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DEPARTMENT OF EDUCATION

34 CFR Chapter II

[Docket ID ED-2019-OPEPD-0019]

RIN 1875-AA12

Final Priority for Discretionary Grant Programs

AGENCY: Department of Education.

ACTION: Final priority.

SUMMARY: The Secretary of Education announces a priority for discretionary grant programs that supports alignment between the Department of Education's (the Department's) discretionary grant investments and the Administration's Opportunity Zones initiative, which aims to spur economic development and job creation in distressed communities.

DATES: This priority is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Allison Holte, U.S. Department of Education, 400 Maryland Avenue, SW, room 4W211, Washington, DC 20202. Telephone: (202) 205-7726.

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:

Program Authority: 20 U.S.C. 1221e-3.

We published a notice of proposed priority in the *Federal Register* on July 29, 2019 (84 FR 36504) (NPP). The NPP contained background information and our reasons for proposing the priority.

There are no differences between the proposed priority and the final priority.

Public Comment: In response to our invitation in the NPP, 11 parties submitted comments on the proposed priority.

We group major issues according to subject. Generally, we do not address comments that raised concerns not directly related to the proposed priority.

Analysis of Comments:

Comment: Two commenters expressed general support for the priority, and shared information about the needs of specific Qualified Opportunity Zones. A third commenter expressed support and recommended that we revise the language to prioritize applicants who propose to strengthen the workforce talent pipeline within the Qualified Opportunity Zone, promote partnerships with other local stakeholders, and build capacity among local leaders and practitioners.

Discussion: We appreciate these comments and encourage all eligible organizations--located in or serving a Qualified

Opportunity Zone--to apply for grants under competitions that use this priority in the future. This document does not solicit grants.

In addition, we appreciate the commenter's suggestion to revise the priority to include a focus on specific policy goals. We agree that the commenter's suggested policies are important but decline to revise this priority to include them. Our intent for this priority is to drive grant funds toward Qualified Opportunity Zones and to encourage applicants to think creatively about how to make use of Qualified Opportunity Funds, where possible, to support their proposed projects. The goals and content of an applicant's proposed project will depend in large part on the statute and regulations governing the grant program to which it is applying, as well as any of the Secretary's Supplemental Priorities (83 FR 9096) we may choose to include in the grant competition. For that reason, including additional requirements in this priority is neither necessary nor appropriate.

Changes: None.

Comment: Several commenters raised concerns about how the Department would practically apply the priority in a grant competition. One commenter cautioned the Department not to require applicants to be physically located in a Qualified

Opportunity Zone, because many organizations provide services in a Qualified Opportunity Zone but have offices in a nearby community. Another commenter expressed concern that the priority would not require applicants to explain the work they propose to do in a Qualified Opportunity Zone, where they would conduct their work, or why. A third commenter expressed general support for the broad Opportunity Zones initiative but urged the Department to exercise caution when determining whether to use the priority as an absolute, competitive preference, or invitational priority. The commenter recommended specifically that we not use the priority as an absolute priority, and only use it as a competitive preference priority after very careful consideration of its potential impact.

Discussion: The priority's flexible structure is specifically designed to allow the Department to address, in the broader context of specific discretionary grant competitions in which the priority may be used, each of the concerns raised by the commenters. In particular, the Department may choose to use all or a subset of the provisions contained in the priority in any discretionary grant competition. For example, the Department may choose not to use paragraph (b) (for applicants that can

demonstrate that they are physically located in a Qualified Opportunity Zone) in a grant competition if we determine that physical co-location of an applicant within a Qualified Opportunity Zone is not necessary for achieving the goals of that competition.

In addition, while each of the subparts do not specifically require applicants to explain the work they propose to do, and paragraph (b) does not specifically require applicants to tell us where they will conduct their projects, we remind commenters that this priority will be used in the context of our discretionary grant programs. The activities an applicant proposes to carry out, either directly or through a contract or subgrant, in response to this priority would still be limited to those permitted by that grant program's statute and regulations. In addition to any applicable statutory and regulatory requirements, we include in each notice inviting applications for new awards a set of selection criteria that applicants must address in order for peer reviewers to score their applications. We include these selection criteria to better understand the details of an applicant's proposal, including why it proposes the project in the first place. For these reasons, we do not think it is necessary to revise the priority in order to ensure that we award high-quality

grants.

Finally, we agree with the commenter that the decision to include any priority--be it absolute, competitive preference, or invitational--should be made judiciously. We intend to include this priority in a grant competition only after careful consideration.

Changes: None.

Comment: One commenter expressed concerns about the general structure of Qualified Opportunity Zones and Qualified Opportunity Funds, noting that investors are more likely to create a Qualified Opportunity Fund in areas with the highest potential return on investment, not necessarily the areas that are most distressed. The commenter also cited research that indicates that States did not always designate the most economically distressed census tracts as Opportunity Zones. Finally, the commenter cautioned that the proposed priority could distort the statutory intent of programs authorized by the Elementary and Secondary Education Act, as amended (ESEA), recommending that the Department instead focus funds on existing ESEA programs as authorized by Congress.

Discussion: We recognize that some Qualified Opportunity Zones may be more attractive to investors than others. The priority includes three subparts that can be used

separately or in combination, and only one of the subparts requires an applicant to demonstrate that its project will benefit from a Qualified Opportunity Fund. When deciding to use this priority in future grant competitions, we will carefully consider whether and how the priority fits appropriately within the existing statutory and regulatory framework of each program. In some cases, for example, it may be more appropriate to only focus on subpart (a) or (b) of the priority, which require that either the applicant's work is conducted in a Qualified Opportunity Zone or the applicant itself is located in a Qualified Opportunity Zone. For both subparts, whether the Qualified Opportunity Zone has received an investment from a Qualified Opportunity Fund is irrelevant.

In addition, we remind the commenter that an applicant addressing this priority in a grant competition would still need to address all statutory and regulatory requirements for the program to which it is applying. Many of the Department's discretionary programs are targeted to high-need populations in some way. Therefore, even in cases where we determine that it is appropriate to use subpart (c) (which asks applicants to demonstrate that they have received or will receive an investment from a Qualified Opportunity Fund), we believe that grant funds will still

benefit communities that need them most.

We agree with the commenter that State governors had wide latitude in determining which census tracts to designate as Opportunity Zones. As a result, some Qualified Opportunity Zones are less economically distressed than others. Despite this fact, research shows that governors generally selected census tracts that are relatively disadvantaged compared to national averages and to averages among communities in eligible, non-designated census tracts. According to the Urban Institute's analysis of the 2012-2016 Census Bureau data, the average poverty rate in Qualified Opportunity Zones was 31.75 percent, compared to an average neighborhood poverty rate of 21.12 percent across all eligible non-designated census tracts and an average poverty rate of 16.6 percent nationwide. In addition, compared to all census tracts nationwide and to all eligible non-designated census tracts, Qualified Opportunity Zones had lower median household incomes, higher unemployment rates, and lower levels of educational attainment.<sup>1</sup> Additionally, with over 8,700 census tracts designated as Qualified Opportunity Zones nationwide,

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<sup>1</sup> Brett Theodos, Brady Meixell, and Carl Hedman, "Did States Maximize Their Opportunity Zones Selections?" (Urban Institute), 2018, available at: [https://www.urban.org/sites/default/files/publication/98445/did\\_states\\_maximize\\_their\\_opportunity\\_zone\\_selections\\_7.pdf](https://www.urban.org/sites/default/files/publication/98445/did_states_maximize_their_opportunity_zone_selections_7.pdf).



significantly more distressed communities will benefit from Opportunity Zone status than under previous place-based initiatives. For example, only 22 communities received the designation of "Promise Zone," a place-based initiative created in 2014.<sup>2</sup>

Finally, we disagree with the commenter that use of this priority would distort the statutory purpose of ESEA programs. As discussed above, applicants addressing this priority in a grant competition would still be required to meet all statutory and regulatory requirements of the program to which they are applying, including any requirements concerning the demographics or location of the population to be served by the grant. For example, if a grant program using this priority also required that funds support projects in schools with a majority of students who receive free- or reduced-price lunch, grants would only support Qualified Opportunity Zones that also met those other requirements. We believe that including this priority in grant competitions may result in more grant funds going to Qualified Opportunity Zones; however, those grant funds still must be used for purposes that meet all applicable statutory and regulatory requirements.

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<sup>2</sup> See: <https://www.hudexchange.info/programs/promise-zones/promise-zones-overview/>.

Changes: None.

Comment: Two commenters expressed concern that this priority is unconstitutional because it violates 20 U.S.C. 1232a, which prohibits, among other things, Federal control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system.

Discussion: This priority does not violate 20 U.S.C. 1232a because it does not establish any requirement involving Federal control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system. Moreover, any prospective applicant that does not wish to work in a Qualified Opportunity Zone, is not located in a Qualified Opportunity Zone, or does not wish to work with a Qualified Opportunity Fund, depending on how the priority is used in a given competition, may choose not to address the priority.

Changes: None.

Comment: One commenter supported the priority and suggested that the Department create and publicly post a list of elementary and secondary schools located in Qualified Opportunity Zones to aid applicants in preparing their applications.

Discussion: We appreciate this suggestion and are exploring ways to assist potential applicants in aligning their projects with Qualified Opportunity Zones. We also note that the Treasury Department has created a website of Opportunity Zones Resources that includes a searchable map: <https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx>.

Changes: None.

FINAL PRIORITY:

Priority--Spurring Investment in Qualified Opportunity Zones.

Under this priority, an applicant must demonstrate one or more of the following:

(a) The area in which the applicant proposes to provide services overlaps with a Qualified Opportunity Zone, as designated by the Secretary of the Treasury under section 1400Z-1 of the Internal Revenue Code (IRC). An applicant must--

(i) Provide the census tract number of the Qualified Opportunity Zone(s) in which it proposes to provide services; and

(ii) Describe how the applicant will provide services in the Qualified Opportunity Zone(s).

(b) The applicant is located in a Qualified Opportunity Zone. The applicant is located in a Qualified

Opportunity Zone if the applicant has multiple locations, at least one of which is within a Qualified Opportunity Zone, or if the applicant's location overlaps with a Qualified Opportunity Zone. The applicant must provide the census tract number of the Qualified Opportunity Zone in which it is located.

(c) The applicant has received, or will receive by a date specified by the Department, an investment, including access to real property, from a Qualified Opportunity Fund under section 1400Z-2 of the IRC for a purpose directly related to its proposed project. An applicant must--

(i) Identify the Qualified Opportunity Fund from which it has received or will receive an investment; and

(ii) Describe how the investment is or will be directly related to its proposed project.

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the *Federal Register*. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does not solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the *Federal Register*.

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 a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new rule 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 FY 2020, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. Although this regulatory action is a significant regulatory action, the requirements of Executive Order 13771 do not apply because this regulatory action is a "transfer rule" not covered by the Executive order.

We have also reviewed this final regulatory action 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 this final priority only on a reasoned determination that its benefits justify its 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 this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and 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 are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

#### Discussion of Potential Costs and Benefits

The Department believes that this regulatory action does not impose significant costs on eligible entities, whose participation in discretionary grant programs is voluntary. Additionally, the benefits of the priority outweigh any associated costs because it would result in the Department's discretionary grant programs selecting high-quality applications to implement activities that are

designed to increase education opportunities and improve education outcomes while also targeting investment in our Nation's most economically distressed communities.

The Secretary believes that the costs imposed on applicants by the priority would be limited to paperwork burden related to preparing an application for a discretionary grant program that is using the priority in its competition. The priority would likely result in some Federal funds that would have been awarded to grantees in areas that are not designated as Qualified Opportunity Zones going instead to grantees in areas that have received that designation. We believe that the results of recently completed FY 2019 competitions provide some helpful descriptive data on the extent to which this priority may increase the number of applications from, and grantees ultimately funded in, Qualified Opportunity Zones. In FY 2019, the Department included a priority for projects in Qualified Opportunity Zones in nine competitions; five of these competitions included only an invitational priority and, in the remaining four competitions, programs created and used a program-specific absolute or competitive preference priority. In the five competitions that included only an invitational priority, 41 percent of total applications and 47 percent of funded applications

addressed the priority. In the four competitions that included a competitive preference or absolute priority, 53 percent of total applications and 60 percent of funded applications addressed the priority. Of the approximately \$55 million awarded to new grantees in these four competitions, over \$30 million went to applicants that addressed an absolute or competitive preference priority for projects in Qualified Opportunity Zones. While these data provide some information about the impact of including the priority announced in this NFP in future competitions, it is important to note that the universe of FY 2019 competitions that used the priority is small, unrepresentative of the Department's overall grant portfolio, and includes programs that made a relatively small number of awards. Further the awards to projects in Qualified Opportunity Zones did not change the total amount of awards made by the Department under these competitions.

Regulatory Flexibility Act Certification: The Secretary certifies that the final priority will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration (SBA) Size Standards define proprietary institutions as small businesses if they are independently owned and operated, are not dominant in their field of operation, and

have total annual revenue below \$7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions are defined as small organizations if they are operated by a government overseeing a population below 50,000.

The Secretary certifies that this regulatory action will not have a significant economic impact on small entities. The priority will be used in a limited number of the Department's discretionary grant competitions annually, would not change the basic eligibility requirements for those competitions, was designed to minimize the paperwork burden added to the normal application process, and would not impose any costs on small entities because the decision to apply for a discretionary grant is entirely voluntary. In the case of small entities that choose to apply for funding under a discretionary grant competition that uses the priority, the increased costs would be limited to the marginally increased paperwork burden of demonstrating an applicant's relationship to a Qualified Opportunity Zone, which generally involves identifying and reporting census tract numbers. For example, we estimate that it would take an entity applying for a discretionary grant under this priority less than one hour to identify the census tract

number(s) for the area they intend to serve, or for their own location. The Department expects to provide resources in the coming months to further expedite this process for applicants. Further, any marginal increase in paperwork burden associated with the regular application process for small entities would be more than offset by the benefits of the priority, including the increased likelihood that small entities in or serving Qualified Opportunity Zones will be successful in competing for Federal education funds and that funded projects will improve educational opportunities and outcomes and thereby contribute materially to the success of other small entities in our Nation's most economically distressed communities.

Intergovernmental Review: This program is subject to 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.

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.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document, as well as all other documents of the Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

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Dated: November 22, 2019.

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Betsy DeVos,  
*Secretary of Education.*

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