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DEPARTMENT OF EDUCATION

34 CFR Part 200

[ED-2018-OESE-0079]

RIN 1810-AB49

Title I-Improving the Academic Achievement of the Disadvantaged; Education of Migratory Children

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

ACTION: Final regulations.

SUMMARY: The Department modifies the requirements related to the responsibilities of State educational agency (SEA) recipients of funds under title I, part C, of the Elementary and Secondary Education Act of 1965, as amended (ESEA), to conduct annual prospective re-interviews to confirm the eligibility of children under the Migrant Education Program (MEP). We clarify the definition of "independent re-interviewer" and reduce the costs and burden of prospective re-interviews conducted by independent re-interviewers while maintaining adequate quality control measures to safeguard the integrity of program eligibility determinations.

DATES: These regulations are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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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: On November 29, 2018, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the *Federal Register* (83 FR 61342). In the preamble of the NPRM, we discussed the major changes proposed in that document to the requirement for SEAs to annually validate MEP eligibility determinations through re-interviews for a randomly selected sample of children identified as migratory during a single performance reporting period. These included the following amendments to § 200.89(b):

- Clarifying for SEAs that as a quality control measure, individuals conducting annual prospective re-

interviews must be individuals who did not work on the initial eligibility determination being reviewed.

- Replacing the reference to “current-year” eligibility determinations with the term “current performance reporting period.” A performance reporting period, sometimes referred to as a child count year, is a more specific time frame: September 1 through August 31, and thus clarifies any ambiguity associated with the phrase “current-year.”

- Modifying the requirement that SEAs use independent re-interviewers for prospective re-interviews at least once every three years. Instead, the regulations require the use of independent re-interviewers at least once every three years until September 1, 2020. After September 1, 2020, SEAs are required to use independent re-interviewers for prospective re-interviews at least once during one of the first three full performance reporting periods (September 1 through August 31) following the effective date of a major statutory or regulatory change that impacts program eligibility (as determined by the Secretary), in order to test eligibility determinations made based on the changed eligibility criteria.

Except for minor editorial revisions, there are no substantive differences between the NPRM and these final regulations.

Public Comment: In response to our invitation in the NPRM, ten parties submitted comments on the proposed regulations. We group major issues according to subject. Generally, we do not address technical and other minor changes. In addition, we do not address comments that raised concerns not directly related to the proposed regulations.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the regulations since publication of the NPRM follows.

Structure of Regulations

Comment: None.

Discussion: Upon further consideration, we have modified the structure of § 200.89(b)(2) from what was proposed in the NPRM. We think it is clearer to include all of the requirements for prospective re-interviewing within § 200.89(b)(2), rather than to add a new paragraph (b)(3). This modification does not change the substance of the requirements as proposed, but, rather, organizes the requirements in such a way that minimizes the changes to

the previous structure. This modification also eliminates the need to make an additional change to § 200.89(d)(5), which currently refers to prospective re-interviewing as described in paragraph (b)(2). In addition, after publication of the NPRM, we identified an additional change that needed to be made to paragraph (b)(2)(ii), for consistency throughout § 200.89(b)(2) in referring to current performance reporting period, instead of current year.

Changes: Paragraph (b)(2)(i) describes the individuals who may conduct annual prospective re-interviews, with specific exceptions for years in which independent re-interviewers are required. Paragraph (b)(2)(i)(A) contains the requirements for independent re-interviewers before September 1, 2020, and paragraph (b)(2)(i)(B) contains the requirements for independent re-interviewers beginning September 1, 2020. Paragraph (b)(2)(ii) has been revised to reference the current performance reporting period instead of current year, consistent with this change in paragraph (b)(2).

Clarity of Regulations

Comment: One commenter suggested that the Background and Proposed Regulations sections of the preamble would be easier to understand if they were divided into more and shorter sections. The commenter indicated that the proposed regulations were clearly stated.

Discussion: We appreciate the commenter's suggestions for clarifying the preamble, and we will take these suggestions into consideration for future NPRMs, to the extent feasible.

Changes: None.

Support for the Proposed Regulations

Comment: Five commenters expressed support for the proposed changes. One of the five commenters specifically noted that the changes will result in a significant cost savings for the State's MEP.

Discussion: We appreciate the commenters' support for these regulations.

Changes: None.

Criteria for Individuals Conducting Annual Prospective Re-interviews

Comment: One commenter asked whether individuals who provided consultation, guidance, or coaching to the

recruiter who conducted the original interview would be considered to have worked on the initial eligibility determination being tested.

Discussion: We consider individuals who worked on the initial eligibility determination being tested to be those individuals who conducted the initial interview used to document the child's MEP eligibility (e.g., the recruiter). The requirements for who may conduct annual prospective re-interviews do not preclude other personnel involved in the eligibility determinations process who may have provided consultation, guidance, or coaching to the recruiter (e.g., identification and recruitment coordinators, SEA-designated Certificate of Eligibility reviewers) from conducting annual prospective re-interviews. The exception to this rule is for any year in which the SEA uses independent re-interviewers to conduct the prospective re-interviews. Those independent re-interviewers may not be SEA or local operating agency personnel working to administer or operate the MEP, nor any other person who worked on the initial eligibility determination being tested.

Changes: None.

§ 200.89(b)(2)(i)(B) Prospective Re-interviewing Following a Major Statutory or Regulatory Change to Child Eligibility

Comment: One commenter identified two sentences in the preamble and proposed regulations that might signal to readers that, if an SEA elects to conduct independent re-interviews in the third performance reporting period following a major statutory or regulatory change, the sample must be drawn from eligibility determinations made during all three performance reporting periods following the statutory or regulatory change. The commenter suggested alternative wording to clarify that the re-interview sample would be limited to those eligibility determinations made during a single performance reporting period.

Discussion: We appreciate the commenter's identification of potentially confusing regulatory language and the suggested revisions. We agree with the commenter that the requirement is intended to validate child eligibility determinations made during one of the first three full performance reporting periods following a major statutory or regulatory change that impacts eligibility. Therefore, the sample must be drawn from eligibility determinations

made during a single performance reporting period, and not from determinations made during a three-year span.

Changes: We have revised § 200.89(b)(2)(i)(B) to clarify the sampling universe for independent re-interviews conducted following a major statutory or regulatory change.

Comment: One commenter identified potential confusion regarding the changes to the requirements for independent re-interviewers. The commenter suggested that it may be difficult for readers to identify what has changed from the previous requirement to use independent re-interviewers at least once every three years.

Discussion: We appreciate the commenters' identification of potentially confusing language. The revised regulations require the use of independent re-interviewers at least once every three years (performance reporting periods), only until September 1, 2020. Beginning September 1, 2020, the use of independent re-interviewers will only be required in the event that the Secretary determines there has been a significant change to eligibility requirements made by statute or regulations.

Changes: None.

Comment: One commenter indicated that the changes to the required use of independent re-interviewers may be confusing and asked whether the change would allow for a child selected in the sample to be re-interviewed in less than three years, potentially losing eligibility when eligibility criteria are changed.

The same commenter also asked whether the changes to the regulations would reduce the number of individuals considered eligible due to the reduced frequency of interviews.

Discussion: In response to the commenter's first question, a prospective re-interview considers whether the child met the eligibility criteria at the time the child's eligibility was determined (i.e., at the time the Certificate of Eligibility was completed and approved). Independent re-interviews taking place after a statutory or regulatory change would be conducted for children who were determined to be eligible after that change took effect. If, as a result of the re-interview process, the SEA determines that the initial eligibility determination is incorrect (i.e., the child did not meet the eligibility requirements at the time the determination was made), the

SEA must stop providing MEP services to the child and remove the child from the database used to compile counts of eligible children. This corrective action, described in § 200.89(b)(2)(v), is unchanged from the previous requirements for prospective re-interviews.

In response to the commenter's second question, regarding the impact of these regulations on the number of children considered eligible for the MEP, we do not anticipate that the reduced frequency of independent re-interviews will reduce the number of children considered eligible for the program. SEAs must continue to conduct annual prospective re-interviews. The change from previous requirements concerns when an SEA must use independent re-interviewers to conduct those annual prospective re-interviews. The purpose of the annual prospective re-interview process is to help ensure that eligibility determinations are being made accurately, and to identify problems in order for the SEA to implement corrective actions in a timely manner. The SEA is not required to re-interview all currently eligible migratory children, nor is a re-interview required to maintain a child's 36 months of

MEP eligibility, which begins on the child's qualifying arrival date.

Changes: None.

Delegation of Responsibility for Prospective Re-interviews

Comment: One commenter asked several questions regarding who will be responsible for conducting prospective re-interviewing (e.g., school district staff, State staff), how independent re-interviewers will be selected, and whether funding will be made available to complete the process.

Discussion: Because the MEP is a State-administered and -operated program, the SEA is responsible for all aspects of the prospective re-interview process, which includes any delegation of responsibility and the process for selecting re-interviewers. In accordance with § 200.82, the SEA may set aside MEP funds for program administrative activities that are unique to the MEP. Therefore, the SEA may choose to use part of its MEP award for re-interviews. The specific amount of funds used, and the costs involved with re-interview efforts will vary by State.

Changes: None.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

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

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

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

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

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

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866 and that imposes total costs greater than zero, it must identify two deregulatory actions. For Fiscal Year 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. The final regulations are not a significant regulatory action. Therefore, the requirements of Executive Order 13771 do not apply.

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 on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

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

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

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

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as

user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

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

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

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

In accordance with these 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.

We anticipate that the changes to these regulations will reduce the cost and burden associated with prospective re-interviewing, specifically the use of independent re-interviewers, for some SEAs. While we believe that SEAs will be required to conduct independent re-interviews less frequently under the amended regulations than they are currently, we cannot predict when statutory changes that directly impact child eligibility will occur. To qualify as "independent," the re-interviewers must be neither SEA nor local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested. Although there is no Federal requirement for SEAs to use a specific funding mechanism to support independent re-interviewers, such as a contract, or to use out-of-State

personnel who require travel costs, several SEAs have chosen to use such methods and personnel for independent re-interviews. For those SEAs that have chosen to use more costly methods for independent re-interviews, we anticipate that the reduced frequency of independent re-interviews will result in reduced cost and burden. Further, we do not believe that burden will be affected by the clarification that annual prospective re-interviews must be conducted by individuals who did not work on the initial eligibility determination being reviewed, as this is consistent with the current practices of most SEAs.

We remain committed to providing SEAs with technical assistance to support their efforts to maintain effective quality control over program eligibility determinations, which includes prospective re-interviewing. Past support has included the Technical Assistance Guide on Re-interviewing published in December 2010,¹ updated non-regulatory guidance on program eligibility published in

¹U.S. Department of Education, Office of Elementary and Secondary Education, Office of Migrant Education, *Technical Assistance Guide on Re-interviewing*, Washington, DC, 20202 (<https://results-assets.s3.amazonaws.com/tools/mep-reinterviewing-guide-dec-10.pdf>).

March 2017,² the Identification and Recruitment Manual updated in September 2018,³ numerous presentations on program eligibility, ongoing responses to questions from grantees regarding program eligibility and identification and recruitment practices, and Title I, Part C Consortium Incentive Grant (CIG) funding for 13 SEAs participating in a five-year cohort focused on identification and recruitment.

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

Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations would not have a significant economic impact on a substantial number of small entities. Because these final regulations would affect only States and State agencies, the final regulations would not have an impact on small

²U.S. Department of Education, Office of Elementary and Secondary Education, Office of Migrant Education, *Non-Regulatory Guidance for the Title I, Part C Education of Migratory Children*, Washington, DC, 2017 (<https://results-assets.s3.amazonaws.com/legislation/MEP%20Non%20Regulatory%20Guidance%20March%202017.docx>).

³U.S. Department of Education, Office of Elementary and Secondary Education, Office of Migrant Education, *Migrant Education Program Identification and Recruitment Manual*, Washington, DC, 2020 (<https://results.ed.gov/idr-manual>).

entities. States and State agencies are not defined as "small entities" in the Regulatory Flexibility Act.

Paperwork Reduction Act of 1995

These regulations contain information collection requirements that are approved by OMB under OMB control number 1810-0662.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the Paperwork Reduction Act of 1995 (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.

Section 200.89(b) contains an information collection requirement. This information collection has been approved by OMB Control Number 1810-0662. The currently approved collection includes cost and burden estimates for annual prospective re-interviewing that do not vary based on the specific personnel used for re-interviews-

i.e., there is no distinction made between the cost and burden hours associated with prospective re-interviews conducted by "independent" re-interviewers compared to other re-interviewers. Although we anticipate that "independent" re-interviewers will be used less frequently under the revised regulations than they are currently, SEAs are still required to conduct prospective re-interviews on an annual basis under the revised regulations, so our cost and burden estimates for this information collection are unchanged from the currently approved information collection.

We estimate a standard number of hours to conduct re-interviews--including multiple attempts to locate the family and travel to their location (2 hours/child), analyze the findings (1 hour/child), and summarize findings for annual reporting (2 hours/SEA). We estimate costs based on a standard hourly rate for staff conducting re-interviews (\$10/hour) and a higher standard hourly rate for staff responsible for analysis and reporting (\$25/hour).

Some SEAs have elected to use more costly resources and methods when conducting independent re-interviews, such as contracts with private organizations and out-of-State

personnel. Since these are not Federal requirements, under the PRA, any increased costs associated with these resources and methods were not factored into the cost and burden estimates in the currently approved collection, and, accordingly, any decreased costs associated with these resources and methods that would result from their less frequent use under the final regulations also do not affect the cost and burden estimates. Thus, the burden estimated in the approved information collection remains unchanged.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Federalism

Executive Order 13132 requires us to ensure meaningful and timely input by State and local elected officials in

the development of regulatory policies that have federalism implications. "Federalism implications" means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

In the NPRM we identified a specific section that may have federalism implications and encouraged State and local elected officials to review and provide comments on the proposed regulations. In the Public Comment section of this preamble, we discuss any comments we received on this subject.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under FOR FURTHER INFORMATION CONTACT.

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You may also access documents of the Department published in the *Federal Register* by using the article search feature at: www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department. (Catalog of Federal Domestic Assistance number 84.011: Education of Migratory Children)

List of Subjects in 34 CFR Part 200

Education of disadvantaged, Elementary and secondary education, Grant programs-education, Indians-education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.
Dated: November 19, 2019.

Betsy DeVos,
Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 200 of title 34 of the Code of Federal Regulations as follows:

PART 200--TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

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

AUTHORITY: 20 U.S.C. 6301 through 6576, unless otherwise noted.

Section 200.1 also issued under 20 U.S.C. 6311(b)(1).

Section 200.11 also issued under 20 U.S.C. 6311(c)(2), (g)(2)(D), (h)(1)(C)(xii), (h)(2)(C), 6312(c)(3), 9622(d)(1).

Section 200.25 also issued under 20 U.S.C. 6314.

Section 200.26 also issued under 20 U.S.C. 6314.

Section 200.29 also issued under 20 U.S.C. 1413(a)(2)(D), 6311(g)(2)(E), 6314, 6396(b)(4), 7425(c), 7703(d).

Section 200.61 also issued under 20 U.S.C. 6312(e).

Section 200.62 also issued under 20 U.S.C. 6320(a).

Section 200.63 also issued under 20 U.S.C. 6320(b).

Section 200.64 also issued under 20 U.S.C. 6320.

Section 200.65 also issued under 20 U.S.C.
6320(a)(1)(B).

Section 200.68 also issued under 20 U.S.C.
6320(a)(3)(B).

Section 200.73 also issued under 20 U.S.C. 6332(c),
6336(f)(3), 7221e(c).

Section 200.77 also issued under 20 U.S.C. 6313(c)(3)-(5),
6318(a)(3), 6320; 42 U.S.C. 11432(g)(1)(J)(ii)-(iii),
11433(b)(1).

Section 200.78 also issued under 20 U.S.C.
6313(a)(5)(B), (c), 6333(c)(2).

Section 200.79 also issued under 20 U.S.C.
6313(b)(1)(D), (c)(2)(B), 6321(d).

Section 200.81 also issued under 20 U.S.C. 6391-6399.

Section 200.83 also issued under 20 U.S.C. 6396.

Section 200.85 also issued under 20 U.S.C. 6398.

Section 200.87 also issued under 20 U.S.C.
7881(b)(1)(A).

Section 200.88 also issued under 20 U.S.C. 6321(d).

Section 200.89 also issued under 20 U.S.C. 6391-6399,
6571, 18 U.S.C. 1001.

Section 200.90 also issued under 20 U.S.C. 6432, 6454,

6472.

Section 200.100 also issued under 20 U.S.C. 6303, 6303b, 6304.

Section 200.103 also issued under 20 U.S.C. 6315(c) (1) (A) (ii), 6571(a), 8101(4).

2. Section 200.89 is amended by:

a. Revising paragraphs (b) (2) introductory text and (b) (2) (i) and (ii).

b. Removing the parenthetical authority citation at the end of the section.

The revisions read as follows:

§ 200.89 Re-interviewing; eligibility documentation; and quality control.

* * * * *

(b) * * *

(2) *Prospective re-interviewing.* As part of the system of quality controls identified in paragraph (d) of this section, an SEA that receives MEP funds must annually validate child eligibility determinations from the current performance reporting period (September 1 to August 31) through re-interviews for a randomly selected sample of children identified as migratory during the same

performance reporting period. In conducting these re-interviews, an SEA must---

(i) Except as specified in paragraphs (b) (2) (i) (A) and (B) of this section, use one or more re-interviewers who may be SEA or local operating agency staff members working to administer or operate the State MEP, or any other person trained to conduct personal interviews and to understand and apply program eligibility requirements, but who did not work on the initial eligibility determinations being tested;

(A) At least once every three years until September 1, 2020, SEAs must use one or more independent re-interviewers (i.e., interviewers who are neither SEA nor local operating agency staff members working to administer or operate the State MEP nor any other persons who worked on the initial eligibility determinations being tested and who are trained to conduct personal interviews and to understand and apply program eligibility requirements).

(B) Beginning September 1, 2020, an SEA must use one or more independent re-interviewers to validate child eligibility determinations made during one of the first three full performance reporting periods (September 1

through August 31) following the effective date of a major statutory or regulatory change that directly impacts child eligibility (as determined by the Secretary). Therefore, the entire sample of eligibility determinations to be tested by independent re-interviewers must be drawn from children determined to be eligible in a single performance period, based on eligibility requirements that include the major statutory or regulatory change.

(ii) Select a random sample of identified migratory children so that a sufficient number of eligibility determinations in the current performance reporting period are tested on a statewide basis or within categories associated with identified risk factors (e.g., experience of recruiters, size or growth in local migratory child population, effectiveness of local quality control procedures) in order to help identify possible problems with the State's child eligibility determinations;

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