illustrated in the following chart, for the 20 selected agricultural adjacent properties, the local official may use one recent sale for that expected-use category, because eight percent (.08) of the 20 properties equals 1.6 properties (eight percent (.08) × 20 agricultural adjacent properties = 1.6) and rounding down to the nearest whole number results in one property.

Table 5-1—Number of Recent Sales Local Official May Use To Determine the Base Value for Each Expected Use Category of Eligible Federal Property

	Residential	Commercial	Agricultural
1. Percent (proportion) of recent sales for expected use category	10% (.10)	6% (.06)	8% (.08)
2. Total selected adjacent properties	10	10	20
3. Row 1 × Row 2	1.0	.6	1.6
4. Number of “recent sales” local official may include among other taxable adjacent properties in determining a base value for the expected use category of the eligible Federal property	1	0	1

(e) *Definitions.* The following terms used in this section are defined as follows:

(1) *Adjacent* means next to or close to the eligible Federal property as follows:

(i) In most cases, the term *adjacent* means the closest taxable parcels within the LEA.

(ii) The term *adjacent* means properties farther away from the eligible Federal property than described in paragraph (e)(1)(i) of this section only if the Secretary determines that it is necessary and reasonable to use those more distant properties to determine the EAV of eligible Federal property.

(iii) The Secretary considers the term *adjacent* to mean properties farther than two miles from the perimeter of the eligible Federal property or outside the LEA only in extremely rare circumstances determined by the Secretary.

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Example 6 (Extremely Rare Circumstances): A very small LEA consists predominantly of non-taxable and tax-exempt property including eligible Federal property. The small taxable portion of the LEA is topographically dissimilar from the Federal property and classified for tax purposes differently than the eligible Federal property most likely would be if it were on the tax rolls, in the opinion of the local official. Based on these facts, the LEA asserts that there are no suitable adjacent taxable properties and requests permission to use taxable properties in the adjoining LEA. After verifying the facts, the Secretary determines that extremely rare circumstances exist within the meaning of §222.23(e)(1)(iii) and grants the LEA's request.

In an LEA bordering on the Pacific Ocean, the entire coastline is taken up by the eligible Federal property. Based on the absence of taxable oceanfront property in the LEA, the LEA seeks permission to use taxable oceanfront property in the adjoining LEA. After verifying the facts, the Secretary determines that extremely rare circumstances exist within the meaning of §222.23(e)(1)(iii) and grants the LEA's request.

(2)(i) *Highest and best use* of adjacent property is determined based on a highest and best use standard in accordance with State or local law or guidelines of general applicability, if available, that is not used exclusively for the eligible Federal property and includes any improvements on that property to the extent consistent with those laws or guidelines. To the extent that State or local law or guidelines of general applicability are not available, highest and best use generally must be based on the current use of the taxable adjacent property (including any improvements).

(ii) In determining the highest and best use, the local official—

(A) Also may consider the most developed and profitable use for which the taxable adjacent property is physically adaptable, but only if that use is legally permissible and financially feasible, and for which there is a need or demand in the near future;

(B) May not base the highest and best use of taxable adjacent property on potential uses that are speculative or remote; and

(C) Must consider the extent to which the eligible Federal property is physically adaptable for those expected uses and the extent to which those uses would be needed if the property were not in Federal ownership.

Example 7 (Determining the Highest and Best Use of Taxable Adjacent Properties as the Basis for EAV): If a Federal installation to be valued is bordered by residential and commercial/industrial properties, the local official takes into consideration those various highest and best uses (residential and commercial/industrial) in determining the EAV of the eligible Federal property as described in paragraphs (a) and (c)(2)(i) of this section.

Under that process, using acres, the local official first determines the relative proportions of adjacent properties devoted to each of those highest and best uses. For example, the local official

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determines that the highest and best uses of the adjacent properties are residential (60 percent) and commercial/industrial (40 percent). However, before allocating the acres of the eligible Federal property (1,000 acres) to those uses as described in paragraphs (a)(2) and (b) of this section, the local official must consider whether the Federal property is adaptable for and there is a need for those uses, in accordance with paragraph (e)(2)(ii)(B) of this section.

For example, if the Federal property is hilly and rocky or contains a large area of marshland, it may not be practical for the property to be developed primarily as residential property. Using his or her professional judgment, the local official may decide that it would be more appropriate to designate 50 percent of the acres as vacant or woodland or some other taxable classification that would indicate that improvements would likely not be located on that property. This may also affect the proportion of the property that would be designated as commercial/industrial because some of those commercial/industrial uses would support the area designated for residential use. Thus, the local official designates the remaining 50 percent of the acres as 20 percent residential and 30 percent commercial/industrial.

After the local official determines the appropriate proportions of expected uses, the official then multiplies those proportions by the total number of eligible Federal acres (1,000) to determine the number of eligible Federal acres in each expected use category, resulting in the following: residential (20 percent or 200 acres), vacant (50 percent or 500 acres), and commercial/industrial (30 percent or 300 acres). The local official then determines the base value for the taxable use portion of each expected use category under paragraph (c)(2) of this section, beginning by selecting a sample of properties that represents the highest and best uses of the taxable adjacent properties.

In selecting the sample, the local official must consider whether the Federal property would support the same degree of development as the taxable adjacent properties selected (e.g., density, size, and improvements) and whether there would be a need for that type and degree of development in the near future. The local official then makes any necessary adjustments to the sample.

(3) *Recent sales or recently sold* means taxable properties that have transferred ownership within the three most recent years for which data are available.

Example 8 (Calculation of Section 8002 EAV for Eligible Federal Property): Two different Federal properties are located within an LEA—a Federal forest (100 eligible acres) and a naval facility (1,000 eligible acres). Based on the highest and best uses of taxable adjacent properties, and as described more specifically below, the local official establishes an EAV for the eligible Federal property in the LEA of \$92,577,000 in the base year of a three-year cycle. That EAV is based on categorizing the Federal forest as 100 percent (100 acres) woodland expected use and the naval facility as 60 percent (600 acres) residential expected use and 40 percent (400 acres) commercial/industrial expected use.

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The taxing jurisdiction determines the assessed value for taxable property by multiplying the value of the property by a single assessment ratio applicable to the property's assessment category. In this case, the applicable assessment ratios are: Woodland property—30 percent of the property's value; residential property—60 percent of the property's value; and commercial/industrial property—75 percent of the property's value.

Federal forest (100 eligible Federal acres). The local official first determines the type of expected-use categories (assessment classifications) and respective proportions to use in valuing the eligible Federal property, based on the highest and best use of the taxable adjacent properties. In this case, the local official categorizes 100 percent of the Federal forest as being in the woodland use category (assessment classification) based on the highest and best use of taxable adjacent properties. The local official multiplies that proportion by the total number of eligible Federal acres (100), to determine the number of Federal acres attributable to the woodland use category (100 acres).

The local official then determines a base value for each category of expected use of the eligible Federal property as described in paragraphs (a)(3), (c), and (d) of this section. The official first determines the taxable-use portion for each expected use category, as described in paragraph (c)(1) of this section, by excluding the proportion of the total area of each use category of the eligible Federal property that the official determines should be allocated to non-assessed or tax-exempt uses.

Based on the general proportion of non-assessed or tax-exempt uses for woodland property, the local official allocates 10 percent of the woodland acres for non-assessed or tax-exempt purposes, and multiplies that proportion by the total number of acres of eligible Federal property categorized as woodland (100 acres), resulting in 10 acres attributable to a non-assessed or tax-exempt proportion of woodland. The local official then subtracts that non-assessed or tax-exempt portion (10 acres) from the total acres of eligible Federal property in that expected-use category (100 acres), resulting in 90 acres attributable to the taxable portion of the woodland expected-use category.

The local official then selects a sample of taxable adjacent properties from the expected use category (woodland), as described in paragraphs (c)(2) and (d) of this section, and uses that sample to establish a base value for that category. The sample includes the minimum required number of taxable adjacent properties (generally at least 10) from the woodland category. In addition, in selecting that sample of properties, the local official uses only the allowable proportion of recent sales, calculated as described in paragraph (d)(2) of this section. In selecting the specific taxable adjacent properties that make up that sample and that reflect the highest and best uses of the adjacent taxable properties in accordance with paragraph (c)(2)(i) of this section, the local official also considers whether the Federal property is adaptable for and whether there would be a need for those specific types of properties, such as in size and improvements, in accordance with paragraph (e)(2)(ii)(B) of this section.

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The local official calculates the average value per acre (\$1,000) of the selected sample of taxable adjacent woodland properties. The local official then multiplies the number of acres attributable to the taxable portion of the woodland expected use category (90 acres) by the average value per acre (\$1,000) of the selected taxable woodland adjacent properties, resulting in a base value for the woodland use category of the Federal forest of \$90,000.

The local official then determines the section 8002 EAV for the Federal forest as described in paragraph (a)(4) of this section by multiplying the base value established for the woodland portion of the property (\$90,000) by 30 percent (the assessment ratio for woodland property), resulting in a section 8002 EAV of \$27,000 for the Federal forest.

Naval facility (1,000 total eligible Federal acres).

The local official first determines the type of expected-use categories (assessment classifications) and respective proportions to use in valuing the eligible Federal property. For the naval facility, the local official determines that the relative mix of taxable adjacent properties, based on their highest and best uses, is 60 percent residential and 40 percent commercial/industrial. The local official multiplies those proportions by the total eligible Federal acres in the naval facility (1,000), resulting in 600 acres (60 percent \times 1,000 acres = 600 acres) to be valued as residential expected use and 400 acres (40 percent \times 1,000 acres = 400 acres) to be valued as commercial/industrial expected use.

The local official then determines a base value for each of those expected use categories of the eligible Federal property. For the residential expected-use category, the local official allocates 20 percent for non-assessed or tax-exempt uses, and multiplies that proportion by the number of eligible Federal acres allocated to that expected-use category (600 acres), resulting in 120 acres allocated to non-assessed or tax-exempt uses. The local official excludes those 120 acres by subtracting them from the total number of residential acres (600 acres), resulting in 480 acres allocated to taxable residential uses for the residential portion of the eligible Federal property in the naval facility.

For the commercial/industrial expected-use category, the local official allocates 15 percent for non-assessed or tax-exempt uses, and multiplies that proportion by the number of eligible Federal acres allocated to that expected-use category (400 acres), resulting in 60 acres allocated to non-assessed or tax-exempt uses. The local official excludes those 60 acres by subtracting them from the total number of commercial/industrial acres (400 acres), resulting in 340 acres allocated to taxable commercial/industrial uses for the commercial/industrial portion of the eligible Federal property in the naval facility.

The local official then selects a sample of taxable adjacent properties from each identified use category, as described in paragraphs (c)(2) and (d) of this section, which the official uses to establish a base value for each of those expected-use categories. That sample includes the minimum required number of taxable adjacent properties (generally at least 10) for each

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expected use category. In addition, in selecting the sample of properties, the official uses only the allowable proportion of recent sales, calculated as described in paragraph (d)(2) of this section.

In considering whether the specific group of taxable adjacent properties selected reflects the highest and best uses of the adjacent taxable properties in accordance with paragraph (c)(2)(i) of this section, the local official also considers whether the Federal property is adaptable for and whether there would be a need for those specific types of properties, in accordance with paragraph (e)(2)(ii)(B) of this section.

For example, if the official selects 10 residential parcels that are all small, such as one quarter (.25) of an acre or less, and uses those parcels to determine an EAV for a large area of Federal property, the result may exaggerate what would likely happen to that property if it were available for development. If the official uses only these small parcels (e.g., .25 acres each) for the 480 acres allocated to taxable residential uses for the residential portion of the eligible Federal property, the official would be projecting that approximately 1,920 small residential lots would be developed on that Federal property ($.25 \times 480 = 1,920$) if the property were no longer in Federal ownership. The Department believes that it would be extremely unlikely that 480 acres of the property would develop into this number of residential properties. This outcome would not reflect the local official's best judgment of the reasonable development of the property. To avoid this inappropriate result, the official would identify other taxable adjacent parcels of varying sizes to provide a more accurate picture of how the Federal property would be developed if it were on the tax rolls.

Similarly, with respect to improvements, if the local official selected taxable adjacent properties that all were improved parcels, the official would be projecting that all of the 480 acres allocated to taxable residential uses for the residential portion of the eligible Federal property would be improved. If the residential taxable adjacent parcels are a mixture of improved and unimproved properties, that projection also may be speculative based on the number of improvements that reasonably would be needed for the current and any expected new population. If the assumption is not reasonable that the entire 480 acres would be improved, then the local official would make adjustments accordingly in the sample of taxable adjacent properties by adding some unimproved residential parcels to the sample.

For the portion of the naval facility allocated to taxable residential use, the local official calculates the average per-acre value (\$100,000) of the selected sample of residential adjacent properties as described in paragraph (c)(2)(ii) of this section. The local official then multiplies the number of acres allocated to the taxable residential portion (480 acres) by the average value per acre (\$100,000) of the sample of residential adjacent properties to determine the base value (\$48,000,000) for that portion of the eligible Federal property, as described in paragraph (c)(2)(iii) of this section. The local official determines a section 8002 EAV for that residential portion by multiplying the \$48 million by 60 percent (assessment ratio for residential property), resulting in \$28,800,000 as described in paragraph (a)(4) of this section.

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Similarly, for the portion of the naval facility allocated to taxable commercial/industrial use, the local official calculates an aggregate per acre value (\$250,000) of the selected sample of commercial/industrial taxable adjacent properties as described in paragraph (c)(2)(ii) of this section. The local official then multiplies the number of eligible Federal property acres allocated to the taxable commercial/industrial portion (340 acres) by the average value per acre of the selected commercial/industrial adjacent properties (\$250,000) to determine the base value for that portion of the eligible Federal property (\$85,000,000), as described in paragraph (c)(2)(iii) of this section. The local official determines a section 8002 EAV for that commercial/industrial portion by multiplying the \$85,000,000 by 75 percent (the assessment ratio for commercial/industrial property), resulting in \$63,750,000 as described in paragraph (a)(4) of this section.

The local official then calculates the total section 8002 EAV for the entire naval facility as described in paragraph (a)(5) of this section by adding the figures for the residential portion (\$28,800,000) and the commercial/ industrial portion (\$63,750,000), resulting in a total section 8002 EAV for the entire naval facility of \$92,550,000.

Total section 8002 property in the LEA. Finally, the local official determines the aggregate section 8002 assessed value for the LEA as described in paragraph (a)(6) of this section by adding the section 8002 EAV for the Federal forest (\$27,000), and the total section 8002 EAV for the naval facility (\$92,550,000), resulting in an aggregate assessed value of \$92,577,000.

This entire process is illustrated in Tables 8-1 and 8-2 below:

Table 8-1—Allocation of Section 8002 Eligible Federal Property to Non-Taxable and Taxable Uses for Determining Base Values

Tax classifications of adjacent properties based on highest and best use	Proportion of eligible Federal property allocated to property use categories (percent)	Total acres allocated to property use categories (Col. 2 × eligible acres)	Proportion allocated to non-assessed or tax-exempt uses (percent)	Acres allocated to non-assessed or tax-exempt uses (Col. 4 × Col. 3)	Acres allocated to taxable uses and used to determine base values (Col. 3 – Col. 5)
(1)	(2)	(3)	(4)	(5)	(6)
Federal Forest (100 eligible acres)					
Woodland	100	100	10	10	90

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Subtotal		100		10	90
Naval Facility (1,000 eligible acres)					
Residential	60	600	20	120	480
Commercial/industrial	40	400	15	60	340
Subtotal	100	1,000		180	820
Total		1,100		190	910

Table 8-2—Calculation of Section 8002 Base Values, Section 8002 Estimated Assessed Values (EAVs), and Aggregate Assessed Value

Classification of adjacent parcels	Federal acres allocated for taxable use (Table 7-1, Col. 6)	Average value/acre of taxable adjacent parcels	Base value of eligible Federal property (Col. 3 × Col. 4)	Assessment ratio (percent)	Section 8002 EAVs and aggregate assessed value
(1)	(2)	(3)	(4)	(5)	(6)
Federal Forest (90 eligible acres allocated for <i>taxable</i> use (see Table 7-1, column 6))					
Woodland	90	\$1,000	\$90,000	30	\$27,000
Subtotal	90		90,000	27,000	
Naval Facility (820 eligible Federal acres allocated for <i>taxable</i> use (see Table 6-1, column 6))					
Residential	480	100,000	48,000,000	60	28,800,000
Commercial/Industrial	340	250,000	85,000,000	75	63,750,000
Subtotal	820		133,000,000		92,550,000

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Total (Aggregate Assessed Value)			133,090,000		92,577,000
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(Authority: 20 U.S.C. 7702)

[73 FR 70575, Nov. 20, 2008]

Effective Date Note: At 73 FR 70575, Nov. 20, 2008, §222.23 was revised. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

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§§222.24-222.29 [Reserved]

Subpart C—Payments for Federally Connected Children Under Section 8003(b) of the Act

§222.30 What is “free public education”?

In addition to the terms defined in §222.2, the following definition applies to this part:

Free public education. (1) The term means education that is provided—

- (i) At public expense;
 - (ii)(A) As the complete elementary or secondary educational program as determined under State law through grade 12; and
 - (B) Preschool education, whether or not included as elementary education by State law;
 - (iii) In a school of the local educational agency (LEA) or under a tuition arrangement with another LEA or other educational entity; and
 - (iv) Under public supervision and direction, except with respect to children with disabilities.
- (2) For the purpose of paragraph (1)(i) of this definition, education is provided at public expense if—
- (i) There is no tuition charge to the child or the child's parents; and
 - (ii) Federal funds, other than funds under the Act, do not provide a substantial portion of the educational program.
- (3) For the purpose of paragraph (1)(ii) of this definition, the complete elementary or secondary educational program is the program recognized by the State as meeting all requirements for

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elementary or secondary education for the children claimed and, except for preschool education, does not include a program that provides only—

(i) Supplementary services or instruction; or

(ii) A portion of the required educational program.

(4) For the purpose of paragraph (1)(iii) of this definition, a tuition arrangement must—

(i) Satisfy all applicable legal requirements in the State; and

(ii) Genuinely reflect the applicant LEA's responsibility to provide a free public education to the children claimed under section 8003.

(5) For the purpose of paragraph (1)(iv) of this definition, education provided under public supervision and direction means education that is provided—

(i) In a school of the applicant LEA or another LEA; or

(ii) By another educational entity, over which the applicant LEA, or other public agency, exercises authority with respect to the significant aspects of the educational program for the children claimed. The Secretary considers significant aspects of the educational program to include administrative decisions relating to teachers, instruction, and curriculum.

(Authority: 20 U.S.C. 7703, 7709, 7713(6))

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§222.31 To which local educational agencies does the Secretary make basic support payments under section 8003(b) of the Act?

The Secretary makes payments to an LEA with an otherwise approvable application for children claimed under section 8003(b) of the Act if—

(a) The LEA meets the requirements in subpart A of these regulations and this subpart; and

(b)(1) The LEA is responsible under applicable State or Federal law for providing a free public education to those children;

(2) The LEA is providing a free public education to those children; and

(3) The State provides funds for the education of those children on the same basis as all other public school children in the State, unless permitted otherwise under section 8009 of the Act.

(Authority: 20 U.S.C. 7703 and 7709)

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§222.32 What information does the Secretary use to determine a local educational agency's basic support payment?

(a) The Secretary determines an LEA's payment under section 8003(b) on the basis of information in the LEA's application, including information regarding the membership of federally connected children.

(b) The LEA must supply information in its application regarding its federally connected membership on the basis of any count described in §§222.33 through 222.35.

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

(Authority: 20 U.S.C. 7703 and 7705)

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§222.33 When must an applicant make its first or only membership count?

(a)(1) An applicant must select a day in the current school year as the survey date for making the first membership count, which must be no earlier than the fourth day of the regular school year and before January 31.

(2) The applicant must use the same survey date for all schools in the LEA.

(b) As of the survey date, the applicant must—

(1) Count the membership of its federally connected children; and

(2) Count the total membership of its children—both federally connected and non-federally connected.

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

(Authority: 20 U.S.C. 7703, 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

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§222.34 If an applicant makes a second membership count, when must that count be made?

(a)(1) The applicant may, but is not required to, make a second count of membership.

(2) If the applicant chooses to make a second count of membership, the applicant must select a day after January 31, but no later than May 14, as the survey date for making the second membership count, and make that count in accordance with §222.33(b).

(3) The applicant must use the same survey date for the second membership count for all schools in the LEA.

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(b) The applicant may use the information obtained from a second membership count to amend its application for assistance as described in §222.5(b).

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

(Authority: 20 U.S.C. 7703 and 7705)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

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§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 by using one or both 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. 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 and parent employment information, including—

(A) Address of the pupil's residence (or other location information for that residence, such as legal description), including the name of the Federal facility if the pupil's residence is on Federal property; and

(B) 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 (unless the parent is a member of the uniformed services on active duty);

(C) Name and address of the Federal property on which the parent is employed (or other location information, such as legal description), unless the parent is a member of the uniformed services on active duty;

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

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

(F) The signature of the parent supplying the information and the date of such signature; and

(G) The name of the parent's employer and the employer's address (or other location information, such as legal description), unless a parent is a member of the uniformed services on active duty.

(2) 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.

(b) *Source check.* (1) An applicant may count the membership of its federally connected children by using a source check to substantiate a pupil's place of residence or parent's place of employment on the survey date.

(2) A source check is a form provided—

(i) To a parent's employer, on which the employer certifies as to the place of employment of a parent of a pupil claimed;

(ii) To a housing official, on which the official certifies as to the residence of each pupil claimed; or

(iii) To a tribal official, on which the official certifies as to the residence of each pupil claimed residing on Indian lands over which that tribal official has jurisdiction.

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

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

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

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§222.36 How many federally connected children must a local educational agency have to receive a payment under section 8003?

(a) An LEA is eligible to receive a payment under section 8003 for a fiscal year only if the total number of eligible federally connected children for whom it provided a free public education for the preceding fiscal year was—

(1) At least 400 who were in average daily attendance (ADA); or

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(2) At least 3 percent of the total number of children in ADA.

(b) An LEA is eligible to receive a payment under section 8003 for a fiscal year on behalf of federally connected children described in section 8003(a)(1)(F) or (G) only if the total number of those children for whom it provided a free public education for the preceding fiscal year was—

(1) At least 1,000 in ADA; or

(2) At least 10 percent of the total number of children in ADA.

(c) Children described in paragraph (b) of this section are counted for the purposes of paragraph (a) of this section only if the applicant LEA is eligible to receive a payment on behalf of those children under section 8003.

(Authority: 20 U.S.C. 7703(a)(3) and (b)(1)(B))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35415, July 1, 1997; 80 FR 33163, June 11, 2015]

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§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) 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:

(1) Except as provided in paragraph (b)(3) of this section—

(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 (b)(1)(i) of this section by the LEA's total membership of federally connected children in each subcategory described in section 8003 and claimed in the LEA's application for the current fiscal year payment (or, in the case of an LEA that conducts two membership counts, by the average of the LEA's total membership of federally connected children in each subcategory on the two survey dates).

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(2)(i) 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.

(ii) 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.

(iii) An LEA's ADA count includes attendance data for children for whom it makes tuition arrangements with other educational entities.

(3) Attendance 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) If an LEA is in a State that does not collect ADA data for purposes of distributing State aid for education, the LEA or SEA shall submit data necessary for the Secretary to calculate the ADA of the LEA's federally connected children as follows:

(1) If an LEA is in a State that formerly collected ADA data for purposes of distributing State aid for education, the SEA may submit the total ADA and total membership data for the State for each of the last three fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

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

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

(2) An LEA may submit attendance data based on sampling conducted during the previous fiscal year. The sampling must include attendance data for all children for at least 30 school days. The data must be collected during at least three periods evenly distributed throughout the school year. Each collection period must consist of at least five consecutive school days. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

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

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(ii) Dividing the figure obtained in paragraph (c)(2)(i) of this section by the LEA's total membership for the previous fiscal year; and

(iii) Multiplying the figure determined in paragraph (c)(2)(ii) of this section by the LEA's total membership of federally connected children for the current fiscal year, as described in paragraph (b)(1)(ii) of this section.

(3) If an LEA is in a State that 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 the 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 of the LEA's federally connected children will be calculated.

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

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

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§222.38 What is the maximum basic support payment that a local educational agency may receive under section 8003(b)(1)?

(a) The maximum basic support payment that an LEA may receive under section 8003(b)(1) for any fiscal year is the sum of its total weighted student units under section 8003(a)(2) for the federally connected children eligible to be counted as the basis for payment, multiplied by the greater of the following:

(1) One-half of the State average per pupil expenditure for the third fiscal year preceding the fiscal year for which the LEA seeks assistance.

(2) One-half of the national average per pupil expenditure for the third fiscal year preceding the fiscal year for which the LEA seeks assistance.

(3) The local contribution rate (LCR) based on generally comparable LEAs determined in accordance with §§222.39-222.41.

(4) The State average per pupil expenditure for the third preceding fiscal year multiplied by the local contribution percentage as defined in section 8013(8) of the Act for that same year.

(b) If satisfactory data from the third preceding fiscal year are not available for the expenditures described in paragraphs (a)(1) or (2), the Secretary uses data from the most recent fiscal year for which data that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7703(a) and (b))

80 FR 33163, June 11, 2015]

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§222.39 How does a State educational agency identify generally comparable local educational agencies for local contribution rate purposes?

(a) To identify generally comparable LEAs within its State for LCR purposes, the State educational agency (SEA) for that State, after appropriate consultation with the applicant LEAs in the State, shall use data from the third fiscal year preceding the fiscal year for which the LCR is being computed to group all of its LEAs, including all applicant LEAs, as follows:

(1) *Grouping by grade span/legal classification alone.* Divide all LEAs into groups that serve the same grade span and then subdivide the grade span groups by legal classification, if the Secretary considers this classification relevant and sufficiently different from grade span within the State. As an alternative grade-span division, divide all LEAs into elementary, secondary, or unified grade-span groups, as appropriate, within the State.

(2) *Grouping by grade span/legal classification and size.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and legal classification, if relevant and sufficiently different from grade span and size.

(ii) List all LEAs within each group in descending order by size as measured by ADA, placing the LEA with the *largest* ADA at the top of the list. A State that does not tabulate actual annual ADA shall use the same formula for establishing ADA for the purpose of ranking LEAs by size as the Department has approved for the purpose of calculating payments under section 8003 for applicant LEAs in the State.

(iii) Divide each group into either two subgroups or three subgroups.

(iv) To determine the subgroups, divide each list at the point(s) that will result in as nearly equal numbers of LEAs in each subgroup as possible, so that no group is more than one LEA larger than any other group.

(3) *Grouping by grade span/legal classification and location.* Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span and location, legal classification; then subdivide these groups by location, as determined by placement inside or outside a metropolitan statistical area (MSA) as defined by the U.S. Bureau of the Census. The Department will supply SEAs with lists of MSA classifications for their LEAs, and only the classifications on those lists will be recognized by the Department for the purposes of these regulations.

(4) *Grouping by grade span/legal classification, size, and location.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span, size, and location, legal classification; then subdivide these groups by size (into two or three subgroups for each grade

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span, as described in paragraph (a)(2) of this section); and further subdivide these groups by location (inside or outside an MSA).

(ii) In using both the size and location factors, the SEA shall subdivide according to the size factor before the location factor.

(b) After applying the following restrictions, the SEA shall compute an LCR according to the provisions of §222.41 for each group of generally comparable LEAs identified under paragraph (a) of this section, as follows:

(1) The SEA shall not, when computing an LCR, include the following “significantly impacted” LEAs in any group of generally comparable LEAs:

(i) Any LEA having—in the third fiscal year preceding the fiscal year for which the LCR is being computed—20 percent or more of its ADA composed of children identified under section 8003(a)(1)(A)-(C).

(ii) Any LEA having—in the third fiscal year preceding the fiscal year for which the LCR is being computed—50 percent or more of its ADA composed of children identified under section 8003(a)(1)(A)-(G) who were eligible under §222.36 to be counted as the basis for payment under section 8003.

(2) The SEA may not compute an LCR for any group that contains fewer than 10 LEAs.

(c) The LCR for a “significantly impacted” LEA described in paragraph (b)(1) of this section is the LCR of any group in which that LEA would be included based on grade span/legal classification, size, location, or a combination of these factors, if the LEA were not excluded as significantly impacted.

(d) This section does not apply to applicant LEAs located in—

(1) Puerto Rico;

(2) Wake Island;

(3) Guam;

(4) American Samoa;

(5) Any outlying area; and

(6) Any State in which there is only one LEA.

Example. An LEA applies for assistance under section 8003 and wishes to recommend to the Secretary an LCR based on generally comparable LEAs within its State.

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1. *Characteristics of Applicant LEA.* The grade span of an applicant LEA is kindergarten through grade 8 (K-8). In the applicant's State, legal classification of LEAs is based on grade span, and thus does not act to further subdivide groups of LEAs.

The ADA of the applicant LEA is above the median ADA of LEAs serving only K-8 in the State.

The applicant LEA is located outside an MSA.

2. *Characteristics of Other LEAs Serving Same Grade Span.* The SEA of the applicant's State groups all LEAs in its State according to the factors in §222.39.

a. The SEA identifies the following groups:

(i) One hundred and one LEAs serve only K-8. The SEA has identified a group of 50 LEAs having an ADA above the median ADA for the group of 101, one LEA having an ADA at the median, and a group of 50 LEAs having an ADA below the median ADA; and according to §222.39(a)(2), the SEA considers 51 LEAs to have an ADA below the median ADA.

(ii) Of the 101 LEAs in the group, the SEA has identified a group of 64 LEAs as being inside an MSA and a group of 37 LEAs as being outside an MSA.

(iii) Among the group of 50 LEAs having an ADA above the median, the SEA has identified a group of 35 LEAs as being inside an MSA and a group of 15 LEAs as being outside an MSA.

(iv) Among the group of 51 LEAs having an ADA at or below the median, the SEA has identified a group of 29 LEAs as being inside an MSA and 22 LEAs as being outside an MSA.

(v) One LEA has 20 percent of its ADA composed of children identified under section 8003(a)(1)(A)-(C) and, therefore, must be excluded from any group it falls within before the SEA computes an LCR for the group. The LEA has an ADA below the median ADA and is located outside an MSA.

b. On the basis of §222.41, the SEA computes the LCR for each group of generally comparable LEAs that the SEA has identified.

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(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33163, June 11, 2015]

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§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?

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(a) To use the procedures in this section, the applicant LEA, for the year of application, must either—

(1)(i) Be located entirely on Federal land; and

(ii) Be raising either no local revenues or an amount of local revenues the Secretary determines to be minimal; or

(2)(i) Be located in a State where State aid makes up no more than 40 percent of the State average per pupil expenditure in the third fiscal year preceding the fiscal year for which the LCR is being computed;

(ii) In its application, have federally connected children identified under section 8003(a)(1)(A)-(C) equal to at least 20 percent of its total ADA; and

(iii) In its application, have federally connected children identified under section 8003(a)(1)(A)-(G) who were eligible to be counted as the basis for payment under section 8003 equal to at least 50 percent of its total ADA.

(b) If requested by an applicant LEA described in paragraph (a) of this section, the SEA follows the procedures in this section, in consultation with the LEA, to determine generally comparable LEAs using additional factors for the purpose of calculating and certifying an LCR for that LEA.

(c) The SEA identifies—

(1) The subgroup of generally comparable LEAs from the group identified under §222.39(a)(2) (grouping by grade span/legal classification and size) that includes the applicant LEA; or

(2) For an LEA described in paragraph (a) of this section that serves a different span of grades from all other LEAs in its State (and therefore cannot match any group of generally comparable LEAs under §222.39(a)(2)), for purposes of this section only, a group using only legal classification and size as measured by ADA.

(d) From the subgroup described in paragraph (c) of this section, the SEA then identifies 10 or more generally comparable LEAs that share one or more additional common factors of general comparability with the applicant LEA described in paragraph (a) of this section, as follows:

(1)(i) The SEA must consider one or more generally accepted, objectively defined factors that affect the applicant's cost of educating its children. Examples of such cost-related factors include location inside or outside an MSA, an unusually large geographical area or an economically depressed area, sparsity of population, and the percentage of its students who are from low-income families or who are children with disabilities, neglected or delinquent children, low-achieving children, or children with limited English proficiency.

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(ii) The SEA may not consider cost-related factors that can be varied at the discretion of the applicant LEA or its generally comparable LEAs or factors dependent on the wealth of the applicant LEA or its generally comparable LEAs. Examples of factors that may not be considered include special alternative curricular programs, pupil-teacher ratio, and per pupil expenditures.

(2) The SEA applies the factor or factors of general comparability identified under paragraph (d)(1)(i) of this section in one of the following ways in order to identify 10 or more generally comparable LEAs for the eligible applicant LEA, none of which may be significantly impacted LEAs:

(i) The SEA identifies all of the LEAs in the group to which the eligible applicant LEA belongs under §222.39(a)(2) that share the factor or factors. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

Example 1. An eligible applicant LEA contains a designated economically depressed area, and the SEA, in consultation with the LEA, identifies “economically depressed area” as an additional factor of general comparability. From the group of LEAs under §222.39(a)(2) that includes the eligible applicant LEA, the SEA identifies two subgroups, those LEAs that contain a designated economically depressed area and those that do not. The entire subgroup identified by the SEA that includes the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(ii) After the SEA identifies all of the LEAs in the group to which the eligible applicant LEA belongs under §222.39(a)(2) that share the factor or factors, the SEA then systematically orders by ADA all of the LEAs in the group that includes the eligible applicant LEA. The SEA may further divide the ordered LEAs into subgroups by using logical division points (*e.g.*, the median, quartiles, or standard deviations) or a continuous interval of the ordered LEAs (*e.g.*, a percentage or a numerical range). If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

Example 2. An eligible applicant LEA serves an unusually high percentage of children with disabilities, and the SEA, in consultation with the LEA, identifies “proportion of children with disabilities” as an additional comparability factor. From the group of LEAs under §222.39(a)(2) that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of children with disabilities enrolled in each of the LEAs. The SEA divides the list of LEAs into four groups containing equal numbers of LEAs. The group containing the

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eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(iii) The SEA may apply more than one factor of general comparability in identifying a new group of 10 or more generally comparable LEAs for the eligible applicant LEA. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The SEA computes the LCR for the eligible applicant LEA using the data from all of the LEAs in the subgroup except the eligible applicant LEA.

Example 3. An eligible applicant LEA is very sparsely populated and serves an unusually high percentage of children with limited English proficiency. The SEA, in consultation with the LEA, identifies “sparsity of population” and “proportion of children with limited English proficiency” as additional comparability factors. From the group of LEAs under §222.39(a)(2) that includes the eligible applicant LEA, the SEA identifies all LEAs that are sparsely populated. The SEA further subdivides the sparsely populated LEAs into two groups, those that serve an unusually high percentage of children with limited English proficiency and those that do not. The subgroup of at least 10 sparsely populated LEAs that serve a high percentage of children with limited English proficiency is the eligible applicant LEA's new group of generally comparable LEAs.

(e)(1) Using the new group of generally comparable LEAs selected under paragraph (d) of this section, the SEA computes the LCR for the eligible applicant LEA according to the provisions of §222.41.

(2) The SEA certifies the resulting LCR by submitting that LCR to the Secretary and providing the Secretary a description of the additional factor or factors of general comparability and the data used to identify the new group of generally comparable LEAs.

(3) The Secretary reviews the data submitted by the SEA, and accepts the LCR for the purpose of use under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment under section 8003 if the Secretary determines that it meets the purposes and requirements of the Act and this part.

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[80 FR 33164, June 11, 2015]

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§222.41 How does a State educational agency compute and certify local contribution rates based upon generally comparable local educational agencies?

Except as otherwise specified in the Act, the SEA, subject to the Secretary's review and approval, computes and certifies an LCR for each group of generally comparable LEAs within its State that was identified using the factors in §222.39, and §222.40 if appropriate, as follows:

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- (a)(1) The SEA shall compile the aggregate local current expenditures of the comparable LEAs in each group for the third fiscal year preceding the fiscal year for which the LCR is being computed.
- (2) For purposes of this section, the SEA shall consider only those aggregate current expenditures made by the generally comparable LEAs from revenues derived from local sources. No State or Federal funds may be included.
- (b) The SEA shall compile the aggregate number of children in ADA to whom the generally comparable LEAs in each group provided a free public education during the third fiscal year preceding the fiscal year for which the LCR is being computed.
- (c) The SEA shall divide—
- (1) The aggregate current expenditures determined under paragraph (a) of this section by;
 - (2) The aggregate number of children determined under paragraph (b) of this section.
- (d) The SEA certifies the resulting figure for each group as the LCR for that group of generally comparable LEAs to be used by the Secretary under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment amount under section 8003.

(Authority: 20 U.S.C. 7703(b)(1)(C)(iii))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33165, June 11, 2015]

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§222.42 [Reserved]

§222.43 What requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(b)(1)(F) due to unusual geographic features?

An LEA is eligible for financial assistance under section 8003(b)(1)(F) if the Secretary determines that the LEA meets all of the following requirements—

- (a)(1) The LEA is eligible for a basic support payment under section 8003(b), including meeting the maintenance of effort requirements in section 8003(g) of the Act;
- (2) The LEA timely applies for assistance under section 8003(b)(1)(F) and meets all other requirements of subparts A and C;
- (3) The LEA is meeting the tax rate requirement in §222.68(c) and the other applicable requirements of §§222.68 through 222.72; and
- (4) The LEA is not in a State that takes the LEA's payment under section 8003(b)(1)(F) into account in an equalization program that qualifies under section 8009 of the Act.

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(b)(1) As part of its section 8003 application, the LEA indicates in writing that it wishes to apply for an “unusual geographic” payment and it will provide the Secretary with documentation upon request that demonstrates that the LEA is unable to provide a level of education equivalent to that provided by its generally comparable LEAs because—

(i) The applicant's current expenditures are affected by unusual geographic factors; and

(ii) As a result, those current expenditures are not reasonably comparable to the current expenditures of its generally comparable LEAs.

(2) The LEA's documentation must include—

(i) A specific description of the unusual geographic factors on which the applicant is basing its request for compensation under this section and objective data demonstrating that the applicant is more severely affected by the factors than any other LEA in its State;

(ii) Objective data demonstrating the specific ways in which the unusual geographic factors affect the applicant's current expenditures so that they are not reasonably comparable to the current expenditures of its generally comparable LEAs;

(iii) Objective data demonstrating the specific ways in which the unusual geographic factors prevent the applicant from providing a level of education equivalent to that provided by its generally comparable LEAs; and

(iv) Any other information that the Secretary may require to make an eligibility determination under this section.

(Authority: 20 U.S.C. 7703(b)(1)(F))

[80 FR 33165, June 11, 2015]

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§222.44 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(b)(1)(F) and §222.43?

The Secretary determines a maximum payment under section 8003(b)(1)(F) for an eligible LEA, using data from the third preceding fiscal year, as follows:

(a) Subject to paragraph (b) of this section, the Secretary increases the eligible LEA's local contribution rate (LCR) for section 8003(b) payment purposes to the amount the Secretary determines will compensate the applicant for the increase in its current expenditures necessitated by the unusual geographic factors identified under §222.43(b)(2).

(b) The Secretary does not increase the LCR under this section to an amount that is more than—

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(1) Is necessary to allow the applicant to provide a level of education equivalent to that provided by its generally comparable LEAs; or

(2) The per pupil share for all children in ADA of the increased current expenditures necessitated by the unusual geographic factors identified under §222.43, as determined by the Secretary.

(Authority: 20 U.S.C. 7703(b)(1)(F))

[80 FR 33165, June 11, 2015]

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§§222.45-222.49 [Reserved]

Subpart D—Payments Under Section 8003(d) of the Act for Local Educational Agencies That Serve Children With Disabilities

§222.50 What definitions apply to this subpart?

In addition to the terms referenced or defined in §222.2, the following definitions apply to this subpart:

Child with a disability as defined in 34 CFR 300.8.

Early intervention services as defined in 34 CFR 303.13.

Free appropriate public education or *FAPE* as defined in 34 CFR 300.17.

Individualized education program or *IEP* as defined in 34 CFR 300.22.

Individualized family service plan or *IFSP* as defined in 34 CFR 303.20.

Infant or toddler with a disability as defined in 34 CFR 303.21.

Infants, toddlers, and children with disabilities, for these regulations, means both a “child with a disability” as defined in 34 CFR 300.8 and an “infant or toddler with a disability” as defined in 34 CFR 303.21.

Related services as defined in 34 CFR 300.34.

Special education as defined in 34 CFR 300.39.

(Authority: 20 U.S.C. 1401, 1414, 1432, 1436, 7703, 7705, 7713; 34 CFR parts 300 and 303)

[80 FR 33166, June 11, 2015]

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§222.51 Which children may a local educational agency count for payment under section 8003(d) of the Act?

(a) An LEA may count children described in sections 8003(a)(1)(A)(ii), (a)(1)(B), (a)(1)(C), and (a)(1)(D) of the Act who are eligible for services under the provisions of Part B or Part C of the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*) (IDEA), for the purpose of computing a payment under section 8003(d) in accordance with the provisions of this section.

(b)(1) An LEA may count a child with a disability described in paragraph (a) of this section who attends a private school or residential program if the LEA has placed or referred the child in accordance with the provisions of section 613 of the IDEA and 34 CFR part 300, subparts C and D.

(2) An LEA may not count a child with a disability described in paragraph (a) of this section who is placed in a private school by his or her parents, but that child may participate in public school programs that use section 8003(d) funds.

(c) An LEA may count infants and toddlers with disabilities described in paragraph (a) of this section if—

(1) The LEA provides early intervention services or FAPE to each of those children—

(i) Either directly or through an arrangement with another entity; and

(ii) The State does not charge a fee or other out-of-pocket cost to the child's parents under the State's system of payments on file with the Secretary required under 34 CFR 303.203(b)(1), 303.520, and 303.521, and there is no other cost to the child's parents (the costs of premiums do not count as out-of-pocket costs); and

(2) Each of those children has an IFSP or IEP (as appropriate).

(Authority: 20 U.S.C. 1400 *et seq.* and 7703(d))

[80 FR 33166, June 11, 2015]

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§222.52 What requirements must a local educational agency meet to receive a payment under section 8003(d)?

To receive a payment under section 8003(d), an eligible LEA shall—

(a) State in its application the number of federally connected children with disabilities it claims for a payment under section 8003(d);

(b) Have in effect written IEPs or IFSPs for all federally connected children with disabilities it claims under section 8003(d); and

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(c) Meet the requirements of subparts A and C of the regulations in this part.

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

(Authority: 20 U.S.C. 1400 *et seq.* and 7703)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

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§222.53 What restrictions and requirements apply to the use of funds provided under section 8003(d)?

(a) An LEA shall use funds provided under section 8003(d) in accordance with the provisions of section 8003(d)(2) and 34 CFR parts 300 and 303.

(b) Obligations and expenditures of section 8003(d) funds may be incurred in either of the two following ways:

(1) An LEA may obligate or expend section 8003(d) funds for the fiscal year for which the funds were appropriated.

(2) An LEA may reimburse itself for obligations or expenditures of local and general State aid funds for the fiscal year for which the section 8003(d) funds were appropriated.

(c) An LEA shall use its section 8003(d) funds for the following types of expenditures:

(1) Expenditures that are reasonably related to the conduct of programs or projects for the free appropriate public education of, or early intervention services for, federally connected children with disabilities, which may include—

(i) Program planning and evaluation; and

(ii) Construction of or alteration to existing school facilities, but only when in accordance with section 605 of the IDEA and when the Secretary authorizes in writing those uses of funds.

(2) Acquisition cost (net invoice price) of equipment required for the free appropriate public education of, and early intervention services for, federally connected children with disabilities.

(i) If section 8003(d) funds are used for the acquisition of any equipment described in this paragraph (c)(2) of this section, the fair market value of any financial advantage realized through rebates, discounts, bonuses, free pieces of equipment used in a program or project for the free appropriate public education of, or early intervention services for, federally connected children with disabilities, or other circumstances, is not an allowable expenditure and may not be credited as an expenditure of those funds.

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(ii) Funds awarded under the provisions of section 8003(d) may be used to acquire equipment for the free appropriate public education of, or early intervention services for, the federally connected children with disabilities only if title to the equipment would be in the applicant agency.

(d) An LEA shall account for the use of section 8003(d) funds as follows:

(1) By recording, for each fiscal year, the receipt (or credit) of section 8003(d) funds separately from other funds received under the Act, *i.e.*, on a line item basis in the general fund account or in a separate account; and

(2) By demonstrating that, for each fiscal year, the amount of expenditures for special education and related services and for early intervention services provided to the federally connected children with disabilities is at least equal to the amount of section 8003(d) funds received or credited for that fiscal year. This is done as follows:

(i) For each fiscal year determine the amount of an LEA's expenditures for special education and related services and for early intervention services provided to all children with disabilities.

(ii) The amount determined in paragraph (d)(2)(i) of this section is divided by the average daily attendance (ADA) of the total number of children with disabilities the LEA served during that fiscal year.

(iii) The amount determined in paragraph (d)(2)(ii) of this section is then multiplied by the total ADA of the LEA's federally connected children with disabilities claimed by the LEA for that fiscal year.

(3) If the amount of section 8003(d) funds the LEA received (or was credited) for the fiscal year exceeds the amount obtained in paragraph (d)(2)(iii) of this section, an overpayment equal to the excess section 8003(d) funds is established. This overpayment may be reduced or eliminated to the extent that the LEA can demonstrate that the average per pupil expenditure for special education and related services and for early intervention services provided to federally connected children with disabilities exceeded its average per pupil expenditure for serving non-federally connected children with disabilities.

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

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

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

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§222.54 What supplement-not-supplant requirement applies to this subpart?

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Funds provided under section 8003(d) may not supplant any State funds that were or would have been available to the LEA for the free appropriate public education of children counted under section 8003(d).

(a) No section 8003(d) funds may be paid to an LEA whose per pupil State aid for federally connected children with disabilities, either general State aid or special education State aid, has been or would be reduced as a result of eligibility for or receipt of section 8003(d) funds, whether or not a State has a program of State aid that meets the requirements of section 8009 of the Act and subpart K of the regulations in this part.

(1) A reduction in the per pupil amount of State aid for children with disabilities, including children counted under section 8003(d), from that received in a previous year raises a presumption that supplanting has occurred.

(2) The LEA may rebut this presumption by demonstrating that the reduction was unrelated to the receipt of section 8003(d) funds.

(b) In any State in which there is only one LEA, all funds for programs, and for early intervention services, for children with disabilities other than funds from Federal sources are considered by the Secretary to be local funds.

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

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

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§222.55 What other statutes and regulations are applicable to this subpart?

Local educational agencies receiving funds under section 8003(d) are subject to the requirements of the Individuals with Disabilities Education Act, and related regulations (20 U.S.C. 1401 *et seq.* and 34 CFR parts 300 and 303).

(Authority: 20 U.S.C. 1401 *et seq.*, 6314, and 7703(d))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33166, June 11, 2015]

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§§222.56-222.59 [Reserved]

Subpart E—Payments for Heavily Impacted Local Educational Agencies Under Section 8003(b)(2) of the Act

Source: 80 FR 33166, June 11, 2015, unless otherwise noted.

§222.60 What are the scope and purpose of this subpart?

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The regulations in this subpart implement section 8003(b)(2) of the Act, which provides financial assistance to certain heavily impacted local educational agencies (LEAs). The specific eligibility requirements are detailed in §§222.62 through 222.66.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.61 What data are used to determine a local educational agency's eligibility under section 8003(b)(2) of the Act?

(a) Computations and determinations made with regard to an LEA's eligibility under section 8003(b)(2) in §§222.61 through 222.66 of these regulations are based on the LEA's final student, revenue, expenditure, and tax data from the third fiscal year preceding the fiscal year for which it seeks assistance.

(b) Except for an LEA described in §222.64(a)(3)(ii), the LEAs used for meeting the applicable tax rate requirement are the comparable LEAs that are identified in §222.74 or all LEAs in the applicant's State.

(c) As used in this subpart, the phrase “tax rate for general fund purposes” means “local real property tax rates for current expenditures purposes” as defined in §222.2. “Current expenditures” is defined in section 8013(4) of the ESEA.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.62 How are local educational agencies determined eligible under section 8003(b)(2)?

(a) An LEA that is eligible to apply for a “continuing” heavily impacted payment under section 8003(b)(2)(B) is one that received an additional assistance payment under section 8003(f) for fiscal year 2000 and that meets eligibility requirements specified in §222.63.

(b) An LEA that is eligible to apply for a “new” heavily impacted payment under section 8003(b)(2)(C) is one that did not receive an additional assistance payment under section 8003(f) for fiscal year 2000 and that meets eligibility requirements specified in §222.64 for two consecutive application years.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.63 When is a local educational agency eligible as a continuing applicant for payment under section 8003(b)(2)(B)?

A continuing heavily impacted LEA must have—

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- (a) The same boundaries as those of a Federal military installation;
- (b)(1) An enrollment of federally connected children described in section 8003(a)(1) equal to at least 35 percent of the total number of children in average daily attendance (ADA) in the LEA;
- (2) A per pupil expenditure (PPE) that is less than the average PPE of the State in which the LEA is located or of all the States, whichever PPE is greater (except that an LEA with a total student enrollment of less than 350 students shall be determined to have met the PPE requirement); and
- (3) A tax rate for general fund purposes of at least 95 percent of the average tax rate of comparable LEAs identified under §222.74 or all LEAs in the applicant's State;
- (c)(1) An enrollment of federally connected children described in section 8003(a)(1) equal to at least 30 percent of the total number of children in ADA in the LEA; and
- (2) A tax rate for general fund purposes of at least 125 percent of the average tax rate of comparable LEAs identified under §§222.39-40 or of all LEAs in the applicant's State; or
- (d) A total enrollment of at least 25,000 students, of which at least 50 percent are children described in section 8003(a)(1) and at least 6,000 of such children are children described in section 8003(a)(1)(A) and (B).

(Authority: 20 U.S.C. 7703(b)(2)(B))

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§222.64 When is a local educational agency eligible as a new applicant for payment under section 8003(b)(2)(C)?

A new heavily impacted LEA must have—

- (a)(1)(i) Federally connected children equal to at least 50 percent of the total number of children in average daily attendance (ADA) in the LEA if children described in section 8003(a)(1)(F)-(G) are eligible to be counted for a section 8003(b)(1) payment; or
- (ii) Federally connected children equal to at least 40 percent of the total number of children in ADA if children described in section 8003(a)(1)(F)-(G) are not eligible to be counted for a section 8003(b)(1) payment; and
- (2)(i) If the LEA has a total ADA of more than 350 children,
 - (A) A per pupil expenditure (PPE) that is less than the average of the State in which the LEA is located; and
 - (B) A tax rate for general fund purposes equal to at least 95 percent of the average tax rate of comparable LEAs identified in §222.74 or of all LEAs in the applicant's State; or

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(ii) If the LEA has a total ADA of less than 350 children,

(A) A PPE that is less than the average PPE of one or three generally comparable LEAs identified in §222.74(b); and

(B) A tax rate equal to at least 95 percent of the average tax rate of one or three generally comparable LEAs identified in §222.74(b);

(b) The same boundaries as those of a Federal military installation; or

(c)(1) The same boundaries as island property held in trust by the Federal government;

(2) No taxing authority; and

(3) Received a payment under section 8003(b)(1) for fiscal year 2001.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.65 What other requirements must a local educational agency meet to be eligible for financial assistance under section 8003(b)(2)?

Subject to §222.66, an LEA described in §222.63 or §222.64 is eligible for financial assistance under section 8003(b)(2) if the Secretary determines that the LEA meets the following requirements:

(a) The LEA timely applies for assistance under section 8003(b)(2) and meets all of the other application and eligibility requirements of subparts A and C of these regulations.

(b) Except for an LEA described in §222.63(a) or (d), or §222.64(b) or (c), the LEA meets the applicable tax rate requirement in accordance with the procedures and requirements of §§222.68 through 222.74.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.66 How does a local educational agency lose and resume eligibility under section 8003(b)(2)?

(a) A continuing heavily impacted LEA that fails to meet the eligibility requirements in §222.63 in any fiscal year or a new heavily impacted LEA that received a section 8003(b)(2) payment but then fails to meet the eligibility requirements in §222.64 will still receive a heavily impacted payment in the first year of ineligibility, based on the number of children in ADA that would be counted for that application if the LEA were eligible.

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(b)(1) A continuing heavily impacted LEA may resume eligibility for a heavily impacted payment if it applies in the fiscal year preceding the year for which it seeks eligibility and it meets the eligibility requirements in §222.63 for both fiscal years.

(2) In the first fiscal year that a continuing heavily impacted LEA qualifies to resume eligibility, it cannot receive a heavily impacted payment but instead will receive a basic support payment under section 8003(b)(1) for that year.

Example:

CONTINUING LEA

In Federal Fiscal Years (FFYs) 1 and 2, a continuing LEA is eligible for a section 8003(b)(2) payment. In FFY 3, the LEA applies but is ineligible for section 8003(b)(2). However, it will still receive a payment under section 8003(b)(2) for FFY 3 (a “hold harmless” payment under §222.66(a)). For FFY 4, the LEA applies and meets the requirements. The LEA is not eligible to receive a section 8003(b)(2) payment in FFY 4 but is instead eligible for a section 8003(b)(1) payment (see §222.66(b)). In FFY 5, the LEA applies, meets the requirements, and receives a section 8003(b)(2) payment. The LEA not only must apply one year in advance and meet the section 8003(b)(2) requirements (FFY 4) but it must apply and meet the requirements for the subsequent FFY (year 5). The effects of these requirements on a continuing applicant's status and payments are summarized in the table below.

Continuing LEAs

	FFY 1	FFY 2	FFY 3	FFY 4	FFY 5
8003(b)(2) Eligibility	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>
Payment Type	(b)(2)	(b)(2)	(b)(2) Hold Harmless	(b)(1)	(b)(2)

(c) A new heavily impacted LEA may resume eligibility for a heavily impacted payment if it meets the eligibility requirements in §222.64 for the fiscal year for which it seeks a payment.

Example:

NEW LEA

A new LEA applies for a section 8003(b)(2) payment and meets the applicable eligibility criteria. The LEA does not receive a section 8003(b)(2) payment in FFY 1 and it must apply and meet the requirements again in FFY 2 before it can receive a (b)(2) payment (see §222.62(b)). If that new district is then ineligible for a year, it can regain eligibility only if it meets the applicable criteria in a subsequent year. For example, if a new LEA loses its section 8003(b)(2) eligibility in FFY 3

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because its tax rate dropped to 94 percent of the average tax rate of comparable districts in the State, that LEA is still entitled to receive a payment under section 8003(b)(2) in FFY 3 if it applies for such payment (a “hold harmless” payment under §222.66(a)). Then if the LEA applies in FFY 4 and meets the eligibility requirement under section 8003(b)(2), it is once again eligible to receive a section 8003(b)(2) payment (see §222.66(c)). The effects of these requirements on a new applicant's status and payments are summarized in the table below.

New LEAs

	FFY 1	FFY 2	FFY 3	FFY 4	FFY 5
8003(b)(2) Eligibility	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>
Payment Type	(b)(1)	(b)(2)	(b)(2) Hold Harmless	(b)(2)	(b)(2)

(Authority: 20 U.S.C. 7703(b)(2))

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§222.67 How may a State aid program affect a local educational agency's eligibility for assistance under section 8003(b)(2)?

The Secretary determines that an LEA is not eligible for financial assistance under section 8003(b)(2) if—

- (a) The LEA is in a State that has an equalized program of State aid that meets the requirements of section 8009; and
- (b) The State, in determining the LEA's eligibility for or amount of State aid, takes into consideration the portion of the LEA's payment under section 8003(b)(2) that exceeds what the LEA would receive under section 8003(b)(1).

(Authority: 20 U.S.C. 7703(b)(2))

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§222.68 How does the Secretary determine whether a fiscally independent local educational agency meets the applicable tax rate requirement?

(a) To determine whether a fiscally independent LEA, as defined in §222.2(c), meets the applicable tax rate requirement in §§222.63(b)(3), 222.63(c)(2), and 222.64(a)(3), the Secretary compares the LEA's local real property tax rate for current expenditure purposes, as defined in §222.2(c) (referred to in this part as “tax rate” or “tax rates”), with the tax rates of its generally comparable LEAs.

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(b) For purposes of this section, the Secretary uses—

(1) The actual tax rate if all the real property in the LEA and its generally comparable LEAs is assessed at the same percentage of true value; or

(2) Tax rates computed under §§222.69-222.71.

(c) The Secretary determines that an LEA described in §§222.63(b), 222.63(c), or 222.64(a) meets the applicable tax rate requirement if—

(1) The LEA's tax rate is equal to at least 95 percent (or 125 percent under 222.63(c)) of the average tax rate of its generally comparable LEAs;

(2) Each of the LEA's tax rates for each classification of real property is equal to at least 95 percent (or 125 percent under 222.63(c)) of each of the average tax rates of its generally comparable LEAs for the same classification of property;

(3) The LEA taxes all of its real property at the maximum rates allowed by the State, if those maximum rates apply uniformly to all LEAs in the State and the State does not permit any rates higher than the maximum; or

(4) The LEA has no taxable real property.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.69 What tax rates does the Secretary use if real property is assessed at different percentages of true value?

If the real property of an LEA and its generally comparable LEAs consists of one classification of property but the property is assessed at different percentages of true value in the different LEAs, the Secretary determines whether the LEA meets the applicable tax rate requirement under §222.68(c)(1) by using tax rates computed by—

(a) Multiplying the LEA's actual tax rate for real property by the percentage of true value assigned to that property for tax purposes; and

(b) Performing the computation in paragraph (a) of this section for each of its generally comparable LEAs and determining the average of those computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.70 What tax rates does the Secretary use if two or more different classifications of real property are taxed at different rates?

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If the real property of an LEA and its generally comparable LEAs consists of two or more classifications of real property taxed at different rates, the Secretary determines whether the LEA meets the applicable tax rate requirement under §222.68(c)(1) or (2) by using one of the following:

- (a) Actual tax rates for each of the classifications of real property.
- (b) Tax rates computed in accordance with §222.69 for each of the classifications of real property.
- (c) Tax rates computed by—
 - (1) Determining the total true value of all real property in the LEA by dividing the assessed value of each classification of real property in the LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;
 - (2) Determining the LEA's total revenues derived from local real property taxes for current expenditures (as defined in section 8013);
 - (3) Dividing the amount determined in paragraph (c)(2) of this section by the amount determined in paragraph (c)(1) of this section; and
 - (4) Performing the computations in paragraphs (c)(1), (2), and (3) of this section for each of the generally comparable LEAs and then determining the average of their computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.71 What tax rates may the Secretary use if substantial local revenues are derived from local tax sources other than real property taxes?

- (a) In a State in which a substantial portion of revenues for current expenditures for educational purposes is derived from local tax sources other than real property taxes, the State educational agency (SEA) may request that the Secretary take those revenues into account in determining whether an LEA in that State meets the applicable tax rate requirement under §222.68.
- (b) If, based upon the request of an SEA, the Secretary determines that it is appropriate to take the revenues described in paragraph (a) of this section into account in determining whether an LEA in that State meets the applicable tax rate requirement under §222.68, the Secretary uses tax rates computed by—
 - (1) Dividing the assessed value of each classification of real property in the LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;

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(2) Determining the LEA's total revenues derived from local tax sources for current expenditures (as defined in section 8013);

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section; and

(4) Performing the computations in paragraphs (b)(1), (2), and (3) of this section for each of the generally comparable LEAs and then determining the average of those computed tax rates.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.72 How does the Secretary determine whether a fiscally dependent local educational agency meets the applicable tax rate requirement?

(a) If an LEA is fiscally dependent, as defined in §222.2(c), the Secretary compares the LEA's imputed local tax rate, calculated under paragraph (b) of this section, with the average tax rate of its generally comparable LEAs, calculated under paragraph (c) of this section, to determine whether the LEA meets the applicable tax rate requirement.

(b) The Secretary imputes a local tax rate for a fiscally dependent LEA by—

(1) Dividing the assessed value of each classification of real property within the boundaries of the general government by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the amount of locally derived revenues made available by the general government for the LEA's current expenditures (as defined in section 8013); and

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section.

(c) The Secretary performs the computations in paragraph (b) of this section for each of the fiscally dependent generally comparable LEAs and the computations in §§222.68 through 222.71, whichever is applicable, for each of the fiscally independent generally comparable LEAs and determines the average of all those tax rates.

(d) The Secretary determines that a fiscally dependent LEA described in §222.63(b) or §222.64(a) meets the applicable tax rate requirement if its imputed local tax rate is equal to at least 95 percent of the average tax rate of its generally comparable LEAs.

(e) The Secretary determines that a fiscally dependent LEA described in §222.63(c) meets the applicable tax rate requirement if its imputed local tax rate is equal to at least 125 percent of the average tax rate of its generally comparable LEAs.

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(Authority: 20 U.S.C. 7703(b)(2))

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§222.73 What information must the State educational agency provide?

The SEA of any State with an LEA applying for assistance under section 8003(b)(2) shall provide the Secretary with relevant information necessary to determine the PPE for all LEAs in the State and whether the LEA meets the applicable tax rate requirement under this subpart.

(Authority: 20 U.S.C. 7703(b)(2))

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§222.74 How does the Secretary identify generally comparable local educational agencies for purposes of section 8003(b)(2)?

(a) Except as otherwise provided in paragraph (b) of this section, the Secretary identifies generally comparable LEAs for purposes of this subpart in accordance with the local contribution rate procedures described in §§222.39 through 222.40.

(b) For applicant LEAs described in §222.64(a)(2)(ii) and (a)(3)(ii), to identify the one or three generally comparable LEAs, the Secretary uses the following procedures:

(1) The Secretary asks the SEA of the applicant LEA to identify generally comparable LEAs in the State by first following the directions in §222.39(a)(4), using data from the preceding fiscal year. The SEA then removes from the resulting list any LEAs that are significantly impacted, as described in §222.39(b)(1), except the applicant LEA.

(2) If the remaining LEAs are not in rank order by total ADA, the SEA lists them in that order.

(3) The LEA may then select as its generally comparable LEAs, for purposes of section 8003(b)(2) only, one or three LEAs from the list that are closest to it in size as determined by total ADA (*i.e.*, the next one larger or the next one smaller, or the next three larger LEAs, the next three smaller, the next two larger and the next one smaller, or the next one larger and the next two smaller).

(Authority: 20 U.S.C. 7703(b)(2))

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§222.75 How does the Secretary compute the average per pupil expenditure of generally comparable local educational agencies under this subpart?

For applicant LEAs described in §222.64(a)(2)(ii), the Secretary computes average per pupil expenditures (APPE) by dividing the sum of the total current expenditures for the third preceding

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fiscal year for the identified generally comparable LEAs by the sum of the total ADA of those LEAs for the same fiscal year.

(Authority: 20 U.S.C. 7703(b)(2))

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§§222.76-222.79 [Reserved]

Subpart F [Reserved]

Subpart G—Special Provisions for Local Educational Agencies That Claim Children Residing on Indian Lands

General

§222.90 What definitions apply to this subpart?

In addition to the definitions in §222.2, the following definitions apply to this subpart:

Indian children means children residing on Indian lands who are recognized by an Indian tribe as being affiliated with that tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(Authority: 20 U.S.C. 7713, 7881, 7938, 8801)

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§222.91 What requirements must a local educational agency meet to receive a payment under section 8003 of the Act for children residing on Indian lands?

To receive a payment under section 8003 of the Act for children residing on Indian lands, a local educational agency (LEA) must—

- (a) Meet the application and eligibility requirements in section 8003 and subparts A and C of these regulations;
- (b) Develop and implement policies and procedures in accordance with the provisions of section 8004(a) of the Act; and
- (c) Include in its application for payments under section 8003—

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(1) 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; and

(2) A copy of the policies and procedures or documentation that the LEA has received a waiver in accordance with the provisions of section 8004(c).

(Authority: 20 U.S.C. 7703(a), 7704(a), (c), and (d)(2))

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§222.92 What additional statutes and regulations apply to this subpart?

(a) The following statutes and regulations apply to LEAs that claim children residing on Indian lands for payments under section 8003:

(1) The General Education Provisions Act (GEPA) in 20 U.S.C. 1221 *et seq.*, unless otherwise noted.

(2) Other relevant regulations in this part.

(b) The following statutes, rules, and regulations do not apply to any hearing proceedings under this subpart:

(1) Administrative Procedure Act.

(2) Federal Rules of Civil Procedure.

(3) Federal Rules of Evidence.

(4) GEPA, part E.

(5) 34 CFR part 81.

(Authority: 20 U.S.C. 1221 *et seq.* unless otherwise noted, 7703, and 7704)

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§222.93 [Reserved]

Indian Policies and Procedures

§222.94 What provisions must be included in a local educational agency's Indian policies and procedures?

(a) An LEA's Indian policies and procedures (IPPs) must include a description of the specific procedures for how the LEA will—

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- (1) Give the tribal officials and parents of Indian children an opportunity to comment on whether Indian children participate on an equal basis with non-Indian children in the education programs and activities provided by the LEA;
 - (2) Assess the extent to which Indian children participate on an equal basis with non-Indian children served by the LEA;
 - (3) Modify, if necessary, its education program to ensure that Indian children participate on an equal basis with non-Indian children served by the LEA;
 - (4) Disseminate relevant applications, evaluations, program plans and information related to the education programs of the LEA in sufficient time to allow the tribes and parents of Indian children an opportunity to review the materials and make recommendations on the needs of the Indian children and how the LEA may help those children realize the benefits of the LEA's education programs and activities;
 - (5) Gather information concerning Indian views, including those regarding the frequency, location, and time of meetings;
 - (6) Notify the Indian parents and tribes of the locations and times of meetings;
 - (7) Consult and involve tribal officials and parents of Indian children in the planning and development of the LEA's education programs and activities; and
 - (8) Modify the IPPs if necessary, based upon the results of any assessment described in paragraph (b) of this section.
- (b) Tribes and parents of Indian children may assess the effectiveness of their input regarding the participation of Indian children in the LEA's education programs and activities and the development and implementation of the IPPs, and share the results of that assessment with the LEA.

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

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§222.95 How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?

- (a) The Director of the Impact Aid Program (Director) periodically reviews applicant LEAs' IPPs to ensure that they comply with the provisions of section 8004(a) and §222.94.
- (b) If the Director determines either that the LEA's IPPs do not comply with the minimum standards of section 8004(a), or that the IPPs have not been implemented in accordance with §222.94, the Director provides the LEA with written notification of the deficiencies related to its IPPs and requires that the LEA take appropriate action.

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(c) An LEA shall make the necessary changes within 60 days of receipt of written notification from the Director.

(d) If the LEA fails to make the necessary adjustments or changes within the prescribed period of time, the Director may withhold all payments that the LEA is eligible to receive under section 8003.

(e) Each LEA that has developed IPPs shall review those IPPs annually to ensure that they—

(1) Comply with the provisions in section 8004(a); and

(2) Are implemented by the LEA in accordance with §222.94.

(f) If an LEA determines that its IPPs do not meet the requirements in paragraphs (e) (1) and (2) of this section, the LEA shall amend its IPPs to conform with those requirements within 60 days of its determination.

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

(1) The Director for approval; and

(2) The affected tribe or tribes.

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

(Authority: 20 U.S.C. 7704 (a) and (d)(2))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35416, July 1, 1997]

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§§222.96-222.101 [Reserved]

Indian Policies and Procedures Complaint and Hearing Procedures

§222.102 Who may file a complaint about a local educational agency's Indian policies and procedures?

(a) Only a tribal chairman or an authorized designee for a tribe that has students attending an LEA's schools may file a written complaint with the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) regarding any action of the LEA pursuant to, or relevant to, section 8004(a) and §222.94.

(b) If a tribe files a complaint through a designee, the tribe shall acknowledge in writing in the complaint that the designee is authorized to act on its behalf.

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(Authority: 20 U.S.C. 7704(e)(1))

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§222.103 What must be included in a complaint?

For purposes of this subpart, a complaint is a signed statement that includes—

- (a) An allegation that an LEA has failed to develop and implement IPPs in accordance with section 8004(a);
- (b) Information that supports the allegation;
- (c) A specific request for relief; and
- (d) A statement describing what steps the tribe has taken to resolve with the LEA the matters on which the complaint is based.

(Authority: 20 U.S.C. 7704(e)(1))

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§222.104 When does the Assistant Secretary consider a complaint received?

(a) The Assistant Secretary considers a complaint to have been received only after the Assistant Secretary determines that the complaint—

- (1) Satisfies the requirements in §§222.102 and 222.103; and
 - (2) Is in writing and signed by the tribal chairman or the tribe's authorized designee.
- (b) If the Assistant Secretary determines that a complaint fails to meet the requirements in §§222.102-222.103, the Assistant Secretary notifies the tribe or its designee in writing that the complaint has been dismissed for purposes of invoking the hearing procedures in §§222.102-222.113.
- (c) Any notification that a complaint has been dismissed includes the reasons why the Assistant Secretary determined that the complaint did not meet the requirements in §§222.102 and 222.103.
- (d) Notification that a complaint has been dismissed does not preclude other efforts to investigate or resolve the issues raised in the complaint, including the filing of an amended complaint.

(Authority: 20 U.S.C. 7704(e)(1))

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§§222.105-222.107 [Reserved]

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§222.108 What actions must be taken upon receipt of a complaint?

Within 10 working days of receipt of a complaint, the Secretary or his designee—

- (a) Designates a hearing examiner to conduct a hearing;
- (b) Designates a time for the hearing that is no more than 30 days after the designation of a hearing examiner;
- (c) Designates a place for the hearing that, to the extent possible, is—
 - (1) Near the LEA; or
 - (2) At another location convenient to the tribe and the LEA, if it is determined that there is good cause to designate another location;
- (d) Notifies the tribe and the LEA of the time, place, and nature of the hearing; and
- (e) Transmits copies of the complaint to the LEA and the affected tribe or tribes.

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

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§222.109 When may a local educational agency reply to a complaint?

An LEA's reply to the charges in the complaint must be filed with the hearing examiner within 15 days of the date the LEA receives a copy of the notice and complaint described in §222.108 (d) and (e) from the hearing examiner.

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

§222.110 What are the procedures for conducting a hearing on a local educational agency's Indian policies and procedures?

Hearings on IPP complaints filed by an Indian tribe or tribes against an LEA are conducted as follows:

- (a) The hearing must be open to the public.
- (b) Parties may be represented by counsel.
- (c)(1) Each party may submit oral and written testimony that is relevant to the issues in the proceeding and make recommendations concerning appropriate remedial actions.
- (2) A party may object to evidence it considers to be irrelevant or unduly repetitious.

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(d) No party shall communicate orally or in writing with the hearing examiner or the Assistant Secretary on matters under review, except minor procedural matters, unless all parties to the complaint are given—

(1) Timely and adequate notice of the communication; and

(2) Reasonable opportunity to respond.

(e) For each document that a party submits, the party shall—

(1) File one copy for inclusion in the record of the proceeding; and

(2) Provide a copy to each of the other parties to the proceeding.

(f) Each party shall bear only its own costs in the proceeding.

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

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§222.111 What is the authority of the hearing examiner in conducting a hearing?

The hearing examiner is authorized to conduct a hearing under section 8004(e) and §§222.109-222.113 as follows:

(a) The hearing examiner may—

(1) Clarify, simplify, or define the issues or consider other matters that may aid in the disposition of the complaint;

(2) Direct the parties to exchange relevant documents or information; and

(3) Examine witnesses.

(b) The hearing examiner—

(1) Regulates the course of proceedings and conduct of the parties;

(2) Arranges for the preparation of a transcript of each hearing and provides one copy to each party;

(3) Schedules the submission of oral and documentary evidence;

(4) Receives, rules on, excludes, or limits evidence;

(5) Establishes and maintains a record of the proceeding, including any transcripts referenced above;

(6) Establishes reasonable rules governing public attendance at the proceeding; and

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(7) Is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

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

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§222.112 What procedures are followed after the hearing?

(a) Each party may submit to the hearing examiner additional evidence that is relevant to the issues raised at the hearing, within the time period and in the manner specified by the hearing examiner.

(b) Within 30 days after the hearing, the hearing examiner—

(1) Makes, on the basis of the record, written findings of fact and recommendations concerning any appropriate remedial action that should be taken;

(2) Submits those findings and recommendations, along with the hearing record, to the Assistant Secretary; and

(3) Sends a copy of those findings and recommendations to each party.

(c)(1) Each party may file with the Assistant Secretary comments on the hearing examiner's findings and recommendations.

(2) The comments must be received by the Assistant Secretary within 10 days after the party receives a copy of the hearing examiner's findings and recommendations.

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

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§222.113 What are the responsibilities of the Assistant Secretary after the hearing?

(a) Within 30 days after receiving the entire hearing record and the hearing examiner's findings and recommendations, the Assistant Secretary makes, on the basis of the record, a written determination that includes—

(1) Any appropriate remedial action that the LEA must take;

(2) A schedule for completing any remedial action; and

(3) The reasons for the Assistant Secretary's decision.

(b) After completing the final determination required by paragraph (a) of this section, the Assistant Secretary sends the parties a copy of that determination.

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(c) The Assistant Secretary's final determination under paragraph (a) of this section is the final action of the Department concerning the complaint and is subject to judicial review.

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

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Withholding and Related Procedures for Indian Policies and Procedures

Source: 62 FR 35416, July 1, 1997, unless otherwise noted.

§222.114 How does the Assistant Secretary implement the provisions of this subpart?

The Assistant Secretary implements section 8004 of the Act and this subpart through such actions as the Assistant Secretary determines to be appropriate, including the withholding of funds in accordance with §§222.115-222.122, after affording the affected LEA, parents, and Indian tribe or tribes an opportunity to present their views.

(Authority: 20 U.S.C. 7704 (d)(2), (e) (8)-(9))

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§222.115 When does the Assistant Secretary withhold payments from a local educational agency under this subpart?

Except as provided in §222.120, the Assistant Secretary withholds payments to an LEA if—

(a) The Assistant Secretary determines it is necessary to enforce the requirements of section 8004 of the Act or this subpart; or

(b) After a hearing has been conducted under section 8004(e) of the Act and §§222.102-222.113 (IPP hearing)—

(1) The LEA rejects the final determination of the Assistant Secretary; or

(2) The LEA fails to implement the required remedy within the time established and the Assistant Secretary determines that the required remedy will not be undertaken by the LEA even if the LEA is granted a reasonable extension of time.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), (e)(8)-(9))

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§222.116 How are withholding procedures initiated under this subpart?

(a) If the Assistant Secretary decides to withhold an LEA's funds, the Assistant Secretary issues a written notice of intent to withhold the LEA's payments.

(b) In the written notice, the Assistant Secretary—

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- (1) Describes how the LEA failed to comply with the requirements at issue; and
- (2)(i) Advises an LEA that has participated in an IPP hearing that it may request, in accordance with §222.117(c), that its payments not be withheld; or
- (ii) Advises an LEA that has not participated in an IPP hearing that it may request a withholding hearing in accordance with §222.117(d).
- (c) The Assistant Secretary sends a copy of the written notice of intent to withhold payments to the LEA and the affected Indian tribe or tribes by certified mail with return receipt requested.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), and (e) (8)-(9))

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§222.117 What procedures are followed after the Assistant Secretary issues a notice of intent to withhold payments?

- (a) The withholding of payments authorized by section 8004 of the Act is conducted in accordance with section 8004 (d)(2) or (e)(8)-(9) of the Act and the regulations in this subpart.
- (b) An LEA that receives a notice of intent to withhold payments from the Assistant Secretary is not entitled to an Impact Aid hearing under the provisions of section 8011 of the Act and subpart J of this part.
- (c) *After an IPP hearing.* (1) An LEA that rejects or fails to implement the final determination of the Assistant Secretary after an IPP hearing has 10 days from the date of the LEA's receipt of the written notice of intent to withhold funds to provide the Assistant Secretary with a written explanation and documentation in support of the reasons why its payments should not be withheld. The Assistant Secretary provides the affected Indian tribe or tribes with an opportunity to respond to the LEA's submission.
- (2) If after reviewing an LEA's written explanation and supporting documentation, and any response from the Indian tribe or tribes, the Assistant Secretary determines to withhold an LEA's payments, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes of the withholding determination in writing by certified mail with return receipt requested prior to withholding the payments.
- (3) In the withholding determination, the Assistant Secretary states the facts supporting the determination that the LEA failed to comply with the legal requirements at issue, and why the provisions of §222.120 (provisions governing circumstances when an LEA is exempt from the withholding of payments) are inapplicable. This determination is the final decision of the Department.

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(d) *An LEA that has not participated in an IPP hearing.* (1) An LEA that has not participated in an IPP hearing has 30 days from the date of its receipt of the Assistant Secretary's notice of intent to withhold funds to file a written request for a withholding hearing with the Assistant Secretary. The written request for a withholding hearing must—

(i) Identify the issues of law and facts in dispute; and

(ii) State the LEA's position, together with the pertinent facts and reasons supporting that position.

(2) If the LEA's request for a withholding hearing is accepted, the Assistant Secretary sends written notification of acceptance to the LEA and the affected Indian tribe or tribes and forwards to the hearing examiner a copy of the Assistant Secretary's written notice, the LEA's request for a withholding hearing, and any other relevant documents.

(3) If the LEA's request for a withholding hearing is rejected, the Assistant Secretary notifies the LEA in writing that its request for a hearing has been rejected and provides the LEA with the reasons for the rejection.

(4) The Assistant Secretary rejects requests for withholding hearings that are not filed in accordance with the time for filing requirements described in paragraph (d)(1) of this section. An LEA that files a timely request for a withholding hearing, but fails to meet the other filing requirements set forth in paragraph (d)(1) of this section, has 30 days from the date of receipt of the Assistant Secretary's notification of rejection to submit an acceptable amended request for a withholding hearing.

(e) If an LEA fails to file a written explanation in accordance with paragraph (c) of this section, or a request for a withholding hearing or an amended request for a withholding hearing in accordance with paragraph (d) of this section, the Secretary proceeds to take appropriate administrative action to withhold funds without further notification to the LEA.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), and (e) (8)-(9))

§222.118 How are withholding hearings conducted in this subpart?

(a) *Appointment of hearing examiner.* Upon receipt of a request for a withholding hearing that meets the requirements of §222.117(d), the Assistant Secretary requests the appointment of a hearing examiner.

(b) *Time and place of the hearing.* Withholding hearings under this subpart are held at the offices of the Department in Washington, DC, at a time fixed by the hearing examiner, unless the hearing examiner selects another place based upon the convenience of the parties.

(c) *Proceeding.* (1) The parties to the withholding hearing are the Assistant Secretary and the affected LEA. An affected Indian tribe is not a party, but, at the discretion of the hearing

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examiner, may participate in the hearing and present its views on the issues relevant to the withholding determination.

(2) The parties may introduce all relevant evidence on the issues stated in the LEA's request for withholding hearing or other issues determined by the hearing examiner during the proceeding. The Assistant Secretary's notice of intent to withhold, the LEA's request for a withholding hearing, and all amendments and exhibits to those documents, must be made part of the hearing record.

(3) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the hearing examiner may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

(4) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

(5) A transcript must be made of the oral evidence unless the parties agree otherwise.

(6) Each party may be represented by counsel.

(7) The hearing examiner is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(d) *Filing requirements.* (1) All written submissions must be filed with the hearing examiner by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, a party may serve a document upon the other party by facsimile transmission.

(3) The filing date for a written submission under this subpart is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was timely received by the hearing examiner.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

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(e) *Procedural rules.* (1) If the hearing examiner determines that no dispute exists as to a material fact or that the resolution of any disputes as to material facts would not be materially assisted by oral testimony, the hearing examiner shall afford each party an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to withholding hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing examiner shall afford to each party—

(i) Sufficient notice of the issues to be considered at the hearing;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(f) *Decision of the hearing examiner.* (1) The hearing examiner—

(i) Makes written findings and an initial withholding decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party and to the affected Indian tribe or tribes, a copy of the written findings and initial withholding decision.

(2) A hearing examiner's initial withholding decision constitutes the Secretary's final withholding decision without any further proceedings unless—

(i) Either party to the withholding hearing, within 30 days of the date of its receipt of the initial withholding decision, requests the Secretary to review the decision and that request is granted; or

(ii) The Secretary otherwise determines, within the time limits stated in paragraph (g)(2)(ii) of this section, to review the initial withholding decision.

(3) When an initial withholding decision becomes the Secretary's final decision without any further proceedings, the Department notifies the parties and the affected Indian tribe or tribes of the finality of the decision.

(g) *Administrative appeal of an initial decision.* (1)(i) Any party may request the Secretary to review an initial withholding decision.

(ii) A party must file this request for review within 30 days of the party's receipt of the initial withholding decision.

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(2) The Secretary may—

(i) Grant or deny a timely request for review of an initial withholding decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision by the Secretary.

(3) The Secretary mails to each party and the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of—

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(h) *Secretary's review of an initial withholding decision.* (1) When the Secretary reviews an initial withholding decision, the Secretary notifies each party and the affected Indian tribe or tribes in writing, by certified mail with return receipt requested, that it may file a written statement or comments; and

(2) Mails to each party and to the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of the Secretary's final withholding decision.

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

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§222.119 What is the effect of withholding under this subpart?

(a) The withholding provisions in this subpart apply to all payments that an LEA is otherwise eligible to receive under section 8003 of the Act for any fiscal year.

(b) The Assistant Secretary withholds funds after completion of any administrative proceedings under §§222.116-222.118 until the LEA documents either compliance or exemption from compliance with the requirements in section 8004 of the Act and this subpart.

(Authority: 20 U.S.C. 7704 (a), (b), (d)(2), (e) (8)-(9))

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§222.120 When is a local educational agency exempt from withholding of payments?

Except as provided in paragraph (d)(2) of this section, the Assistant Secretary does not withhold payments to an LEA under the following circumstances:

(a) The LEA documents that it has received a written statement from the affected Indian tribe or tribes that the LEA need not comply with section 8004 (a) and (b) of the Act, because the

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affected Indian tribe or tribes is satisfied with the provision of educational services by the LEA to the children claimed on the LEA's application for assistance under section 8003 of the Act.

(b) The Assistant Secretary receives from the affected Indian tribe or tribes a written request that meets the requirements of §222.121 not to withhold payments from an LEA.

(c) The Assistant Secretary, on the basis of documentation provided by the LEA, determines that withholding payments during the course of the school year would substantially disrupt the educational programs of the LEA.

(d)(1) The affected Indian tribe or tribes elects to have educational services provided by the Bureau of Indian Affairs under section 1101(d) of the Education Amendments of 1978.

(2) For an LEA described in paragraph (d)(1) of this section, the Secretary recalculates the section 8003 payment that the LEA is otherwise eligible to receive to reflect the number of students who remain in attendance at the LEA.

(Authority: 20 U.S.C. 7703(a), 7704(c), (d)(2) and (e)(8))

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§222.121 How does the affected Indian tribe or tribes request that payments to a local educational agency not be withheld?

(a) The affected Indian tribe or tribes may submit to the Assistant Secretary a formal request not to withhold payments from an LEA.

(b) The formal request must be in writing and signed by the tribal chairman or authorized designee.

(Authority: 20 U.S.C. 7704 (d)(2) and (e)(8))

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§222.122 What procedures are followed if it is determined that the local educational agency's funds will not be withheld under this subpart?

If the Secretary determines that an LEA's payments will not be withheld under this subpart, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes, in writing, by certified mail with return receipt requested, of the reasons why the payments will not be withheld.

(Authority: 20 U.S.C. 7704 (d)-(e))

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§§222.123-222.129 [Reserved]

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Subpart H [Reserved]

Subpart I—Facilities Assistance and Transfers Under Section 8008 of the Act

§222.140 What definitions apply to this subpart?

In addition to the terms referenced or defined in §222.2, the following definitions apply to this subpart:

Minimum school facilities means those school facilities for which the Secretary may provide assistance under this part as follows:

(1) The Secretary, after consultation with the State educational agency and the local educational agency (LEA), considers these facilities necessary to support an educational program—

(i) For the membership of students residing on Federal property to be served at normal capacity; and

(ii) In accordance with applicable Federal and State laws and, if necessary or appropriate, common practice in the State.

(2) The term includes, but is not restricted to—

(i) Classrooms and related facilities; and

(ii) Machinery, utilities, and initial equipment, to the extent that these are necessary or appropriate for school purposes.

Providing assistance means constructing, leasing, renovating, remodeling, rehabilitating, or otherwise providing minimum school facilities.

(Authority: 20 U.S.C. 7708)

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§222.141 For what types of projects may the Secretary provide assistance under section 8008 of the Act?

The types of projects for which the Secretary may provide assistance under section 8008 of the Act during any given year include, but are not restricted to, one or more of the following:

(a)(1) Emergency repairs to existing facilities for which the Secretary is responsible under section 8008.

(2) As used in this section, the term *emergency repairs* means those repairs necessary—

(i) For the health and safety of persons using the facilities;

(ii) For the removal of architectural barriers to the disabled; or

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- (iii) For the prevention of further deterioration of the facilities.
- (b) Renovation of facilities for which the Secretary is responsible under section 8008 to meet the standards of minimum school facilities in exchange for an LEA or another appropriate entity accepting transfer of the Secretary's interest in them under §222.143.
- (c) Provision of temporary facilities on Federal property pending emergency repairs.
- (d) Construction of replacement minimum school facilities when more cost-effective than renovation and when the replacement facilities are to be transferred to local ownership under §222.143.

(Authority: 20 U.S.C. 7708)

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§222.142 What terms and conditions apply to minimum school facilities operated under section 8008 by another agency?

When minimum school facilities are provided under section 8008, the Secretary may—

- (a) Arrange for the operation of the facilities by an agency other than the Department;
- (b) Establish terms and conditions for the operation of the facilities; and
- (c) Require the operating agency to submit assurances and enter into other arrangements that the Secretary specifies.

(Authority: 20 U.S.C. 7708)

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§222.143 What terms and conditions apply to the transfer of minimum school facilities?

When the Secretary transfers to an LEA or other appropriate entity (transferee) facilities that have been used to carry out the purposes of section 10 of Pub. L. 81-815 or section 8008, the Secretary establishes appropriate terms and conditions for the transfer including that it be—

- (a) Without charge; and
- (b) Consented to by the transferee.

(Authority: 20 U.S.C. 7708)

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§§222.144-222.149 [Reserved]

IMPACT AID REGULATIONS

Subpart J—Impact Aid Administrative Hearings and Judicial Review Under Section 8011 of the Act

§222.150 What is the scope of this subpart?

(a) Except as provided in paragraph (b) of this section, the regulations in this subpart govern all Impact Aid administrative hearings under section 8011(a) of the Act and requests for reconsideration.

(b) Except as otherwise indicated in this part, the regulations in this subpart do not govern the following administrative hearings:

(1) Subpart G, §§222.90-222.122 (Indian policies and procedures tribal complaint and withholding hearings).

(2) Subpart K, §222.165 (hearings concerning determinations under section 8009 of the Act).

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997]

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§222.151 When is an administrative hearing provided to a local educational agency?

(a) Any local educational agency (LEA) that is adversely affected by the Secretary's (or the Secretary's delegate's) action or failure to act upon the LEA's application under the Act is entitled to an administrative hearing in accordance with this subpart.

(b) An applicant is entitled to an administrative hearing under this subpart only if—

(1) The applicant files a written request for an administrative hearing within 60 days of its receipt of written notice of the adverse action; and

(2) The issues of fact or law specified in the hearing request are material to the determination of the applicant's rights and are not committed wholly to the discretion of the Secretary.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997; 80 FR 33170, June 11, 2015]

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§222.152 When may a local educational agency request reconsideration of a determination?

(a)(1) An LEA may request reconsideration of any determination made by the Secretary (or the Secretary's delegate) under the Act, either in addition to or instead of requesting an administrative hearing under §222.151.

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(2) A request for reconsideration, or actual reconsideration by the Secretary (or the Secretary's delegatee), does not extend the time within which an applicant must file a request for an administrative hearing under §222.151, unless the Secretary (or the Secretary's delegatee) extends that time limit in writing.

(b) The Secretary's (or the Secretary's delegatee's) consideration of a request for reconsideration is not prejudiced by a pending request for an administrative hearing on the same matter, or the fact that a matter has been scheduled for a hearing. The Secretary (or the Secretary's delegatee) may, but is not required to, postpone the administrative hearing due to a request for reconsideration.

(c) The Secretary (or the Secretary's delegatee) may reconsider any determination under the Act concerning a particular party unless the determination has been the subject of an administrative hearing under this part with respect to that party.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35418, July 1, 1997;80 FR 33170, June 11, 2015]

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§222.153 How must a local educational agency request an administrative hearing?

An applicant requesting a hearing in accordance with this subpart must—

(a)(1) If it mails the hearing request, address it to the Secretary, c/o Director, Impact Aid Program, Room 3E105, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202-6244;

(2) If it hand-delivers the hearing request, deliver it to the Director, Impact Aid Program, Room 3E105, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202-6244; or

(3) If it emails the hearing request, send it to *Impact.Aid@ed.gov*.

Note to paragraph (a): The Secretary encourages applicants requesting an Impact Aid hearing to mail or email their requests. Because of enhanced security procedures, building access for non-official staff may be limited. Applicants should be prepared to mail their hearing requests if they or their courier are unable to obtain access to the building.

(b) Clearly specify in its written hearing request the issues of fact and law to be considered; and

(c) Furnish a copy of its hearing request to its State educational agency (SEA) (unless the applicant is an SEA).

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(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

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§222.154 How must written submissions under this subpart be filed?

(a) All written submissions under this subpart must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(b) If agreed upon by the parties, a party may serve a document upon the other party or parties by facsimile transmission.

(c) The filing date for a written submission under this subpart is the date the document is—

(1) Hand-delivered;

(2) Mailed; or

(3) Sent by facsimile transmission.

(d) A party other than the Department filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department, including by the administrative law judge (ALJ).

(e) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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§222.155 When and where is an administrative hearing held?

Administrative hearings under this subpart are held at the offices of the Department in Washington, DC, at a time fixed by the ALJ, unless the ALJ selects another place based upon the convenience of the parties.

(Authority: 20 U.S.C. 7711(a))

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§222.156 How is an administrative hearing conducted?

Administrative hearings under this subpart are conducted as follows:

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- (a) The administrative hearing is conducted by an ALJ appointed under 5 U.S.C. 3105, who issues rules of procedure that are proper and not inconsistent with this subpart.
- (b) The parties may introduce all relevant evidence on the issues stated in the applicant's request for hearing or on other issues determined by the ALJ during the proceeding. The application in question and all amendments and exhibits must be made part of the hearing record.
- (c) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the ALJ may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.
- (d) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.
- (e) A transcript must be made of the oral evidence unless the parties agree otherwise.
- (f) Each party may be represented by counsel.
- (g) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(Authority: 5 U.S.C. 556 and 3105; 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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§222.157 What procedures apply for issuing or appealing an administrative law judge's decision?

- (a) *Decision.* (1) The ALJ—
 - (i) Makes written findings and an initial decision based upon the hearing record; and
 - (ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.
- (2) An ALJ's initial decision constitutes the Secretary's final decision without any further proceedings unless—
 - (i) A party, within the time limits stated in paragraph (b)(1)(ii) of this section, requests the Secretary to review the decision and that request is granted; or
 - (ii) The Secretary otherwise determines, within the time limits stated in paragraph (b)(2)(ii) of this section, to review the initial decision.

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(3) When an initial decision becomes the Secretary's final decision without any further proceedings, the Department's Office of Hearings and Appeals notifies the parties of the finality of the decision.

(b) *Administrative appeal of an initial decision.* (1)(i) Any party may request the Secretary to review an initial decision.

(ii) A party must file such a request for review within 30 days of the party's receipt of the initial decision.

(2) The Secretary may—

(i) Grant or deny a timely request for review of an initial decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision.

(3) The Secretary mails to each party written notice of—

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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§222.158 What procedures apply to the Secretary's review of an initial decision?

When the Secretary reviews an initial decision, the Secretary—

(a) Notifies the applicant in writing that it may file a written statement or comments; and

(b) Mails to each party written notice of the Secretary's final decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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§222.159 When and where does a party seek judicial review?

If an LEA or a State that is aggrieved by the Secretary's final decision following an administrative hearing proceeding under this subpart wishes to seek judicial review, the LEA or State must, within 30 working days (as determined by the LEAs or State) after receiving notice of the Secretary's final decision, file with the United States Court of Appeals for the circuit in

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which that LEA or State is located a petition for review of the final agency action, in accordance with section 8011(b) of the Act.

(Authority: 20 U.S.C. 7711(b))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

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Subpart K—Determinations Under Section 8009 of the Act

§222.160 What are the scope and purpose of this subpart?

(a) *Scope.* This subpart applies to determinations made by the Secretary under section 8009 of the Act.

(b) *Purpose.* The sole purpose of the regulations in this subpart is to implement the provisions of section 8009. The definitions and standards contained in this subpart apply only with respect to section 8009 and do not establish definitions and standards for any other purpose.

(Authority: 20 U.S.C. 7709)

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§222.161 How is State aid treated under section 8009 of the Act?

(a) *General rules.* (1) A State may take into consideration payments under sections 8002 and 8003(b) of the Act (including hold harmless payments calculated under section 8003(e)) in allocating State aid if that State has a State aid program that qualifies under §222.162, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency (LEA) only in the proportion described in §222.163.

(ii) A State may not take into consideration—

(A) That portion of an LEA's payment that is generated by the portion of a weight in excess of one under section 8003(a)(2)(B) of the Act (children residing on Indian lands);

(B) Payments under section 8003(d) of the Act (children with disabilities); or

(C) The amount that an LEA receives under section 8003(b)(2) that exceeds the amount the LEA would receive if eligible under section 8003(b)(1) and not section 8003(b)(2) (heavily impacted LEAs).

(2) No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public

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education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

(3) No State, whether or not it has an equalization program that qualifies under §222.162, may, in allocating State aid, take into consideration an LEA's eligibility for payments under the Act if that LEA does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 8009 in allocating State aid to LEAs must reimburse any LEA for any amounts taken into consideration for any fiscal year to the extent that the LEA did not in fact receive payments in those amounts during that fiscal year.

(5) A State may not take into consideration payments under the Act before its State aid program has been certified by the Secretary.

(b) *Data for determinations.* (1) Except as provided in paragraph (b)(2) of this section, determinations under this subpart requiring the submission of financial or school population data must be made on the basis of final data for the second fiscal year preceding the fiscal year for which the determination is made if substantially the same program was then in effect.

(2)(i) If the Secretary determines that the State has substantially revised its State aid program, the Secretary may certify that program for any fiscal year only if—

(A) The Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in §222.162 for the fiscal year for which the determination is made; and

(B) The State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met that standard for the fiscal year for which the determination is made, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA.

(ii) Data projections submitted by a State must set forth the assumptions upon which the data projections are founded, be accompanied by an assurance as to their accuracy, and be adjusted by actual data for the fiscal year of determination that must be submitted to the Secretary as soon as these data are available.

(c) *Definitions.* The following definitions apply to this subpart:

Current expenditures means the total charges incurred for the benefit of the school year in an elementary (including pre-kindergarten) or secondary school program. "Current expenditures" does not include—

(1) Expenditures for capital outlay;

(2) Expenditures for debt service for capital outlay;

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- (3) Expenditures from State sources for special cost differentials of the type specified in §222.162(c)(2);
- (4) Expenditures of revenues from local or intermediate sources that are designated for special cost differentials of the type specified in §222.162(c)(2); or
- (5) Expenditures of funds received by the agency under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(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 §222.163.

Equalize expenditures means to meet the standard set forth in §222.162.

Local tax revenues means compulsory charges levied by an LEA or by an intermediate school district or other local governmental entity on behalf of an LEA for current expenditures for educational services. “Local tax revenues” include the proceeds of ad valorem taxes, sales and use taxes, income taxes and other taxes. Where a State funding formula requires a local contribution equivalent to a specified mill tax levy on taxable real or personal property or both, “local tax revenues” include any revenues recognized by the State as satisfying that local contribution requirement.

Local tax revenues covered under a State equalization program means “local tax revenues” as defined in paragraph (c) of this section contributed to or taken into consideration in a State aid program subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

Revenue means an addition to assets that does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds. Furthermore, the term “revenue” includes only revenue for current expenditures.

State aid means any contribution, no repayment for which is expected, made by a State to or on behalf of LEAs within the State for current expenditures for the provision of free public education.

Total local tax revenues means all “local tax revenues” as defined in paragraph (c) of this section, including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(Authority: 20 U.S.C. 7709)

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[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997; 80 FR 33170, June 11, 2015]

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§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?

(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses “weighted pupil,” “classroom,” “instructional unit,” or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

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(d) *Revenues and current expenditures included in determinations.* All revenues or current expenditures must be included for each LEA in the State in determining the percentage of disparity under paragraph (a) of this section.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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§222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under §222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709(d)(1)(B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in §222.161(a)(1)(ii) and (iii), the proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) may be applied by a State to actual receipts of those payments.

(Authority: 20 U.S.C. 7709(d)(1)(B))

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

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§222.164 What procedures does the Secretary follow in making a determination under section 8009?

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to the State and all LEAs in the State and provide them with a complete copy of the submission initiating the proceeding. In addition, the party initiating the proceeding 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.

(b) *Submission.* (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2)(i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with §222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with §222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in §222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in §222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the

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Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an opportunity to present their views as follows:

(i) Upon receipt of a timely request for a predetermination hearing, the Secretary notifies all LEAs and the State of the time and place of the predetermination hearing.

(ii) Predetermination hearings are informal and any LEA and the State may participate whether or not they requested the predetermination hearing.

(iii) At the conclusion of the predetermination hearing, the Secretary holds the record open for 15 days for the submission of post-hearing comments. The Secretary may extend the period for post-hearing comments for good cause for up to an additional 15 days.

(iv) Instead of a predetermination hearing, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. In such a case, the Secretary notifies all LEAs and the State that this alternative procedure is being followed and that they have up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State may submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

(c) *Determinations.* The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

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

(Authority: 20 U.S.C. 7709)

Note to paragraph (b)(2) of this section: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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§222.165 What procedures does the Secretary follow after making a determination under section 8009?

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(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 60 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* (1) The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(2) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

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(g) *Procedural rules.* (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions.* (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) Appeals to the Secretary and the finality of initial decisions under section 8009 are governed by §§222.157(b), 222.158, and 222.159 of subpart J of this part.

(Authority: 20 U.S.C. 7709)

(i) *Corrective action.* (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide satisfactory written assurances that it will undertake appropriate corrective action if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

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(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35420, July 1, 1997; 80 FR 33170, June 11, 2015]

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§§222.166-222.169 [Reserved]

Appendix to Subpart K of Part 222—Determinations Under Section 8009 of the Act—Methods of Calculations for Treatment of Impact Aid Payments Under State Equalization Programs

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. Determinations of disparity standard compliance under §222.162(b)(1).

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of \$820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of \$1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($\$1,000 - \$820 = \$180 / \820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

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(b) In cases under §222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(i); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

Example

Group 1 (grades 1-6), 80,000 pupils×18.00%=	14,400
Group 2 (grades 7-12), 100,000 pupils×22.00%=	22,000
Group 3 (grades 1-12), 20,000 pupils×35.00%=	7,000
Total 200,000 pupils	43,400
43,400/200,000=21.70% Disparity	

2. *Determinations under §222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program.* The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

Examples

Example 1. State A has an equalization program under which each LEA is guaranteed \$900 per pupil less the LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, \$700 per pupil, and the State contributes the \$200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent

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(\$700/\$700). If LEA X receives \$100 per pupil in payments under the Act, \$100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing \$800 and State A would now contribute the \$100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional \$100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent (\$700/\$800). If LEA X receives \$100 per pupil in payments under the Act, \$87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing \$787.50 per pupil under the program and State A would now contribute \$112.50 per pupil as the difference.

Example 3. State B has an equalization program under which each LEA is guaranteed \$900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes \$700 per pupil from a two mill tax levy and an additional \$500 per pupil from local interest, bake sales, in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent (\$700/\$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives \$100 per pupil in payments under the Act, \$100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing \$800 and State A would now contribute the \$100 difference.

Example 4. State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is \$500, for nine mills \$550, for 10 mills \$600. LEA X levies a 10 mill rate and realizes \$300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another \$300 per pupil. The \$300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent (\$300/\$600). If LEA X receives \$100 per pupil in payments under the Act, \$50 per pupil may be taken into consideration. LEA X may be regarded as contributing \$350 per pupil under the program and State B would now contribute \$250 as the difference.

Example 5. The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes \$550 per pupil for each tax. As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives \$150 per pupil in payments under the Act, then up to \$75 per pupil normally could be taken into consideration. However, since LEA Y would have received only \$50 per pupil in State aid, only

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\$50 of the allowable \$75 could be taken into consideration. Thus, LEA Z may be regarded as contributing \$600 per pupil under the program and State B would not contribute any State aid.

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Subpart L—Impact Aid Discretionary Construction Grant Program Under Section 8007(b) of the Act

Source: 69 FR 12235, Mar. 15, 2004, unless otherwise noted.

General

§222.170 What is the purpose of the Impact Aid Discretionary Construction grant program (Section 8007(b) of the Act)?

The Impact Aid Discretionary Construction grant program provides competitive grants for emergency repairs and modernization of school facilities to certain eligible local educational agencies (LEAs) that receive formula Impact Aid funds.

(Authority: 20 U.S.C. 7707(b))

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§222.171 What LEAs may be eligible for Discretionary Construction grants?

(a) Applications for these grants are considered in four funding priority categories. The specific requirements for each priority are detailed in §§222.177 through 222.182.

(b)(1) Generally, to be eligible for an emergency construction grant, an LEA must—

(i) Enroll a high proportion (at least 40 percent) of federally connected children in average daily attendance (ADA) who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services;

(ii) Have a school that enrolls a high proportion of one of these types of students;

(iii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act; or

(iv) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of the emergency.

(c)(1) Generally, to be eligible for a modernization construction grant, an LEA must—

(i) Be eligible for Impact Aid funding under either section 8002 or 8003 of the Act;

(ii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act;

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(iii) Enroll a high proportion (at least 40 percent) of federally connected children in ADA who reside on Indian lands or who have a parent on active duty in the U.S. uniformed services;

(iv) Have a school that enrolls a high proportion of one of these types of students; or

(v) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of its need for modernization funds.

(Authority: 20 U.S.C. 7707(b))

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§222.172 What activities may an LEA conduct with funds received under this program?

(a) An LEA may use emergency grant funds received under this program only to repair, renovate, alter, and, in the limited circumstances described in paragraph (c) of this section, replace a public elementary or secondary school facility used for free public education to ensure the health and safety of students and personnel, including providing accessibility for the disabled as part of a larger project.

(b) An LEA may use modernization grant funds received under this program only to renovate, alter, retrofit, extend, and, in the limited circumstances described in paragraph (c) of this section, replace a public elementary or secondary school facility used for free public education to provide school facilities that support a contemporary educational program for the LEA's students at normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

(c)(1) An emergency or modernization grant under this program may be used for the construction of a new school facility but only if the Secretary determines—

(i) That the LEA holds title to the existing facility for which funding is requested; and

(ii) In consultation with the grantee, that partial or complete replacement of the facility would be less expensive or more cost-effective than improving the existing facility.

(2) When construction of a new school facility is permitted, emergency and modernization funds may be used only for a new school facility that is used for free public education. These funds may be used for the—

(i) Construction of instructional, resource, food service, and general or administrative support areas, so long as they are a part of the instructional facility; and

(ii) Purchase of initial equipment or machinery, and initial utility connections.

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(Authority: 20 U.S.C. 7707(b))

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§222.173 What activities will not receive funding under a Discretionary Construction grant?

The Secretary does not fund the following activities under a Discretionary Construction grant:

- (a) Improvements to facilities for which the LEA does not have full title or other interest, such as a lease-hold interest.
- (b) Improvements to or repairs of school grounds, such as environmental remediation, traffic remediation, and landscaping, that do not directly involve instructional facilities.
- (c) Repair, renovation, alteration, or construction for stadiums or other facilities that are primarily used for athletic contests, exhibitions, and other events for which admission is charged to the general public.
- (d) Improvements to or repairs of teacher housing.
- (e) Except in the limited circumstances as provided in §222.172(c), when new construction is permissible, acquisition of any interest in real property.
- (f) Maintenance costs associated with any of an LEA's school facilities.

(Authority: 20 U.S.C. 7707(b))

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§222.174 What prohibitions apply to these funds?

Grant funds under this program may not be used to supplant or replace other available non-Federal construction money. These grant funds may be used for emergency or modernization activities only to the extent that they supplement the amount of construction funds that would, in the absence of these grant funds, be available to a grantee from non-Federal funds for these purposes.

Example 1. "Supplanting." An LEA signs a contract for a \$300,000 roof replacement and plans to use its capital expenditure fund to pay for the renovation. Since the LEA already has non-Federal funds available for the roof project, it may not now use a grant from this program to pay for the project or replace its own funds in order to conserve its capital fund.

Example 2. "Non-supplanting." The LEA from the example of supplanting that has the \$300,000 roof commitment has also received a \$400,000 estimate for the replacement of its facility's heating, ventilation, and air conditioning (HVAC) system. The LEA has not made any commitments for the HVAC system because it has no remaining funds available to pay for that

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work. Since other funds are not available, it would not be supplanting if the LEA received an emergency grant under this program to pay for the HVAC system.

(Authority: 20 U.S.C. 7707(b))

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§222.175 What regulations apply to recipients of funds under this program?

The following regulations apply to the Impact Aid Discretionary Construction program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 75 (Direct Grant Programs) except for 34 CFR §§75.600 through 75.617.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(5) 34 CFR part 82 (New Restrictions on Lobbying).

(6) 34 CFR part 84 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)).

(b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended in 2 CFR part 3474.

(c) The regulations in 34 CFR part 222.

(Authority: 20 U.S.C. 1221e-3)

[60 FR 50778, Sept. 29, 1995, as amended at 80 FR 33170, June 11, 2015]

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§222.176 What definitions apply to this program?

(a) In addition to the terms referenced in 34 CFR 222.2, the following definitions apply to this program:

Bond limit means the cap or limit that a State may impose on an LEA's capacity for bonded indebtedness. For applicants in States that place no limit on an LEA's capacity for bonded

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indebtedness, the Secretary shall consider the LEA's bond limit to be 10 percent of its total assessed valuation.

Construction means

- (1) Preparing drawings and specifications for school facilities;
- (2) Repairing, renovating, or altering school facilities;
- (3) Extending school facilities as described in §222.172(b);
- (4) Erecting or building school facilities, as described in §222.172(c); and
- (5) Inspections or supervision related to school facilities projects.

Emergency means a school facility condition that is so injurious or hazardous that it either poses an immediate threat to the health and safety of the facility's students and staff or can be reasonably expected to pose such a threat in the near future. These conditions can include deficiencies in the following building features: a roof; electrical wiring; a plumbing or sewage system; heating, ventilation, or air conditioning; the need to bring a school facility into compliance with fire and safety codes, or providing accessibility for the disabled as part of a larger project.

Level of bonded indebtedness means the amount of long-term debt issued by an LEA divided by the LEA's bonding capacity.

Minimal capacity to issue bonds means that the total assessed value of real property in an LEA that may be taxed for school purposes is at least \$25,000,000 but not more than \$50,000,000.

Modernization means the repair, renovation, alteration, or extension of a public elementary or secondary school facility in order to support a contemporary educational program for an LEA's students in normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

No practical capacity to issue bonds means that the total assessed value of real property in an LEA that may be taxed for school purposes is less than \$25,000,000.

School facility means a building used to provide free public education, including instructional, resource, food service, and general or administrative support areas, so long as they are a part of the facility.

Total assessed value per student means the assessed valuation of real property per pupil (AVPP), unless otherwise defined by an LEA's State.

(b) The following terms used in this subpart are defined or referenced in 34 CFR 77.1:

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Applicant

Application

Award

Contract

Department

EDGAR

Equipment

Fiscal year

Grant

Grantee

Project

Public

Real property

Recipient

(Authority: 20 U.S.C. 7707(b) and 1221e-3)

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Eligibility

§222.177 What eligibility requirements must an LEA meet to apply for an emergency grant under the first priority?

An LEA is eligible to apply for an emergency grant under the first priority of section 8007(b) of the Act if it—

- (a) Is eligible to receive formula construction funds for the fiscal year under section 8007(a) of the Act;
- (b)(1) Has no practical capacity to issue bonds;
- (2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or
- (3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and

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(c) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

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§222.178 What eligibility requirements must an LEA meet to apply for an emergency grant under the second priority?

Except as provided in §222.179, an LEA is eligible to apply for an emergency grant under the second priority of section 8007(b) of the Act if it—

- (a) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act;
- (b)(1) Enrolls federally connected children living on Indian lands equal to at least 40 percent of the total number of children in average daily attendance (ADA) in its schools; or
- (2) Enrolls federally connected children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools;
- (c) Has used at least 75 percent of its bond limit;
- (d) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and
- (e) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

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§222.179 Under what circumstances may an ineligible LEA apply on behalf of a school for an emergency grant under the second priority?

An LEA that is eligible to receive section 8003(b) assistance for the fiscal year but that does not meet the other eligibility criteria described in §222.178(a) or (b) may apply on behalf of a school located within its geographic boundaries for an emergency grant under the second priority of section 8007(b) of the Act if—

- (a) The school—
 - (1) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or
 - (2) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

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- (b) The school has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel;
- (c) The LEA has used at least 75 percent of its bond limit; and
- (d) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average.

(Authority: 20 U.S.C. 7707(b))

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§222.180 What eligibility requirements must an LEA meet to apply for a modernization grant under the third priority?

An LEA is eligible to apply for a modernization grant under the third priority of section 8007(b) of the Act if it—

- (a) Is eligible to receive funds for the fiscal year under section 8002 or 8003(b) of the Act;
- (b)(1) Has no practical capacity to issue bonds;
- (2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or
- (3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and
- (c) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

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§222.181 What eligibility requirements must an LEA meet to apply for a modernization grant under the fourth priority?

An LEA is eligible to apply for a modernization grant under the fourth priority of section 8007(b) of the Act if it—

- (a)(1) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act; and
- (i) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA in its schools; or

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(ii) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools; or

(2) Is eligible to receive assistance for the fiscal year under section 8002 of the Act;

(b) Has used at least 75 percent of its bond limit;

(c) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

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§222.182 Under what circumstances may an ineligible LEA apply on behalf of a school for a modernization grant under the fourth priority?

An LEA that is eligible to receive a payment under Title VIII for the fiscal year but that does not meet the other eligibility criteria described in §222.181 may apply on behalf of a school located within its geographic boundaries for a modernization grant under the fourth priority of section 8007(b) of the Act if—

(a) The school—

(1) Enrolls children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or

(2) Enrolls children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

(b) The LEA has used at least 75 percent of its bond limit;

(c) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) The school has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

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How To Apply for a Grant

§222.183 How does an LEA apply for a grant?

(a) To apply for funds under this program, an LEA may submit only one application for one educational facility for each competition.

(b) An application must—

(1) Contain the information required in §§222.184 through 222.186, as applicable, and in any application notice that the Secretary may publish in the Federal Register; and

(2) Be timely filed in accordance with the provisions of the Secretary's application notice.

(Approved by the Office of Management and Budget under control number 1810-0657)

(Authority: 20 U.S.C. 7707(b))

[60 FR 50778, Sept. 29, 1995, as amended at 76 FR 23713, Apr. 28, 2011]

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§222.184 What information must an application contain?

An application for an emergency or modernization grant must contain the following information:

(a) The name of the school facility the LEA is proposing to repair, construct, or modernize.

(b)(1) For an applicant under section 8003(b) of the Act, the number of federally connected children described in section 8003(a)(1) enrolled in the school facility, as well as the total enrollment in the facility, for which the LEA is seeking a grant; or

(2) For an applicant under section 8002 of the Act, the total enrollment, for the preceding year, in the LEA and in the school facility for which the LEA is seeking a grant, based on the fall State count date.

(c) The identification of the LEA's interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement.

(d) The original construction date of the school facility that the LEA proposes to renovate or modernize.

(e) The dates of any major renovations of that school facility and the areas of the school covered by the renovations.

(f) The proportion of Federal acreage within the geographic boundaries of the LEA.

(g) Fiscal data including the LEA's—

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- (1) Maximum bonding capacity;
- (2) Amount of bonded debt;
- (3) Total assessed value of real property available to be taxed for school purposes;
- (4) State average assessed value per pupil of real property available to be taxed for school purposes;
- (5) Local real property tax levy, in mills or dollars, used to generate funds for capital expenditures; and
- (6) Sources and amounts of funds available for the proposed project.
- (h) A description of the need for funds and the proposed project for which a grant under this subpart L would be used, including a cost estimate for the project.
- (i) Applicable assurances and certifications identified in the approved grant application package.

(Approved by the Office of Management and Budget under control number 1810-0657)

(Authority: 20 U.S.C. 7707(b))

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§222.185 What additional information must be included in an emergency grant application?

In addition to the information specified in §222.184, an application for an emergency grant must contain the following:

- (a) A description of the deficiency that poses a health or safety hazard to occupants of the facility.
- (b) A description of how the deficiency adversely affects the occupants and how it will be repaired.
- (c) A statement signed by an appropriate local official, as defined below, that the deficiency threatens the health and safety of occupants of the facility or prevents the use of the facility. An appropriate local official may include a local building inspector, a licensed architect, or a licensed structural engineer. An appropriate local official may not include a member of the applicant LEA's staff.

(Approved by the Office of Management and Budget under control number 1810-0657)

(Authority: 20 U.S.C. 7707(b))

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§222.186 What additional information must be included in a modernization grant application?

In addition to the information specified in §222.184, an application for a modernization grant must contain a description of—

- (a) The need for modernization; and
- (b) How the applicant will use funds received under this program to address the need referenced in paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1810-0657)

(Authority: 20 U.S.C. 7707(b))

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§222.187 Which year's data must an SEA or LEA provide?

(a) Except as provided in paragraph (b) of this section, the Secretary will determine eligibility under this discretionary program based on student and fiscal data for each LEA from the fiscal year preceding the fiscal year for which the applicant is applying for funds.

(b) If satisfactory fiscal data are not available from the preceding fiscal year, the Secretary will use data from the most recent fiscal year for which data that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7707(b))

How Grants Are Made

§222.188 What priorities may the Secretary establish?

In any given year, the Secretary may assign extra weight for certain facilities systems or emergency and modernization conditions by identifying the systems or conditions and their assigned weights in a notice published in the Federal Register.

(Authority: 20 U.S.C. 7707(b))

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§222.189 What funding priority does the Secretary give to applications?

(a) Except as provided in paragraph (b) of this section, the Secretary gives funding priority to applications in the following order:

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(1) First priority is given to applications described under §222.177 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in §222.190, including the severity of the emergency.

(2) After all eligible first-priority applications are funded, second priority is given to applications described under §§222.178 and 222.179 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in §222.190, including the severity of the emergency.

(3) Third priority is given to applications described under §222.180 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in §222.190, including the severity of the need for modernization.

(4) Fourth priority is given to applications described under §§222.181 and 222.182 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in §222.190, including the severity of the need for modernization.

(b)(1) The Secretary makes awards in each priority described above until the Secretary is unable to make an approvable award in that priority.

(2) If the Secretary is unable to fund a full project or a viable portion of a project, the Secretary may continue to fund down the list of high-ranking applicants within a priority.

(3) The Secretary applies any remaining funds to awards in the next priority.

(4) If an applicant does not receive an emergency or modernization grant in a fiscal year, the Secretary will, subject to the availability of funds and to the priority and award criteria, consider that application in the following year along with the next fiscal year's pool of applications.

Example: The first five applicants in priority one have been funded. Three hundred thousand dollars remain available. Three unfunded applications remain in that priority. Application #6 requires a minimum of \$500,000, application #7 requires \$400,000, and application #8 requires \$300,000 for a new roof and \$150,000 for related wall and ceiling repairs. Applicant #8 agrees to accept the remaining \$300,000 since the roof upgrade can be separated into a viable portion of applicant #8's total project. Applications #6 and #7 will be retained for consideration in the next fiscal year and will compete again with that fiscal year's pool of applicants. Applicant #8 will have to submit a new application in the next fiscal year if it wishes to be considered for the unfunded portion of the current year's application.

(Authority: 20 U.S.C. 7707(b))

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§222.190 How does the Secretary rank and select applicants?

(a) To the extent that they are consistent with these regulations and section 8007(b) of the Act, the Secretary will follow grant selection procedures that are specified in 34 CFR 75.215 through 75.222. In general these procedures are based on the authorizing statute, the selection criteria, and any priorities or other applicable requirements that have been published in the Federal Register.

(b) In the event of ties in numeric ranking, the Secretary may consider as tie-breaking factors: the severity of the emergency or the need for modernization; for applicants under section 8003 of the Act, the numbers of federally connected children who will benefit from the project; or for applicants under section 8002 of the Act, the numbers of children who will benefit from the project; the AVPP compared to the LEA's State average; and available resources or non-Federal funds available for the grant project.

(Authority: 20 U.S.C. 7707(b))

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§222.191 What is the maximum award amount?

(a) Subject to any applicable contribution requirements as described in §§222.192 and 222.193, the procedures in 34 CFR 75.231 through 75.236, and the provisions in paragraph (b) of this section, the Secretary may fund up to 100 percent of the allowable costs in an approved grantee's proposed project.

(b) An award amount may not exceed the difference between—

(1) The cost of the proposed project; and

(2) The amount the grantee has available or will have available for this purpose from other sources, including local, State, and other Federal funds.

(Authority: 20 U.S.C. 7707(b))

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§222.192 What local funds may be considered as available for this project?

To determine the amount of local funds that an LEA has available under §222.191(b)(2) for a project under this program, the Secretary will consider as available all LEA funds that may be used for capital expenditures except \$100,000 or 10 percent of the average annual capital expenditures of the applicant for the three previous fiscal years, whichever is greater. The Secretary will not consider capital funds that an LEA can demonstrate have been committed through signed contracts or other written binding agreements but have not yet been expended.

(Authority: 20 U.S.C. 7707(b))

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§222.193 What other limitations on grant amounts apply?

(a) Except as provided in paragraph (b) of this section and §222.191, the amount of funds provided under an emergency grant or a modernization grant awarded to an eligible LEA is subject to the following limitations:

(1) The award amount may not be more than 50 percent of the total cost of an approved project.

(2) The total amount of grant funds may not exceed four million dollars during any four-year period.

Example: An LEA that is awarded four million dollars in the first year may not receive any additional funds for the following three years.

(b) Emergency or modernization grants to LEAs with no practical capacity to issue bonds as defined in §222.176 are not subject to the award limitations described in paragraph (a) of this section.

(Authority: 20 U.S.C. 7707(b))

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§222.194 Are “in-kind” contributions permissible?

(a) LEAs that are subject to the applicable matching requirement described in §222.193(a) may use allowable third party in-kind contributions as defined below to meet the requirements.

(b) Third party in-kind contributions mean property or services that benefit this grant program and are contributed by non-Federal third parties without charge to the grantee or by a cost-type contractor under the grant agreement.

(c) Subject to the limitations of 34 CFR 75.564(c)(2) regarding indirect costs, the provisions of 2 CFR 200.306 govern the allowability and valuation of in-kind contributions, except that it is permissible for a third party to contribute real property to a grantee for a project under this program, so long as no Federal funds are spent for the acquisition of real property.

(Authority: 20 U.S.C. 7707(b))

[69 FR 12235, Mar. 15, 2004, as amended at 79 FR 70695, Dec. 19, 2014]

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Conditions and Requirements Grantees Must Meet

§222.195 How does the Secretary make funds available to grantees?

The Secretary makes funds available to a grantee during a project period using the following procedure:

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- (a) Upon final approval of the grant proposal, the Secretary authorizes a project period of up to 60 months based upon the nature of the grant proposal and the time needed to complete the project.
- (b) The Secretary then initially makes available to the grantee 10 percent of the total award amount.
- (c) After the grantee submits a copy of the emergency or modernization contract approved by the grantee's governing board, the Secretary makes available 80 percent of the total award amount to a grantee.
- (d) The Secretary makes available up to the remaining 10 percent of the total award amount to the grantee after the grantee submits a statement that—
 - (1) Details any earnings, savings, or interest;
 - (2) Certifies that—
 - (i) The project is fully completed; and
 - (ii) All the awarded funds have been spent for grant purposes; and
 - (3) Is signed by the—
 - (i) Chairperson of the governing board;
 - (ii) Superintendent of schools; and
 - (iii) Architect of the project.

(Authority: 20 U.S.C. 7707(b))

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§222.196 What additional construction and legal requirements apply?

- (a) Except as provided in paragraph (b) of this section, a grantee under this program must comply with—
 - (1) The general construction legal requirements identified in the grant application assurances;
 - (2) The prevailing wage standards in the grantee's locality that are established by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*); and
 - (3) All relevant Federal, State, and local environmental laws and regulations.
- (b) A grantee that qualifies for a grant because it enrolls a high proportion of federally connected children who reside on Indian lands is considered to receive a grant award primarily for the

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benefit of Indians and must therefore comply with the Indian preference requirements of section 7(b) of the Indian Self-Determination Act.

(Authority: 20 U.S.C. 7707(b) and 1221e-3)

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