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DEPARTMENT OF EDUCATION

34 CFR Part 222

RIN 1810-AB24

[ED-2015-OESE-0109]

Impact Aid Programs

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

ACTION: Notice of proposed rulemaking.

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

DATES: We must receive your comments on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by

fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the help tab at "How To Use Regulations.gov."

- Postal Mail, Commercial Delivery, or Hand Delivery: If you mail or deliver your comments about these proposed regulations, address them to Kristen Walls-Rivas, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C103, Washington, DC 20202-6244.

Privacy Note: The Department's policy for comments received from members of the public is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Kristen Walls-Rivas, U.S. Department of Education, 400 Maryland Avenue, SW., room

3C103, Washington, DC 20202-6244. Telephone: (202) 260-3858 or by email: Impact.Aid@ed.gov.

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

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding these proposed regulations. We specifically invite you to comment on the ways in which school districts can collect data for counting federally-connected children for Impact Aid purposes, under proposed §222.35; the proposed changes to the Indian policies and procedures (IPPs) in §§222.91 and 222.94-95; and the proposed changes to the equalization disparity test in §222.162. Regarding the first of those topics, we invite comment on the following specific questions:

- Are there alternative methods for counting federal-connected children besides the parent-pupil survey form or source check collection tools, either in use or that you propose?
- What types of technical assistance would you like the Department to provide to properly educate and inform LEAs on the two regulatory methods of data collection, or on other methods?

- Can you propose ways in which online or electronic data collection might be used to facilitate the data collection process? This may include but is not limited to the electronic collection of parent-pupil survey forms and the use of student information systems for Impact Aid data collection.

To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866 and 13563 and their overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the Department's programs and activities.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing [Regulations.gov](https://www.regulations.gov). You may also inspect the

comments in person at 400 Maryland Avenue, SW, Washington, DC, between 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays. Please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Background:

The Secretary proposes to amend certain regulations in part 222 of title 34 of the Code of Federal Regulations (CFR). The regulations in 34 CFR part 222 pertain to the Impact Aid Program and implement Title VIII of the ESEA. The purpose of this regulatory action is to update the current regulations in response to statutory changes and related issues that have arisen, as many of the regulations for this section have not been updated since 1995; to

improve clarity and transparency regarding Federal program operations; and to improve the LEA's application processes to generate a more accurate data collection, which will facilitate more timely Impact Aid payments. The Department published final technical amendments for this program on June 11, 2015, deleting obsolete provisions and incorporating statutory changes that did not require notice and comment. These proposed regulations contain provisions on which we seek comment from the public.

Tribal Consultation: Before developing these proposed regulations, the Department held two nationally accessible tribal consultation teleconferences on July 15, 2015, and July 28, 2015, pursuant to Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), to solicit tribal input on the Impact Aid program regulations broadly, and specifically on the provisions that affect LEAs that claim students living on Indian lands. The Impact Aid Program announced the consultation teleconferences via the Office of Indian Education's listserv on July 2, 2015, and July 14, 2015. During the webinars, the attendees discussed a range of topics, including Indian lands property verification and data collection, IPPs, and IPP waivers. The Impact Aid Program received the most feedback on the regulations

concerning IPPs, IPP waivers, and remedies for non-compliance with IPPs.

There was a concern among many consultation participants that LEAs are not implementing IPPs with the degree of seriousness intended by the law and Impact Aid program regulations. Commenters wished to see LEAs focus more attention on equal participation of Indian students in all educational programs, including Advanced Placement courses, sports, and other extra-curricular activities. Some participants were concerned that LEAs do not provide sufficient time for tribes or parents to review data regarding participation of Indian children in the LEAs' programs; others stated that some LEAs provide outdated data to tribal leaders.

In addition, participants sought more guidance on the standard for meaningful input from tribal officials and parents of Indian children. Commenters were further concerned that there is no requirement in the current Impact Aid regulations that tribes review and affirm that an LEA is in compliance with the content in the IPP before it is submitted to the Department for review. Others stated that tribes are not receiving copies of IPPs at all. Many commenters felt that some LEAs provide tribal leaders

and parents of Indian children insufficient notice of meetings.

There was also a general concern among many participants that the current remedy for non-compliance with IPPs, the withholding of an LEA's Impact Aid payments, is unhelpful, because withholding all funds would have a negative effect on Indian children. Others stated that the IPP complaint process is highly adversarial; they wished to see an intermediate step, such as a requirement that the LEA and tribal leaders attend a mediation session before a complaint is submitted to the Department. Commenters indicated that tribes would also like to be informed when the Department finds that an LEA serving children on the tribe's land is out of compliance with the IPP requirements.

With regard to the current program regulations regarding an LEA's ability to submit a waiver from a tribe in lieu of IPPs, commenters expressed the concern that tribes may be waiving rights without informed knowledge about what they are waiving.

The Impact Aid Program also heard comments about the verification of students living on Indian lands. Participants were concerned that LEAs were not providing sufficient time for tribal officials to confirm that the

students in question resided on Indian land. Participants also stated that it would be helpful for them and for the officials certifying Indian land to have customized training that focuses on the Impact Aid program's requirements.

The Department considered the views gathered during the tribal consultation process in developing these proposed regulations. Specifically, proposed provisions regarding IPPs and waivers of IPPs (§§222.91, 222.94, and 222.95) reflect this input.

Applicability of the Every Student Succeeds Act

On December 10, 2015, the President signed the Every Student Succeeds Act (ESSA), Pub.L. 114-95, 129 Stat. 1802 (2015), which amends the Elementary and Secondary Education Act of 1965 (ESEA). The ESSA includes Impact Aid amendments (see new title VII of the ESEA, formerly title VIII), which take effect starting with fiscal year 2017 payments. Pub.L. 114-95, §5(d). These proposed regulations are not directly affected by the ESSA. The statutory provisions underlying each regulatory provision in this document were not affected in a relevant manner by the ESSA. We plan to make any conforming references needed, including authority citations, in the final regulations. The Department will be considering in the

near future whether further changes to the Impact Aid regulations are needed due to the ESSA.

Summary of Proposed Changes

These proposed changes would:

- Amend the definition of "membership" in §222.2 to clarify that an eligible student in membership must live in the same State as the LEA except in certain circumstances.

- Amend §§ 222.3 and 222.5 to change the date by which an LEA may amend its application from September 30 to June 30 of the year preceding the Federal fiscal year for which it seeks assistance.

- Amend §222.22 to reflect a statutory change that would include payments in lieu of taxes (PILTs) and revenues from other Federal sources in the calculation of compensation from Federal activities, for purposes of determining eligibility and payments under section 8002 of the ESEA.

- Amend §222.23 to replace the current provision with a new provision that describes how LEAs formerly eligible for section 8002 grants, that have consolidated with another LEA, are treated with respect to section 8002 grant payments.

- Amend §222.30 to exclude Federal charter school startup funds from the analysis of whether Federal funds provide a substantial portion of the educational program, for purposes of determining an LEA's eligibility.

- Amend §222.35 to specify certain unusual circumstances in which someone other than a parent or legal guardian may sign a parent-pupil survey form and to require the use of source check forms to document children residing on Indian lands or in low-rent housing.

- Amend §222.37 to clarify the options for reporting average daily attendance and to make them available to all States.

- Amend §222.40 to require that an SEA submit the rationale for the additional factors selected to identify generally comparable districts and describe how those factors affect the cost of educating students.

- Amend §222.91 to add a requirement for an LEA claiming children residing on Indian lands to include with its application an assurance that the LEA has responded in writing to input from the tribes and parents of Indian children received during the IPP consultation process, prior to submitting the application for Impact Aid.

- Amend §222.94 to add a requirement that LEAs claiming children residing on Indian lands respond in writing to input obtained from parents of Indian children and tribal officials during the IPP consultation process, disseminate these responses to the parents of Indian children and tribal officials prior to submission of the Impact Aid application, and provide a copy of the IPPs to the tribe; and changing from 60 to 90 days the time period in which an LEA must amend its IPPs based on its own determination after obtaining tribal input.

- Amend §222.95 to allow the Department to withhold all or part of the Impact Aid payment from an LEA that is not in compliance with the requirements of §222.94, and changing from 60 to 90 days the time within which LEAs must revise IPPs in response to Department notification.

- Amend §222.161 to give the SEA the ability to request permission from the Secretary to make estimated State aid payments that consider an LEA's Impact Aid payment in the event that the Department does not make an equalization determination before the start of an SEA's fiscal year.

Significant Proposed Regulations

We discuss substantive issues under the sections of the proposed regulations to which they pertain. Generally, we do not address proposed regulatory changes that are technical or otherwise minor in effect.

§222.2 What definitions apply to this part?

Membership

Statute: Section 8003 of the ESEA provides that payments are based on the number of eligible children in average daily attendance in schools of the LEA. The definition of "average daily attendance" in section 9101(1) of the ESEA provides in part that average daily membership can be converted to average daily attendance.

Current Regulations: Paragraph (3) of the current definition of "membership" in §222.2 excludes four categories of students.

Proposed Regulation: The proposed regulation adds an additional exclusion to paragraph (3) of the definition of "membership." Under the proposed provision, LEAs could not claim students who reside in a different State, unless the circumstances described in section 8010(c) of the Act apply, or unless the student is covered under a formal State enrollment or tuition agreement.

Reasons: LEAs have sometimes attempted to claim children who reside in another State but attend school in the LEA.

Children who reside in one State and attend school in a different State are generally excluded from Impact Aid eligibility by the current regulations because eligible students must be supported by State aid, and States typically do not provide State aid for the education of children who reside in other states. The proposed regulation would clarify this rule and provide the two exceptions to it: one is statutory (section 8010(c)) and the other is a situation in which children are covered under a formal written tuition or enrollment agreement between two States.

Parent Employed on Federal Property

Statute: Under section 8003 of the Act, several categories of eligible children include those who resided with a parent who is employed on Federal property.

Current Regulation: Paragraph (1)(i) of the current definition of "parent employed on Federal property" in §222.2 provides that a parent employed on Federal property is a parent who is employed by the Federal government and reports to work on Federal property or whose place of work is on Federal property.

Proposed Regulation: The proposed regulation would clarify the definition of "parent employed on Federal property" by revising paragraph (1)(i) so it specifically includes

parents employed by the Federal government but who report to an alternate duty station, such as a telework location, on the survey date.

Paragraph (1)(ii) would not change; paragraph (1)(iii) would be deleted. Finally, paragraph (2) of the definition would be amended to further clarify that children whose parent's job includes providing services on a Federal property, but who are not Federal employees and whose duty station is not on the Federal property, are not eligible to be counted for Impact Aid.

Reason: The Telework Enhancement Act of 2010 has increased the number of Federal employees who telework on a regular basis. The proposed change to paragraph (1)(i) of the regulation is intended to include the children of Federal employees who might otherwise not be considered eligible for Impact Aid purposes because they telework. We propose deleting the provision in paragraph (1)(iii) because the provision is obsolete. LEAs have not used this provision since it was effective and the Department does not foresee it being needed in the future. We propose the revision to paragraph (2) to clarify further that parents who provide services to a Federal property, but who are not Federal employees and whose main duty station is not located on

Federal property, are not eligible under the definition of "parent employed on Federal property."

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

Statute: Section 8005 of the Act governs the submission of applications for payments under sections 8002 and 8003 of the Act.

Current Regulations: The current regulation describes how an LEA applies for assistance under sections 8002 and 8003 of the Act. Section 222.3(b)(2) provides that, under the exceptional circumstances described in §222.3(b)(1), an LEA must file its application either 60 days following the event or by September 30 of the Federal fiscal year preceding the year for which it seeks assistance, whichever comes later.

Proposed Regulations: The proposed regulation would change the application deadline in §222.3(b)(2) for LEAs with exceptional circumstances from September 30 to June 30 under section 8002 and 8003.

Reasons: The proposed regulatory change would make §222.3(b)(2) consistent with the proposed changes in §222.5, in which the Department proposes to change the application amendment deadline from September 30 to June

30. See the discussion of proposed §222.5 directly below for the reasons for that change.

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

Statute: Section 8005 of the Act governs the submission of applications for payments under sections 8002 and 8003 of the Act.

Current Regulations: Under §222.5(a)(2), an LEA may amend its application for situations described in §222.3(b)(1) by September 30 following the January application deadline. In addition, §222.5(b) permits an LEA that did not have data available at the time it filed its application, such as after a second membership count, to amend its application by September 30.

Proposed Regulations: The Department proposes to change the amendment deadlines in §§222.5(a)(2) and 222.5(b)(2) from September 30 to June 30.

Reasons: The National Defense Authorization Act (NDAA) of 2013 mandates that Impact Aid payments be made no later than two years after the funds are appropriated. Many LEAs submit their applications in January of each year showing incomplete counts of eligible children and submit amendments as late as September 30 to provide complete and accurate information. This procedure inhibits the

Department's ability to review the applications and prepare initial payments. A June 30th amendment deadline will ensure that the Department receives complete application information for the review of data and release of funds in a timely manner.

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

Statute: Section 8002(a) of the Act provides that an LEA is not eligible for a payment under section 8002 if it is substantially compensated for the loss in revenue resulting from Federal ownership of land. Compensation is measured by increases in revenue from the conduct of Federal activities, but the statute does not define "substantial compensation." Section 8002(b) contains a maximum payment provision that takes into account the amount of revenue received by the LEA from activities conducted on Federal property; those revenues specifically include payments received from any Federal agency other than the Department or education-related payments from the Department of Defense (DOD).

Current Regulation: For purposes of determining an LEA's eligibility and maximum payment under section 8002, the current regulations provide in §222.22 that an LEA is

substantially compensated if its other Federal revenue exceeds its maximum payment amount under Section 8002. In §222.22(d) the regulation excludes from "other Federal revenue" only payments from the DOD.

Proposed Regulation: Proposed §222.22(b)(1) would specifically include payments in lieu of taxes (PILTS) received from any other Federal agencies in the amount of revenue received by the LEA from activities conducted on Federal property, for purposes of determining an LEA's eligibility for, and amount of, payment under section 8002 of the Act.

Reasons: This proposed revision would conform with the statutory requirements for calculating the revenue received by an LEA, in determining both eligibility and the maximum payment under section 8002 of the Act. The proposed regulation would specify that PILTs, which are payments from other Federal agencies, are part of revenues considered for eligibility and maximum payment purposes. In addition, by including, in proposed paragraph (b)(1), payments received by any *other* Federal agency, that means we do not take into account Federal funds from the Department, consistent with the statute and with current Department practice.

§222.23 How are consolidated local educational agencies treated for the purposes of eligibility and payment under section 8002?

Statute: Section 8002(g) of the Act contains provisions granting eligibility to certain districts that consolidated from two or more former districts prior to 1995. The Consolidated Appropriations Act of 2014 (Public Law 113-76) amended this provision to also permit LEAs that consolidated after 2005 to receive a section 8002 foundation payment if one of the former districts was eligible for section 8002 funds for the fiscal year prior to consolidation.

Current Regulation: There is no current regulation regarding the eligibility of consolidated districts. The current regulation at §222.23 contains the previous formula for calculating a section 8002 payment under statutory provisions that have been replaced.

Proposed Regulation: We propose to remove §222.23 in its entirety and replace it with the proposed regulatory language regarding consolidated districts. The new regulation would clarify which consolidated LEAs are eligible, what documentation is necessary to prove eligibility, and how foundation payments are calculated for consolidated districts when more than one former district

qualifies. The regulation would also clarify that consolidated LEAs remain eligible for section 8002 funds as long as the amount of Federal land in at least one former LEA upon which eligibility is based (i.e. the LEA that was eligible for Section 8002 funds in the prior fiscal year) comprises at least 10 percent of the taxable value of the former LEA at the time of Federal acquisition.

Reasons: The 2014 statutory change created a new category of school districts that qualify for section 8002 grant funds, and this regulation would clarify the eligibility and payment for these districts, as well as for districts eligible under the previous statutory provision. The proposed regulation will require that the consolidated district still contains, within the boundaries of one of its former districts, Federal property that comprises at least 10 percent of the taxable value of the former LEA at the time of Federal acquisition. This is to ensure that an LEA will not receive both tax revenue and section 8002 funds for the same property, if a significant amount of previously-eligible Federal land within the boundaries of the former district has been sold and is no longer prohibited from being taxed.

The regulation would also provide that an eligible consolidated LEA receives only a foundation payment and not

any "remaining funds." Remaining funds require submission of data by LEAs to calculate a maximum payment, and a consolidated LEA's payment is based only on the last payment received by a former LEA, so there is no documentation available with which to calculate a maximum payment. The provisions that are proposed in this section reflect current Department practice.

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

Statute: Section 8002(b)(2) of the Act requires the Secretary to use an LEA's current levied real property tax rate for current expenditures in calculating an LEA's maximum payment amount under section 8002 of the Act.

Current Regulation: None.

Proposed Regulation: This proposed new regulation would describe how an LEA with multiple tax rates for different property classifications derives a single tax rate.

Essentially, the LEA divides the total revenues it received from property taxes by the assessed valuation of the property in the LEA.

Reasons: The statutory formula requires a single tax rate for an LEA. Taxing jurisdictions often set different tax rates for each type of property, resulting in multiple tax

rates within an LEA. This provision would mandate a standardized arithmetic procedure to determine a single tax rate under section 8002, and reflects current practice.

§222.30 What is "free public education"?

Statute: Section 8013(6) of the Act defines "free public education." The definition includes the requirement that education must be at public expense, under public supervision and direction, and without tuition charge.

Current Regulations: The current regulatory definition of "free public education" in §222.30(2)(ii) states in relevant part that education is provided at public expense if Federal funds, other than Impact Aid funds, do not constitute a substantial portion of the educational program.

Proposed Regulation: The proposed regulation would exclude Federal charter school startup grant funds (Title V, part B, subpart I) from the calculation of the Federal portion that funds an LEA's educational program. The regulation would also add a provision clarifying that the Secretary analyzes whether a substantial portion of the education program is funded by Federal sources by comparing the LEA's finances to other LEAs in the State.

Reasons: Under section 8003(a) of the Act, an LEA can only claim students for Impact Aid if the LEA provides a free

public education to those students. Section 8003 Impact Aid funds are intended to replace lost local revenues due to Federal activity. Under the current regulations, if Federal funds are providing for the educational program (e.g. schools funded by the Department of Interior), then the lack of local tax revenue is already being compensated by another Federal source. As a result, the LEA is not eligible for Impact Aid for those students.

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

Under the proposed regulation, in analyzing the portion of the education program that is funded by Federal sources, the Department would compare the LEA's finances to other LEAs in the State to account for the circumstances unique to the State.

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

Statute: Section 8005(b)(1) of the Act specifies that an LEA must submit an application that includes information for the Secretary to be able to determine the LEA's eligibility and payment amount.

Current Regulations: Section 222.32(b) requires that an LEA must submit its federally connected membership based on a student count described in §§222.33 through 222.35 of the regulations.

Proposed Regulations: The proposed regulation would clarify that the LEA must submit its federally connected membership count in its timely and complete annual application.

Reasons: The proposed regulation would clarify that each LEA must include an accurate membership count in its application by the deadline of January 31. In recent years, the Department's Impact Aid field reviews of LEAs have revealed that some applicants submitted estimated data on the section 8003 Impact Aid application, and then relied on the amendment process to provide the actual counted data. Accurate application information must be submitted before the program can review the application and calculate payments. If LEAs submit estimated data and rely on the amendment process to provide accurate data, the Impact Aid Program is delayed in processing payments to all districts.

§222.33 When must an applicant make its membership count?

Statute: Section 8003 of the Act does not directly address when an LEA must make its membership count. The Secretary has the authority to regulate when an LEA calculates its membership under 20 U.S.C. 1221-e and 3474.

Current Regulations: The current regulation refers to the “first or only” membership count.

Proposed Regulations: The proposed regulation would remove the reference to the first or only membership count. Additionally, the proposed regulation would clarify that the data from the only membership count must be complete by the application deadline.

Reasons: The proposed regulatory change in §222.34 (see below) would eliminate the current regulatory option of a second membership count. That change in turn would eliminate the need to reference first or only membership count, since there would be only one count. The proposed language in §222.33(c) stating that the LEA must complete its membership count by the application deadline supports the proposed changes in §222.32 that would help to ensure submission of a complete application by the deadline.

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

Statute: Section 8003 of the Act does not directly address when an LEA must make its membership count. The Secretary has the authority to regulate when an LEA calculates its membership under 20 U.S.C. 1221-e and 3474.

Current Regulations: The current regulation describes the process for undertaking a second membership survey.

Proposed Regulations: The proposed regulations would delete this provision and reserve the section for future use.

Reasons: This provision has become obsolete over time. The second membership survey provision has not been used since 2012 and at that time it was used by only two LEAs. This change would streamline the review process to support timely and accurate payments. Allowing second membership surveys late in the year causes delays in the review process and potentially delays payment. The Department has determined that the impact of removing this provision is low and the benefits outweigh any foreseen consequence.

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

Statute: Section 8005(b)(1) of the Act specifies that an LEA must submit an application that includes information for the Secretary to be able to determine the LEA's eligibility and payment amount.

Current Regulations: The current regulation describes the information required on a parent-pupil survey form and on a source check form.

Proposed Regulations: The proposed regulation would reorganize paragraph (a) regarding parent-pupil survey forms, to first list the information required for all types of children, followed by specific requirements for certain categories of children. In addition, proposed paragraph (a) (4) would clarify for LEAs the rare situations in which an LEA may accept a parent-pupil survey form that is not signed by a parent or legal guardian. The regulation also would clarify that the Department will not accept parent-pupil survey forms signed by an employee of the LEA, unless the employee is a parent of a child attending school within the LEA, signing their own child's form.

Proposed paragraph (b) pertains to source check documents, which are a data collection alternative to the parent-pupil survey form. The proposed regulations would require source check documents for children residing on Indian lands and for children residing in eligible low-rent housing. Under the proposed regulation, the source check forms must contain sufficient information to verify the eligibility of both the Federal property and the individual children claimed on the source check form.

Reasons: With regard to parent-pupil survey forms, recent Impact Aid field reviews of LEAs have revealed instances of LEA staff members signing forms for parents or verifying the information by phone, without a parent signature on the form. The proposed revisions to paragraph (a) would clarify the requirements and provide examples of the few unusual situations in which someone other than a parent may sign a parent-pupil survey form. In no instance would an employee of the LEA be permitted to sign a form for a parent. These proposed changes reflect current Department policy.

Paragraph (b) would be revised to require that LEAs claiming children who reside on Indian lands, and children who reside in low-rent housing, use a source check document to obtain the data required to determine the children's eligibility. The parent-pupil survey form is insufficient to document the different types of eligible Indian lands property and low-rent housing property and confirm that property's eligibility, because parents are unlikely to have the necessary documentation or information. In order to ensure accurate and timely eligibility and payment determinations, LEAs need to reach out directly to the government entities (e.g. for Indian lands- tribal officials, Bureau of Indian Affairs (BIA) staff, and/or tax

assessors; for low-rent housing— the U.S. Department of Housing and Urban Development (HUD) and/or local housing authorities) who have access to the records that document the legal status of a specific parcel of land and can certify that the status is consistent with the Federal property definition.

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

Statute: Section 8003 the Act requires that payments be based on the average daily attendance (ADA) of federally connected children. Section 9101(1) of the Act defines ADA.

Current Regulations: The current regulations describe the process for calculating ADA for LEAs that reside in States that use actual ADA when determining State aid, and for LEAs that reside in States where something other than ADA is used to calculate State aid. The current regulations also describe other options for LEAs or States if the State does not use ADA for determining State aid, including the use of a State average attendance ratio (which has informally been referred to as a “negotiated ratio,”), sampling, or the use of data similar to ADA.

Proposed Regulations: The proposed regulation would reorganize this section so that the options for LEAs, the

States, and the Secretary are grouped together by actor. The proposed regulation would allow any State to ask the Secretary for a State average attendance ratio. In addition, in cases where there is reliable public data, the Secretary may calculate a State average attendance ratio.

Reasons: Use of a State average attendance ratio typically benefits most LEAs and those that do not benefit have the option to submit actual attendance data to obtain a higher payment. Currently, 35 States have a State average attendance ratio. The proposed change would give LEAs in all States the opportunity to use a State average attendance ratio and alternative options for obtaining an attendance rate. This would reduce the LEAs' data collection burden and provide more options for each LEA to obtain a higher attendance rate, which may typically result in a higher Impact Aid payment.

§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?

Statute: Section 8003(b)(1) of the Act contains the formula for determining an LEA's maximum payment amount, based in part on calculating each LEA's local contribution rate (LCR). The statute states that the LCR is to be

determined under the procedures set forth in the Department's regulations as they were in effect on January 1, 1994.

Current Regulations: The current regulations in §222.39-§222.41 provide that an LEA's LCR is determined by identifying generally comparable districts. Under §222.40, for certain qualifying LEAs, the SEA may use additional factors in identifying the generally comparable LEAs for the purpose of calculating and certifying an LCR. Section 222.40(d) provides that if an SEA proposes to use a special additional factor to select a group of generally comparable districts (GCDs) to support a higher LCR for a specific LEA, it must be a generally accepted, objectively defined factor that affects the LEA's cost of educating its students.

Proposed Regulations: The proposed regulation would clarify that SEAs that wish to use special additional factors to identify GCDs for purposes of calculating a higher LCR for certain LEAs must provide a rationale and explain how the selected factor or factors affect the cost of education. The proposed regulation does not substantively alter the manner in which the LCRs are calculated.

Reasons: To determine GCDs for local contribution rate purposes, an SEA may use a special additional factor only if that factor has an impact on the cost of education for an LEA. In the past, the Department has had to contact the SEA to learn the rationale for a specific factor or factors after the GCD data were submitted. Requiring the rationale as part of the submission process would help ensure timely and accurate payments to the LEAs in the State.

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

Statute: Section 8003(b)(2) of the Act contains the requirements for eligibility and payment for heavily impacted districts.

Current Regulations: The current regulation does not address how an applicant may apply for heavily impacted funding under section 8003(b)(2) on the Impact Aid application.

Proposed Regulations: The proposed regulation would require that an LEA that wishes to be considered for a heavily impacted payment under section 8003(b)(2) submit with its initial application the information needed to establish eligibility.

Reasons: The majority of applicants that request assistance under section 8003(b)(2) do not meet the

eligibility requirements for these payments, nor have they investigated the eligibility requirements and learned whether they may qualify. Requiring the LEAs to submit the supporting documentation that indicates potential eligibility would facilitate faster determinations of eligibility and payment for heavily impacted districts. This proposed regulatory change would be complemented by a change to the application forms to require submission of a brief document certified by the SEA to trigger a Department review for section 8003(b)(2) eligibility.

§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?

Statute: Section 8004 of the Act requires that an LEA claiming children who reside on Indian lands must establish IPPs. As an alternative, the LEA may obtain a waiver of this requirement from each tribe indicating that the tribe is satisfied with the educational services the LEA is providing to the children of the tribe.

Current Regulations: The current regulation requires that an LEA claiming children residing on Indian lands submit with its application its IPPs and a signed assurance attesting that the LEA developed its IPPs in consultation with the parents of Indian children and tribal officials.

The current regulation provides that in the alternative, an LEA can submit documentation that the LEA has received a waiver that complies with section 8004(c) of the Act.

Proposed Regulations: The proposed regulation would require an assurance that the LEA has provided a written response to the comments, recommendations, and concerns expressed by the parents of children who reside on Indian lands and tribal officials during the IPP consultation process. In addition, the proposed regulation would require that an IPP waiver submitted with an application include a written statement from an appropriate tribal official stating that the tribe has received a copy and understands the requirements of §§222.91 and 222.94 that are being waived and that it is satisfied with the LEA's educational services provided to the tribe's students. An LEA would be required to submit its waiver at the time it submits its application.

Reasons: The Department's tribal consultations yielded many concerns from the Indian community that LEAs are not engaging in meaningful consultation with the tribes and families, or providing meaningful opportunities for engagement and communication. One of the concerns most frequently voiced was that LEAs have not considered the tribes or parents' comments, concerns or recommendations

when creating the educational program or making decisions about school-sponsored activities.

The Department has taken these concerns into account and proposes to add to the Impact Aid section 8003 application package an assurance that the LEA has provided written responses to comments, concerns, or recommendations received through the IPP consultation process. This assurance does not mean that an LEA must adopt any specific recommendations; rather it will require the LEAs to explain in writing to the parents of Indian children and tribal officials why the LEA is not adopting the recommendations, or how it will implement or take into consideration those recommendations or concerns.

With regard to a waiver of IPPs, the proposed rules would clarify that a waiver must be voluntary and must reflect an understanding on the part of the tribal official of the rights being waived. The statutory option of a waiver was intended to be used only when a tribe is truly satisfied with an LEA's program and services, and not as a way for an LEA to avoid the IPP process. The proposed regulation would require that a waiver be submitted with the application and not later; in the past when the Department has reviewed IPPs, some LEAs have submitted a waiver as an application amendment in order to avoid

amending the IPPs, under circumstances that call into question whether the waiver has been knowing and voluntary on the part of the tribe.

Based on the discussions during the consultation process, the Department is also considering administrative options, such as providing additional technical assistance to better support and assist LEAs, parents, and tribal officials as they negotiate the IPP consultation process.

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

Statute: Section 8004 of the Act states that an LEA claiming children residing on Indian lands must establish and maintain a set of IPPs in order to receive funds under section 8003 of the Act. The IPPs are intended to ensure: that Indian children participate on an equal basis in the educational program and activities sponsored by the LEA; that parents of Indian children and tribal leaders are given the opportunity to present their views on programs and activities and make recommendations; that the LEA consults with parents of Indian children and tribal leaders in the planning and development of the educational program and activities; and that the LEA disseminates evaluations, reports and program plans to the parents of Indian children and the tribes.

Current Regulations: The current regulation identifies eight specific procedures than an LEA must describe in its IPPs. The IPPs must describe how the LEA: 1) gives tribal officials and parents of Indian children the opportunity to comment on whether or not Indian children participate on an equal basis with non-Indian children in the LEA's educational program and school sponsored activities; 2) assesses whether or not Indian children participate on an equal basis; 3) modifies, if necessary, its education program to ensure equal participation for Indian children; 4) disseminates relevant documentation related to the education programs to parents of Indian children and tribes with sufficient time to allow the tribes and parents of Indian children an opportunity to review the documentation and make informed recommendations on the needs of the Indian children; 5) gathers information concerning Indian views in general and related to the frequency, location, and time of meetings; 6) notifies Indian parents and tribes of the time and location of meetings; 7) consults and involves tribal officials and parents of Indian children in the planning and development phase of the LEA's education programs and activities; and 8) modifies the IPPs, if necessary.

Proposed Regulations: The proposed regulation would reorganize the information from §§222.94 and 222.95(e)-(g); it would also add a requirement that the LEA respond in writing, at least annually, to the comments and recommendations of the tribes or parents of Indian children and disseminate these responses to the tribes and parents prior to the submission of the IPPs to the Department. The regulation would also require the LEA to provide a copy of the IPPs to the tribe annually. Additionally, the proposed regulation would move paragraphs (e)-(g) of section §222.95 to the revised §222.94. Under those relocated provisions, proposed §222.94(c)(3) would change the number of days that an LEA has to amend its IPPs, if it determines that they are not in compliance, from 60 days to 90 days.

Reasons: The proposed provisions of §§222.94 and 222.95(e)-(g) are reorganized for clarity and order. Proposed §222.94 would emphasize that the LEA must consult with, and actively solicit involvement from, the local tribes and parents of Indian children in the development of both the IPPs and the educational program and activities.

Proposed §222.94(b)(5) would add a requirement that the LEA provide written responses at least annually to comments and recommendations received through the IPP consultation process. This proposal stems from one of the

most frequent concerns raised during the Indian consultation; that many LEAs have not considered the tribes or parents' comments, concerns or recommendations when creating the educational program or making decisions about school-sponsored activities. This provision would not require that an LEA adopt any specific recommendations; rather it would require the LEA to explain in writing to the parents of Indian children and tribal officials why the LEA is not adopting the recommendations, or how it will implement or take into consideration those recommendations or concerns. The LEA's response would demonstrate how the feedback has been thoughtfully considered in the development of the educational program, and would be reflected in the IPPs. Optimally, the outcome of the IPP consultation process would be a document that demonstrates to the tribe that the LEA has heard and acknowledged the feedback from the parents of Indian children and tribes.

In addition, we learned during consultations that tribes do not always have access to a copy of the IPPs; thus the revisions would require the LEA to provide a copy of the IPPs to the tribe annually.

Because LEAs are often required by State or local law to have the school board (or equivalent) certify any changes to the IPPs, extending the time that an LEA has to

revise its IPPs from 60 to 90 days would allow time for both the revision and any necessary procedural steps. The provisions in proposed paragraph (c) were moved from current §222.95(e)-(g) to keep the provisions related to the creation, content, and revision of IPPs under one regulatory section.

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

Statute: Section 8004(e) of the Act provides for a complaint procedure for tribes with regard to IPPs. Under certain circumstances following a hearing and a determination by the Secretary, if the Department finds that the LEA is still in noncompliance with the provisions of section 8004, the Department must withhold Impact Aid payments to the LEA until the LEA undertakes the required remedy, unless the withholding would substantially disrupt the LEA's education programs.

Current Regulations: The current regulation describes how the Department reviews and evaluates IPPs to ensure compliance with §§222.91 and 222.94. It provides that the Secretary will review IPPs periodically to ensure compliance. If an LEA is not in compliance, the Secretary will notify the LEA in writing of the deficiencies.

Current §222.95(d) states that the Department may withhold all payments if the LEA fails to bring its IPPs into compliance within 60 days of receipt of the Department's formal notification.

Proposed Regulations: Proposed §222.95(c) would change the number of days that an LEA has to remedy issues of noncompliance from 60 days to 90 days. The proposed regulation would also change the provision on withholding all section 8003 payments to the option to withhold all or part of the section 8003 payments. Finally, the proposed regulations would move paragraphs (e)-(g) of current §222.95 into proposed §222.94.

Reasons: LEAs often need to have the school board (or equivalent body) certify any changes to the IPPs. Extending the time that an LEA has to revise its IPPs following Department notification from 60 to 90 days would allow time for both the revision and school board certification.

Under the current withholding provisions, if an LEA does not correct deficiencies in its IPPs within 60 days, the Department's only sanction is to withhold all section 8003 payments, unless the withholding would substantially disrupt the LEA's education programs. As many LEAs rely heavily on Impact Aid funds, withholding all section 8003

funds would prevent some LEAs from being able to provide an adequate educational program to the students they serve. The Secretary's intent in proposing to amend this regulation is to adopt clear, fair, and flexible withholding procedures in the event a withholding action is required. We learned through the tribal consultation that tribes favor incentives to encourage LEAs to bring deficient IPPs into compliance with the law in a way that does not interrupt the educational services provided to their children. The proposed withholding procedure balances the need for compliance with the interests of ensuring the LEA has the resources needed to provide adequate educational services to the children they serve.

Regarding the comments we heard requesting a more informal process for resolving disputes about IPPs, we fully encourage school districts and tribes to use alternative methods of dispute resolution, such as mediation or arbitration. This could obviate the need for a formal complaint to the Department, and nothing in the proposed or current regulations would prevent such a step. In addition, a party, once it has initiated a formal complaint, may request the Department to stay the proceedings to pursue mediation, and the Department would do so if both parties agree. In addition, the Impact Aid

Program is willing to provide technical assistance to both parties to facilitate a common understanding before a formal complaint is launched.

Subpart K - Determinations Under Section 8009 of the Act

Section 222.161 How is State aid treated under Section 8009 of the Act?

Statute: Section 8009(d)(2) of the Act prohibits States from taking Impact Aid into consideration as local revenues when making State aid payments before the Secretary certifies that the State's program of aid is equalized.

Current Regulations: The current regulation in §222.161(a)(5) repeats the statutory prohibition against a State taking Impact Aid into consideration before being certified. The current regulation does not specifically address the data needed from a State that was not previously certified but that is now requesting certification under section 8009 of the Act.

Proposed Regulations: Under the proposed regulations, if the Secretary has not issued a certification before the beginning of the State's fiscal year, the State may request permission from the Secretary to make estimated State aid payments that take Impact Aid into account as local revenue. Before granting permission, the Secretary would consider whether the Secretary certified the State as

equalized for the prior fiscal year, and whether the State revised its State aid program since the date of the prior year's certification. Also, the State must assure that if the State does not meet the disparity standard, the State will reimburse each LEA the amount deducted, within 60 days of the Department's determination.

The proposed regulations would also clarify that if the Secretary has not previously certified a State's program of State aid and the State wishes to apply for certification, the State would submit projected data showing that it would meet the disparity standard if it were authorized to deduct Impact Aid under section 8009 of the Act.

Reasons: The Department interprets section 8009 of the Act to prohibit States from making final, as opposed to estimated, State aid payments that consider eligible Impact Aid funds as local effort without the Secretary's certification. In instances where a State or LEA requests a pre-determination hearing under §222.164(b) (5) and the issues presented are complex, the Secretary may not be able to make a final determination as to whether the State is equalized before the beginning of the State's fiscal year. In these instances, States should have the option of including estimated eligible Impact Aid revenues as local

effort when making estimated State aid payments, rather than removing these Impact Aid revenues from consideration. Because certifications apply to an entire State fiscal year, if a State were required to remove Impact Aid revenues from estimated State aid payments and the Secretary later determines that the State is equalized, the State would need to adjust all State aid payments and Impact Aid recipients would have to return funds to the State. This could seriously destabilize an LEA's budget. On the other hand, if the State begins by taking eligible Impact Aid payments into account in its estimated State aid payments, as these regulations propose, and the Secretary does not certify the State as equalized, the State would have to increase each Impact Aid LEA's State aid within 60 days. The effect on the LEA's budget would then be positive, rather than negative. Even though the State would have to come up with additional funds, States are not required to request this advanced permission to make estimated payments that consider Impact Aid.

Definition of Current Expenditures

Statute: Section 8013(4) of the Act defines "current expenditures."

Current Regulations: The current regulation in paragraph (c) repeats the definition of "current expenditures" in the

Act, and lists specific exclusions from that definition for the purposes of section 8009, such as expenditures from revenues designated for special cost differentials.

Proposed Regulations: The Department proposes that the regulatory definition for "current expenditures" refer to, rather than repeat, the definition in section 8013(4) of the Act, and then list the additional exclusion for purposes of section 8009 of the Act. We would remove the exclusions in current subparagraphs (1) through (5) as part of the reorganized definition.

Reasons: Referring applicants to the statutory definition of "current expenditures" will reduce redundancy.

Subparagraphs (1) and (2) are contained in the statutory definition and thus are not needed. The intent of paragraphs (3) and (4), regarding special cost differentials, will be more clearly addressed by proposed §222.162, which would define the four acceptable methods of calculating cost differentials for purposes of the disparity test. The substance of the current subparagraph (5) is combined into the text of the proposed regulation for clarity.

Section 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?

Statute: Section 8009(b)(2)(B)(ii) of the Act states that when certifying a State as equalized, the Secretary may take into account the extent to which a State aid program reflects additional costs of providing education in areas with special geographical factors or for students with particular needs, such as students with disabilities.

Current Regulations: The current regulations explain the data a State should submit to the Secretary as evidence that its State aid program is equalized. The regulations identify the types of "special cost differentials" a State may account for when calculating per-pupil expenditures or revenues for each LEA, but do not explain specifically how these differentials are to be considered.

Proposed Regulations: The Department proposes that a State may account for special cost differentials in one of four ways: the inclusion method on a revenue basis, the inclusion method on an expenditure basis, the exclusion method on a revenue basis, or the exclusion method on an expenditure basis. Using the inclusion method, a State would divide an LEA's revenue or total current expenditures by a pupil count that includes weights associated with special cost differentials. Using the exclusion method, a State would take an LEA's total revenues or current expenditures, subtract those revenues or expenditures

associated with special cost differentials, and divide by the LEA's unweighted pupil count.

Reasons: The current regulations are not clear regarding how States should treat special cost differentials in submitting data under the disparity test. The Department's longstanding interpretation of section 8009 of the Act and §222.162 of the regulations is that there are four methods available, logically and mathematically, for treating those cost differentials. Explicitly defining the four options for taking special cost differentials into account would clarify the Department's long-standing interpretation of the statute, and avoid potential controversy over data submission under section 8009.

Section 222.164 What procedures does the Secretary follow in making a determination under section 8009?

Statute: Section 8009(c)(2) of the Act states that before making a determination under section 8009, the Secretary shall afford the State, and LEAs in the State, an opportunity to present their views.

Current Regulations: Under the current regulations, the party initiating the proceeding under section 8009 shall notify the State and all LEAs in the State of their right to present views before the Secretary makes a determination.

Proposed Regulations: The Department proposes that the Secretary, rather than a State or LEA initiating a proceeding, notify the State and all LEAs in the State of their right to present their views before the Secretary makes a determination under section 8009.

Reasons: It is more practical for the Secretary to send the notification that the State and all LEAs in the State may present views, because the Department coordinates the predetermination hearing, and the request for the informal hearing needs to be made to the Department. In current practice, the Department notifies all LEAs in the State when the State submits written notice of its intention to consider Impact Aid payments in providing State aid to LEAs, and at that time gives instructions for requesting a predetermination hearing.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

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

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

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

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

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

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

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

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

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

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

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

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

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as

possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

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

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

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department’s programs and activities. Upon review of the costs to the LEA, we have determined

there is minimal financial or resource burden associated with these changes, and that the net impact of the changes would be a reduction in burden hours. Certain affected LEAs would need to respond in writing to comments from tribes and parents of Indian students, but this time burden would be balanced by other proposed regulatory changes that reduce the burden, which result in a net decrease of both burden hours and cost associated with these regulations.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to

understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, §222.2 What definitions apply to this part?)

- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?

- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the ADDRESSES section.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The U.S. Small Business Administration Size Standards define institutions as "small entities" if they are for-profit or nonprofit institutions with total annual revenue below \$5,000,000 or if they are institutions controlled by governmental entities with populations below 50,000. These proposed regulations would affect LEAs that meet this definition; therefore, these proposed regulations would

affect small entities, but they would not have a significant economic impact on these entities.

The proposed regulations would benefit both small and large institutions, including those that qualify as small entities, by removing the paperwork burden for reporting average daily attendance, reducing the burden for collection of data for the LEAs reporting children residing on Indian lands and low-rent housing. Multiple children can be verified on one form instead of one form per child. Thus, small entities would experience regulatory relief and a positive economic impact as a result of these proposed regulations.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps ensure that: the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly

understood, and the Department can properly assess the impact of collection requirements on respondents.

Sections 222.35, 222.37, 222.40, 222.62, and 222.91 contain information collection requirements. Under the PRA the Department has submitted a copy of these sections to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

In the final regulations we will display the control number assigned by OMB to any information collection requirement proposed in this NPRM and adopted in the final regulations.

The Department currently collects information from LEA applicants for the Impact Aid program using a program-specific grant application package (OMB Control Number 1810-0687). The application package, and some information

grantees are required to submit, would change as a result of the proposed regulations.

We estimate the total burden for the collection of information through the application package to be 104,720 hours. Based on past experience with this program, we estimate that a total of 1,264 applications would be received annually for the grant program. We estimate that it would take each applicant 82.8 hours to complete the application package, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The proposed changes to the regulations would change the burden hours for this collection by -35,959.

Collection of Information:

Section 222.35

The proposed regulations would require that LEAs claiming children who reside on Indian lands, and children who reside in low-rent housing, use a source check document to obtain the data required to determine the children's eligibility. The current burden hour estimation includes 500,000 parent respondents for the parent pupil survey form estimating 15 minutes per form for a total burden hours of 125,000 burden hours. The new provision would reduce the

total number of parent respondents to 355,000 because the 145,000 children residing on Indian lands or low rent housing will no longer be surveyed using the parent pupil survey form. The burden hours for this category would reduce to 88,750 total burden hours. This is a reduction of 36,250 burden hours.

The 145,000 children are distributed across approximately 500 LEAs. The previous burden hour calculation included 500 LEAs at an average of 3 hours for source checks per LEA, resulting in 1,500 total burden hours. Under the proposed regulation, the number of LEAs would increase to 1,000 LEAs increasing the burden hours to 3,000 for source checks, an increase of 1,500 burden hours. The net change in burden hours between parent pupil survey forms and source checks is a decrease of -34,750 burden hours.

The program has also reduced the average number of hours per LEA to submit its application from 10 hours to 9 hours due to enhancements in the e-Application reporting system. This adjustment decreases the burden hours by -1,264, which results in a total decrease in this section of -36,014 burden hours.

Section 222.37

Under existing regulations, the burden estimation of hours is 900 LEAs taking 20 minutes each to report ADA for a total of 300 hours total burden. Since the last estimation of burden hours, the number of LEAs that are required to submit this data has reduced and will reduce again to zero under the proposed regulations. An LEA may exercise the option to report ADA in order to try and increase its attendance rate above the State average. We estimate that approximately 100 LEAs may use this option and the amount of time would be 5 minutes to report the data as it is readily available and accessible to the LEA. The entire estimated hours for all applicants would be an insignificant 8.3 total hours for this component.

Section 222.40

Proposed §222.40 would require SEAs that opt to use special additional factors for the selection of GCDs to provide a rationale demonstrating how the special factors selected impact the cost of education.

In the past 10 years (2006-2016) there are 14 SEAs that have used the GCD provision. In those 10 years, only one SEA has used the special additional factors provision. The SEA already submits the data, they are simply now providing a very brief narrative justification. At a maximum, this should only take 20 minutes to complete as

the majority of the work is already accounted for in the burden hour calculation. As a result, there is essentially no increase for this provision.

Section 222.62

The burden hours associated with this activity have already been factored into the active data collection total burden hours; there is no increase to the burden hour calculation.

Section 222.94

The proposed regulatory provision would require LEAs claiming children residing on Indian lands to respond in writing to comments, recommendations, and concerns from the parents of Indian children and tribal officials. There is an associated increase with this requirement for the LEA. There are approximately 800 LEAs that are required to comply with this new requirement. We estimate 1.3 hours for the completion of this requirement, which would result in an increase of 1,040 total burden hours.

Burden Hour Estimates for the Impact Aid Section 8003

Information Collection Package

The Impact Aid Program is extending the existing and approved 1810-0687, and renewing its section 8003 application package with this notice. The following charts identify the changes from the current information

collection with the proposed substantive changes to this information collection. Some of the changes in burden hours are a result of the proposed regulations, while others are the result of more accurate numbers of impacted LEAs and to account for system enhancements that make reporting easier. The activities associated directly with the changes proposed in this notice have been denoted with an asterisk. Table 1 provides a summary of the total burden hours associated with completing an Impact Aid application. Table 2 breaks down the hours associated with the completion of tables 1-5 of the Impact Aid application for reporting an applicant's federally-connected children. All applicants must complete at least one of these tables to be eligible to receive funding. Table 3 breaks down the burden hours associated with supplemental information that some or all Impact Aid applicants must submit with their applications. Table 4 shows the dollar change associated with the changes in the burden hours. For more complete information on burden hours and the justifications, please refer to the Information Collection Request (ICR).

Table 1: Summary of Burden Hours to Submit a Complete Impact Aid Application Package

By regulatory section or subsection	Total Annual Burden Hours under Current Regulations	Estimated Total Annual Burden Hours under the Proposed Regulations
34 CFR 222.35, 34 CFR 222.50-52 Tables 1-5	139,140	103,126
34 CFR 222.37, Table 6	1,264	100
34 CFR 222.53 Table 7	217	217
34 CFR 222.141-143 Table 8	5	5
Reporting Construction Expenditures	40	40
Housing Official Certification Form	13	5
Indian Policies and Procedures (IPPs)	0	187
IPP Responses*	0	1,040
TOTAL	140,679	104,720
Number of LEAs	1,265	1,264
Average Hours Per LEA (total divided by number of LEAs)	111.2	82.8

* Denotes changes directly associated with the proposed regulatory changes

Table 2: Reporting Numbers of Federally-Connected Children on Tables 1-5 of the Impact Aid Application

Task	Current Est. Number	Proposed Est. Number	Average Hours	Total Hours	Explanation
Parent-pupil surveys*	500,000	355,000	0.25	88,750	Assumes 355,000 federally-connected children identified through a survey form completed

					by a parent. The number is reduced due to new regulations requiring source check forms for children residing on Indian lands or children residing on eligible low rent housing.
Source check with Federal official to document children living on Federal property (LEAs) *	500	1000	3	3,000	Assumes 3 hours verify information on a source check.
Collecting and organizing data to report on Tables 1-5 in the Application (LEAs)	1,265	1,264	9	11,376	Assumes time to complete and organize survey/source check data on federally-connected children averages nine hours
Total Current				103,126	

Total Previous				139,140	
Change				-36,014	

* Denotes changes directly associated with the proposed regulatory changes

Table 3: Additional Reporting Tasks and Supplemental Information on Tables 6-10 of the Impact Aid Application

Task	Current Est. Number	Proposed Est. Number	Average Hours	Total Hours	Explanation
Reporting enrollment and attendance data on Table 6 (LEAs) *	1,264	100	1	100	The proposed regulations would reduce the number even further to approximately 100 LEAs who will have a higher attendance rate than the State average.
Collecting and reporting expenditure data for federally-connected children with disabilities on Table 7 (LEAs)	869	868	.25	217	This assumes that an average of 868 LEAs received a payment for children with disabilities in the previous year and is required by law to report expenditures for children with

					disabilities for the prior year.
Reporting children educated in federally-owned school buildings on Table 8 (LEAs)	5	5	1	5	Assumes LEAs maintain data on children housed in the small number of schools owned by ED but operated by LEAs
Reporting expenditures of Section 8007 funds on Table 10 (LEAs)	159	159	0.25	40	Assumes that the LEAs eligible to receive these funds have ready access to financial reports to retrieve and report these data.
Indian Policies and Procedures (IPPs)	625	625	0.3	187	The LEA does not have to collect any new information to meet this requirement.
IPP Response*	0	800	1.3	1,040	This assumes some LEAs may have to respond to more than one tribe.
Contact Form for Housing Undergoing Renovation or Rebuilding	10	10	0	0	The time associated is too small to calculate (<5 minutes per applicant)
Housing	10	10	.50	5	Amount of

Official Certificati on Form					time for the housing official to estimate the number of school-age children that would have resided in the housing had it not been unavailable due to renovation or rebuilding
Total Current				1,594	
Total Previous				1,529	
Change				65	

* Denotes changes directly associated with the proposed regulatory changes

Table 4: Estimation of Annualized Cost to Applicants

Respondent	Hours Per Response	Rate (\$/hour)	# of Respondents	Cost
Parent Respondents*	.25	10	355,000	\$887,500
LEA Respondents	9	15	1,264	\$170,640
Total Cost				\$1,058,140
Prior Cost Estimate				\$1,443,992
Cost Change				-\$385,852

* Denotes changes directly associated with the proposed regulatory changes

We have prepared an ICR for these information collection requirements. If you want to review and comment on the ICR, please follow these instructions:

In preparing your comments you may want to review the ICR, including the supporting materials, in www.regulations.gov by using the Docket ID number specified in this notice. This proposed collection is identified as proposed collection 1810-0687.

We consider your comments on this proposed collection of information in--

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Between 30 and 60 days after publication of this document in the Federal Register, OMB is required to make a

decision concerning the collection of information contained in these proposed regulations. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives your comments on this ICR by [INSERT 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This does not affect the deadline for your comments to us on the proposed regulations.

When commenting on the ICR for these proposed regulations, please specify the Docket ID number and indicate "Information Collection Comments" on the top of your comments.

Written requests for information or comments submitted by postal mail or delivery related to the information collection requirements should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue, SW., Mailstop L-OM-2E319LBJ, room 2E115, Washington, D.C. 20202-4537.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

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(Catalog of Federal Domestic Assistance Number 84.041 Impact Aid)

List of Subjects in 34 CFR Part 222

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Federally affected areas, Grant programs-

education, Indians-education, Reporting and recordkeeping requirements, School construction.

Dated: December 22, 2015.

Ann Whalen,
Delegated the authority to perform
the functions and duties of
Assistant Secretary for Elementary
and Secondary Education

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

PART 222--IMPACT AID PROGRAM

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

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

2. Section 222.2 is amended in paragraph (c) by:

A. Revising paragraph (3)(iv) under the definition of "Membership", and adding paragraph (3)(v).

B. Revising the definition of "Parent employed on Federal property".

The revisions and addition read as follows:

§ 222.2 What definitions apply to this part?

* * * * *

(c) * * *

Membership means the following:

(3) * * *

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

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

(A) Section 8010(c) of the Act; or

(B) A formal State tuition or enrollment agreement.

* * * * *

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

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

(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.

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

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

* * * * *

§ 222.3 [Amended]

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

4. Section 222.5 is amended by revising paragraphs (a)(2) and (b)(1) and (2) to read as follows:

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

(a) * * *

(2) By June 30 of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

(b) * * *

(1) Those data were not available at the time the LEA filed its application and are acceptable to the Secretary; and

(2) The LEA submits a written request to the Secretary with a copy to its SEA no later than June 30 of the Federal fiscal year preceding the fiscal year for which the LEA seeks assistance.

* * * * *

5. Section 222.22 is amended by revising paragraph (b) (1) to read as follows:

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

* * * * *

(b) * * *

(1) The LEA received revenue during the preceding fiscal year, including payments in lieu of taxes (PILOTS or PILTs) and other payments received from any other Federal Department or agency, generated directly from the eligible Federal property or activities in or on that property; and

* * * * *

6. Section 222.23 is revised to read as follows:

§222.23 How are consolidated LEAs treated for the purposes of eligibility and payment under section 8002?

(a) Eligibility. An LEA formed by the consolidation of one or more LEAs is eligible for section 8002 funds, notwithstanding section 222.21(a)(1), if –

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

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

(i) Was eligible for section 8002 funds in the fiscal year prior to the consolidation; and

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

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

(c) Basis for foundation payment. (1) The foundation payment for a consolidated district is based on the total section 8002 payment for the last fiscal year for which the former LEA received payment. When more than one former LEA qualifies under paragraph (a)(2), the payments for the last

fiscal year for which the former LEAs received payment are added together to calculate the foundation basis.

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

(Authority: 20 U.S.C. 7702(g) and Public Law 113-76)

7. Section 222.24 is added to read as follows:

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

An LEA that has multiple tax rates for real property classifications derives a single tax rate for the purposes of determining its Section 8002 maximum payment by dividing the total revenues for current expenditures it received from local real property taxes by the total taxable value of real property located within the boundaries of the LEA. These data are from the fiscal year prior to the fiscal year in which the applicant seeks assistance.

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

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

§ 222.30 What is "free public education"?

* * * * *

(2) * * *

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

* * * * *

§ 222.32 [Amended]

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

10. Section 222.33 is amended by:

A. Revising the section heading.

B. Removing the phrase "the first" in paragraph (a) (1) and adding in its place "its".

C. Adding paragraph (c).

The revision and addition reads as follows:

§222.33 When must an applicant make its membership count?

* * * * *

(c) The data resulting from the count in paragraph (b) must be complete by the application deadline.

* * * * *

§ 222.34 [Removed and Reserved]

10. Section 222.34 is removed and reserved.

11. Section 222.35 is amended by revising paragraphs (a) (1) and (2), adding paragraphs (a) (3) and (4), and revising paragraph (b) to read as follows:

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

* * * * *

(a) * * *

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

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

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

(A) Name of pupil;

(B) Date of birth of the pupil; and

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

(ii) Pupil residence information, including:

(A) The complete address of the pupil's residence, or other acceptable location information for that residence, such as a complete legal description, a complete U.S. Geological Survey number, or complete property tract or parcel number; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) A source check is required to document children residing on Indian lands and children residing in eligible low-rent housing.

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

(3) A source check may also include:

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

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

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

* * * * *

12. Section 222.37 is amended by revising paragraphs (b) and (c) and adding paragraphs (d) and (e) to read as follows:

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

* * * * *

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

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

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

(4) Data are not counted for any child-

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

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

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

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

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

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

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

(ii) By multiplying the figure determined in paragraph (c) (1) (i) (A) 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.

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

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

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

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

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

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

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

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

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

(B) Dividing the figure obtained in paragraph

(c) (3) (iv) (A) of this section by the LEA's total membership for the previous fiscal year; and

(C) Multiplying the figure determined in paragraph

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

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

(1) If the SEA distributes State aid for education based on data similar to attendance data, the SEA may request that the Secretary use those data to calculate the ADA of each LEA's federally connected children. If the

Secretary determines that those data are, in effect, equivalent to attendance data, the Secretary allows use of the requested data and determines the method by which the ADA for all of the LEA's federally connected children will be calculated.

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

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

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

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

* * * * *

13. Section 222.40 is amended in paragraph (d) (1) (i) by adding the phrase "or density" after the word "sparsity" and by adding paragraph (d) (1) (iii).

The addition reads as follows:

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

* * * * *

(d) * * *

(1) * * *

(iii) The SEA must submit its rationale for selecting the additional factors and describe how they affect the cost of education in the LEA.

* * * * *

14. Section 222.62 is amended:

A. By redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively.

B. By adding a new paragraph (a).

C. In newly redesignated paragraph (b), by removing the phrase "an additional assistance payment under section 8003(f)" and adding in its place "a heavily impacted payment".

D. In newly redesignated paragraph (c), by removing the phrase "an additional assistance payment under section 8003(f)" and adding in its place "a heavily impacted payment".

The addition reads as follows:

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

(a) An applicant that wishes to be considered to receive a heavily impacted payment must submit the required information indicating eligibility under §§222.63 or 222.64 with the annual section 8003 Impact Aid application.

* * * * *

15. Section 222.91 is revised to read as follows:

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

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

(1) Meet the application and eligibility requirements in section 8003 and subparts A and C of these regulations;

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

(3) Include in its application for payments under section 8003—

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

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

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

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

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

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

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

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

(3) The LEA must obtain a waiver from each tribe that has Indian children living on Indian lands claimed by the LEA on its application under section 8003 of the Act. If the LEA only obtains waivers from some, but not all, applicable tribes, the LEA must comply with the requirements of §222.94 with respect to those tribes that did not agree to waive these requirements.

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

16. Section 222.94 is revised to read as follows:
§ 222.94 What are the responsibilities of the LEA with regard to Indian policies and procedures?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (i) The Impact Aid Program Director for approval; and
- (ii) The affected tribe or tribes.

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

§ 222.95 [Amended]

17. Section 222.95 is amended:

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

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

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

18. Section 222.161 is amended by:

A. Adding the phrase "Except as provided in paragraph (a) (6)," to the beginning of paragraph (a) (5) and lowercasing the word "A".

B. Adding paragraphs (a) (6) and (b) (3).

C. Revising paragraph (c).

The additions and revisions read as follows:

§222.161 How is State aid treated under section 8009 of the Act?

(a) * * *

(6) (i) If the Secretary has not made a determination 30 days before the beginning of the State's fiscal year, the State may request permission from the Secretary to make estimated or preliminary State aid payments that consider a portion of Impact Aid payments as local resources in accordance with this section.

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

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

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

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

(b) * * *

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

(c) Definitions. The following definitions apply to this subpart:

Current expenditures is defined in section 8013(4) of the Act. Additionally, for the purposes of this section it does not include 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 §222.162.

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

19. Section 222.162 is amended:

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

B. Revising paragraph (d).

The revision reads as follows:

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

* * * * *

(d) Accounting for Special Cost Differentials. In computing per-pupil figures under paragraph (c) of this section, the State accounts for special cost differentials that meet the requirements of paragraph (c)(2) of this section in one of four ways:

(1) The Inclusion Method on a Revenue Basis. The State divides total revenues by a weighted pupil count that includes only those weights associated with the special cost differentials.

(2) The Inclusion Method on an Expenditure Basis. The State divides total current expenditures by a weighted

pupil count that includes only those weights associated with the special cost differentials.

(3) The Exclusion Method on a Revenue Basis. The State subtracts revenues associated with the special cost differentials from total revenues, and divides this net amount by an unweighted pupil count.

(4) The Exclusion Method on an Expenditure Basis. The State subtracts current expenditures that come from revenues associated with the special cost differentials from total current expenditures, and divides this net amount by an unweighted pupil count.

* * * * *

20. Section 222.164 is amended by revising paragraph (a) (2) to read as follows:

§222.164 What procedures does the Secretary follow in making a determination under section 8009?

(a) * * *

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

days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

[FR Doc. 2015-32618 Filed: 12/29/2015 8:45 am; Publication Date: 12/30/2015]