

CODE OF FEDERAL REGULATIONS

Title 34--Education

CHAPTER II -OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, DEPARTMENT OF EDUCATION

PART 222 - IMPACT AID PROGRAMS (Subparts: A, C, & G)

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Subpart A--General

222.1 What is the scope of this part?

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

222.2 What definitions apply to this part?

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

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

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

Free public education

(b) The following terms defined in section 14101 of the ESEA (General Provisions) also apply to this part:

- Average daily attendance (ADA)
- Child
- County
- Department
- Outlying area
- Parent
- Secretary
- State
- State educational agency (SEA)

(c) In addition, the following definitions apply to this part: Act means title VIII of the Elementary and Secondary Education Act of 1965 (ESEA), as amended. Applicant means any LEA that files an application for financial assistance under section 8002, 8003, or 8006 of the Act and the regulations in this part implementing those provisions. Except as provided in section 8005 (d)(4) of the Act, an SEA may be an applicant for assistance under section 8003 only if the SEA directly operates and maintains facilities for providing free public education for the children it claims in its application. Application means a complete and signed application in the form approved by the Secretary, filed by an applicant. Federally connected children means children described in sections 8003(a)(1) and 8010(c)(2) of the Act.

Federal property.

(1) The term means--

- (i) Federal property described in section 8013; and
- (ii) Ships that are owned by the United States and whose home ports are located upon Federal property described in this definition.

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

- (i) Any real property that the United States does not own in fee simple, except for Indian lands described in section 8013(7), and transferred property described in section 8002(d); and
- (ii) Real property described in section 8002(c) (real property with respect to which payments are being made under section 13 of the Tennessee Valley Authority Act of 1933). Fiscally dependent LEA means an LEA that does not have the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes. Fiscally independent LEA means an LEA that has the final authority to determine the amount of revenue to be raised from local sources for current expenditure purposes within the limits established by State law. Local educational agency (LEA) is defined in section 8013(9). Except for an SEA qualifying under section 8005(d)(4),

the term includes an SEA only so long as--

- (1) The SEA directly operates and maintains the facilities for providing free public education for the children it claims in its application;
- (2) The children claimed by the SEA actually are attending those State-operated facilities; and
- (3) The SEA does not, through a tuition arrangement, contract, or by any other means, pay another entity to operate and maintain facilities for those children.

Local real property tax rate for current expenditure purposes.

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

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

- (i) The entire tax levied by the general government on real property if all but a de minimus amount of the total proceeds from that tax levy are available to the LEA for current expenditures (as defined in section 8013);
- (ii) That portion of a local real property tax rate designated by the general government for current expenditure purposes (as defined in section 8013); or
- (iii) If no real property tax levied by the general government meets the criteria in paragraphs (2)(i) or (ii) of this definition, an imputed tax rate that the Secretary determines by--

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

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

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

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

Membership means the following:

(1) (i) The definition given to the term by State law; or
(ii) If State law does not define the term, the number of children listed on an LEA's current enrollment records on its survey date(s).

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

(3) The term does not include children who--
(i) Have never attended classes in schools of the LEA or of another educational entity with which the LEA has a tuition arrangement;
(ii) Have permanently left the LEA;
(iii) Otherwise have become ineligible to attend classes there; or
(iv) Attend the schools of the applicant LEA under a tuition arrangement with another LEA that is responsible for providing them a free public education.

Parent employed on Federal property.

(1) The term means the following:
(i) An employee of the Federal Government who reports to work on, or whose place of work is located on, Federal property.
(ii) A person not employed by the Federal Government but who spends more than 50 percent of his or her working time on Federal property (whether as an employee or self-employed) when engaged in farming, grazing, lumbering, mining, or other operations that are authorized by the Federal Government, through a lease or other arrangement, to be carried out entirely or partly on Federal property.
(iii) A proportion, to be determined by the Secretary, based on persons working on commingled Federal and non-Federal properties other than those persons covered under paragraph (1)(ii) of this definition.

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

Real property.

(1) The term means--
(i) Land; and
(ii) Improvements (such as buildings and appurtenances to those buildings, railroad lines, utility lines, pipelines, and other permanent fixtures), except as provided in paragraph (2).

(2) The term does not include--
(i) Improvements that are classified as personal property under State law; or
(ii) Equipment and movable machinery, such as motor vehicles, movable house trailers, farm machinery, rolling railroad stock, and floating dry docks, unless that equipment or movable machinery is classified as real property or subject to local real property taxation under State law.

Revenues derived from local sources.

(1) The term means--
(i) Tax funds derived from real estate; and
(ii) Other taxes or receipts that are received from the county, and any other local tax or miscellaneous receipts.

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

(A) Locally received funds that are derived from local taxation of real property;
(B) Tax funds that are received on account of Wherry-Spence housing projects (12 U.S.C. 1702 et seq.) located on private property; and
(C) All local real property tax funds that are received from either the county or the State, serving as a collecting agency, and that are returned to the LEA for expenditure by that agency.

(ii) The term does not include--
(A) Any payments under this Act or the Johnson-O'Malley Act (25 U.S.C. 452);
(B) Tax payments that are received on account of Wherry-Spence housing projects located on federally owned property; or
(C) Local real property tax funds that are received by the State and distributed to LEAs on a per-pupil or formula basis.

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

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

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

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

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

- (1) File with the Secretary a complete and signed application for payment under section 8002 or 8003; and
- (2) Certify to the Secretary that it will file, and file, a copy of the application referred to in paragraph (a) of this section with its SEA.

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

- (i) The United States Government initiates or reactivates a Federal activity, or acquires real property.
- (ii) The United States Congress enacts new legislation.
- (iii) A reorganization of school districts takes place.
- (iv) Property, previously determined by the Secretary not to be Federal property, is determined in writing by the Secretary to be Federal property.

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

- (i) File an application, as permitted by paragraph (b)(1) of this section, with the Secretary; and
- (ii) File a copy of that application with its SEA.

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

- (i) For an application subject to the filing deadlines in paragraph (a)(1) of this section, on or before February 15 of the fiscal year for which the LEA seeks assistance under section 8002, or of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8003; and
- (ii) On or before fifteen days following the date by which an application subject to the filing deadlines in paragraph (b) of this section must be filed.

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

application are, to the best of the SEA's knowledge, true, complete, and correct.

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

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

(a) To be timely filed under Sec. 222.3, an application must be received by the Secretary, or mailed, on or before the applicable filing date.

(b) An applicant must show one of the following as proof of mailing:

- (1) A legibly dated U.S. Postal Service postmark.
- (2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.
- (3) A dated shipping label, invoice, or receipt from a commercial carrier.
- (4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

- (1) A private metered postmark.
- (2) A mail receipt that is not dated by the U.S. Postal Service.

222.5 When may a local educational agency amend its application?

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

- (1) The 60th day following the applicable event.
- (2) By the end of the Federal fiscal year--
 - (i) For which assistance is sought under section 8002; or
 - (ii) Preceding the fiscal year for which the LEA seeks assistance under section 8003.

(b) The LEA also may amend its application no later than the end of the Federal fiscal year for which assistance is sought under section 8002 or of the fiscal year preceding the fiscal year for which the LEA seeks assistance under section 8003--

- (1) For an adjustment to its payment based on data obtained from a second membership count; or
- (2) For an adjustment to its payment based on actual satisfactory data regarding eligible Federal properties or federally connected children if those data were not available at the time the LEA filed its application.

222.6 Which applications does the Secretary accept?

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

(b) (1) Except as provided in paragraph (b)(2) of this section, the Secretary does not accept or approve for payment any application under section 8002 or 8003 that is not timely filed with the Secretary.

(2) The Secretary accepts and approves for payment any otherwise approvable application filed within 60 days of the applicable filing date established in Sec. 222.3, but reduces the payment based on the application by 10 percent of the amount that would have been paid if the application had been filed by the applicable filing date established in that section.

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

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

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

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

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

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

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

- (1) An adjustment is made in the payment of a successor LEA to account for the payment to the predecessor LEA; or

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

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

222.9 What records must a local educational agency maintain?

Except as otherwise provided in Sec. 222.10--

(a) An LEA must maintain adequate written records to support the amount of payment it received under the Act for any fiscal year;

(b) On request, the LEA must make its records available to the Secretary for the purpose of examination or audit; and

(c) Each applicant must submit such reports and information as the Secretary may require to determine the amount that the applicant may be paid under the Act.

222.10 How long must a local educational agency retain records?

An LEA must retain the records described in Sec. 222.9 until the later of--

(a) Three years after the last payment for a fiscal year; or

(b) If the records have been questioned on Federal audit or review, until the question is finally resolved and any necessary adjustments to payments have been made.

222.11 How does the Secretary recover overpayments?

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

(a) If the Secretary determines that an LEA has received a payment in excess of what it should have received under the Act and this part, the Secretary deducts the amount of the overpayment from subsequent payments for which the LEA is eligible under the Act.

(b) (1) If the LEA is not eligible for subsequent payments under the Act, the LEA must promptly refund the amount of the overpayment to the Secretary.

(2) If the LEA does not promptly repay the amount of the overpayment or promptly enter into a repayment agreement with the Secretary, the Secretary may use the procedures in 34 CFR part 30 to offset that amount against payments from

other Department programs or, under the circumstances permitted in part 30, to request that another agency offset the debt.

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

(a) The Secretary considers as eligible for forgiveness under section 8012 of the Act ("eligible overpayment") any overpayment amount that is more than an LEA was eligible to receive for a particular fiscal year under Public Law 81-874, Public Law 81-815, or the Act (except for the types of overpayments listed in Sec. 222.13), and that--

- (1) Remains owing on or after July 31, 1997;
- (2) Is the subject of a written request for forgiveness filed by the LEA before July 31, 1997; or
- (3) Is the subject of a pending, timely written request for an administrative hearing or reconsideration, and has not previously been reviewed under Secs. 222.12--222.18.

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

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

The Secretary does not consider the following overpayments to be eligible for forgiveness under section 8012 of the Act:

(a) Any overpayment under section 7 of Public Law 81-874 or section 16 of Public Law 81-815.

(b) An amount received by an LEA, as determined under section 8003(g) of the Act (payments to LEAs for certain federally connected children with severe disabilities, implemented in subpart F of this part), that exceeds the LEA's maximum basic support payment under section 8003(b) of the Act.

(c) Any overpayment caused by an LEA's failure to expend or account for funds properly in accordance with the following laws and regulations:

- (1) Section 8003(d) of the Act (implemented in subpart D of this part) or section 3(d)(2)(C) of Public Law 81-874 for certain federally connected children with disabilities.
- (2) Section 8003(g) of the Act.

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

The Secretary forgives an eligible overpayment, in whole or part as described in Sec. 222.18, if--

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

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

(2) September 2, 1997;

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

(c) The Secretary determines under Sec. 222.17 that--

- (1) In the case either of an LEA's or the Department's error, repayment of the LEA's total eligible overpayments will result in an undue financial hardship on the LEA and seriously harm the LEA's educational program; or
- (2) In the case of the Department's error, determined on a case-by-case basis, repayment would be manifestly unjust ("manifestly unjust repayment exception").

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

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

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

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

222.16 What information and documentation must a LEA submit for an eligible overpayment to be considered for forgiveness?

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

- (1) A copy of the LEA's annual financial report to the State.
- (2) The LEA's local real property tax rate for current expenditure purposes, as described in Sec. 222.17(b).
- (3) The average local real property tax rate of all LEAs in the State.
- (4) The average per pupil expenditure (APPE) of the LEA, calculated by dividing the LEA's aggregate current expenditures by the total number of children in average daily attendance for whom the LEA provided a free public education.
- (5) The APPE of the State, as defined in section 8013 of the ESEA.

(b) An LEA requesting forgiveness under Sec. 222.14(c)(2) (manifestly unjust repayment exception), or Sec. 222.17(a)(3)

(no present or prospective ability to repay), also must submit written information and documentation in specific support of its forgiveness request under those provisions within the time limits established under Sec. 222.14(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

222.18 What amount does the Secretary forgive?

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

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

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

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

(b) Forgiveness in part.

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

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

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

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

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

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

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

222.19 What other statutes and regulations apply to this part?

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

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

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

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

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

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

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

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

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

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

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

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

(3) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), for payments under sections 8003(d) (payments for federally connected children with disabilities), 8007 (construction), and 8008 (school facilities).

(4) 34 CFR part 82 (New Restrictions on Lobbying).

(5) 34 CFR part 85 (Government-wide Debarment and Suspension (Non-procurement) and Government-wide Requirements for Drug-free Workplace (Grants)).

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

222.30 What is "free public education"?

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

Free public education.

(1) The term means education that is provided--

(i) At public expense;

(ii) (A) As the complete elementary or secondary educational program as determined under State law through grade 12; and

(B) Preschool education, whether or not included as elementary education by State law;

(iii) In a school of the local educational agency (LEA) or under a tuition arrangement with another LEA or other educational entity; and

(iv) Under public supervision and direction, except with respect to children with disabilities.

(2) For the purpose of paragraph (1)(i) of this definition, education is provided at public expense if--

(i) There is no tuition charge to the child or the child's parents; and

(ii) Federal funds, other than funds under the Act, do not provide a substantial portion of the educational program.

(3) For the purpose of paragraph (1)(ii) of this definition, the complete elementary or secondary educational program is the program recognized by the State as meeting all requirements for elementary or secondary education for the children claimed and, except for preschool education, does not include a program that provides only--

(i) Supplementary services or instruction; or

(ii) A portion of the required educational program.

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

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

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

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

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

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

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

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

- (a) The LEA meets the requirements in subpart A of these regulations and this subpart; and
- (b) (1) The LEA is responsible under applicable State or Federal law for providing a free public education to those children;
(2) The LEA is providing a free public education to those children; and
(3) The State provides funds for the education of those children on the same basis as all other public school children in the State, unless permitted otherwise under section 8009 of the Act.

222.32 Upon what information is a local educational agency's basic support payment based?

- (a) The Secretary determines an LEA's payment under section 8003(b) on the basis of information in the LEA's application, including information regarding the membership of federally connected children.
- (b) The LEA must supply information in its application regarding its federally connected membership on the basis of any count described in Secs. 222.33 through 222.35.

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

- (a) (1) An applicant must select a day in the current school year as the survey date for making the first membership count, which must be no earlier than the fourth day of the regular school year and on or before January 31.
(2) The applicant must use the same survey date for all schools in the LEA.
- (b) As of the survey date, the applicant must--
 - (1) Count the membership of its federally connected children; and
 - (2) Count the total membership of its children--both federally connected and non-federally connected.

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

- (a) (1) The applicant may, but is not required to, make a second count of membership.
(2) If the applicant chooses to make a second count of membership, the applicant must select a day after January 31, but no later than May 14, as the survey date for making

the second membership count, and make that count in accordance with Sec. 222.33(b).

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

(b) The applicant may use the information obtained from a second membership count to amend its application for assistance as described in Sec. 222.5(b)(1).

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

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

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

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

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

- (A) Name of pupil;
- (B) Date of birth of the pupil; and
- (C) Name of public school and grade of the pupil.

(ii) Pupil residence and parent employment information, including--

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

(B) Name (as it appears on the employer's payroll record) of the parent (mother, father, legal guardian or other person standing in loco parentis) who is employed on Federal property and with whom the pupil resides (unless the parent is a member of the uniformed services on active duty);

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

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

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

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

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

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

(b) Source check.

- (1) An applicant may count the membership of its federally connected children by using a source check to substantiate a pupil's place of residence or parent's place of employment on the survey date.
- (2) A source check is a form provided--
 - (i) To a parent's employer, on which the employer certifies as to the place of employment of a parent of a pupil claimed;
 - (ii) To a housing official, on which the official certifies as to the residence of each pupil claimed; or
 - (iii) To a tribal official, on which the official certifies as to the residence of each pupil claimed residing on Indian lands over which that tribal official has jurisdiction.

222.36 What minimum number of federally connected children must a local educational agency have to receive a payment on behalf of those children under section 8003(b) and (e)?

(a) Except as provided in paragraph (d) of this section, an LEA is eligible to receive a payment under section 8003(b) (basic support and learning opportunity threshold) and (e) (hold harmless) for a fiscal year only if the total number of its eligible federally connected children for whom it provided a free public education for the preceding fiscal year was--

- (1) At least 400 who were in average daily attendance (ADA); or
- (2) At least 3 percent of the total number of children in ADA.

(b) Except as provided in paragraph (d) of this section, an applicant LEA is eligible to receive a payment under section 8003 for a fiscal year on behalf of federally connected children described in section 8003(a)(1)(F) or (G) only if the total number of those children for whom it provided a free public education for the preceding fiscal year was at least--

- (1) 1,000 in ADA; or
- (2) 10 percent of the total number of children in ADA.

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

(d) This section does not apply to hold harmless payments under section 8003(e) for fiscal year 1995.

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

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

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

- (1) Except as provided in paragraph (b)(3) of this section--
 - (i) By dividing the ADA of all the LEA's children for the second preceding fiscal year by the LEA's total membership on its survey date for the second preceding fiscal year (or, in the case of an LEA that conducted two membership counts in the second preceding fiscal year, by the average of the LEA's total membership on the two survey dates); and
 - (ii) By multiplying the figure determined in paragraph (b)(1)(i) of this section by the LEA's total membership of federally connected children in each subcategory described in section 8003 and claimed in the LEA's application for the current fiscal year payment (or, in the case of an LEA that conducts two membership counts, by the average of the LEA's total membership of federally connected children in each subcategory on the two survey dates).
- (2)
 - (i) For purposes of this section, actual ADA means raw ADA data that have not been weighted or adjusted to reflect higher costs for specific types of students for purposes of distributing State aid for education.
 - (ii) If an LEA provides a program of free public summer school, attendance data for the summer session are included in the LEA's ADA figure in accordance with State law or practice.
 - (iii) An LEA's ADA count includes attendance data for children for whom it makes tuition arrangements with other educational entities.
- (3) Attendance data are not counted for any child--
 - (i) Who is not physically present at school for the daily minimum time period required by the State, unless the child is--
 - (A) Participating via telecommunication or correspondence course programs that meet State standards; or
 - (B) Being served by a State-approved homebound instruction program for the daily minimum time period appropriate for the child; or
 - (ii) Attending the applicant's schools under a tuition arrangement with another LEA.

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

- (1) If an LEA is in a State that formerly collected ADA data for purposes of distributing State aid for education, the SEA

may submit the total ADA and total membership data for the State for each of the last three fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by--

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

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

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

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

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

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

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

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

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

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

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

(c) The comparable local contribution rate (LCR) determined in accordance with Secs. 222.39-222.41.

(d) The State average per pupil expenditure multiplied by the local contribution percentage as defined in section 8013(8) of the Act.

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

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

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

(2) Grouping by grade span/legal classification and size.

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

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

(iii) After consultation with the applicant LEAs in the State, divide each group into either two subgroups or three subgroups.

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

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

recognized by the Department for the purposes of these regulations.

(4) Grouping by grade span/legal classification, size, and location.

(i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span, size, and location, legal classification; then subdivide these groups by size (into two or three subgroups for each grade span, as described in paragraph (a)(2) of this section); and further subdivide these groups by location (inside or outside an MSA).

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

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

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

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

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

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

(c) (1) For an applicant LEA that satisfies the requirements contained in paragraph (c)(3) of this section, the SEA, in consultation with the LEA, may select a subgroup of 10 or more generally comparable LEAs from the group identified under paragraph (a)(2) of this section that includes the applicant LEA.

(2) An LEA that otherwise meets either of the requirements of paragraph (c)(3) of this section but serves a different span of grades from all other LEAs in its State (and therefore cannot match any group of generally comparable LEAs under paragraph (a)(2) of this section) must be matched, for purposes of this paragraph (c) only, to a group using legal classification and size as measured by ADA. The group identified using legal classification and size will be the applicant's group under paragraph (a)(2) of this section for purposes of this paragraph (c) only.

(3) In order to qualify under paragraph (c) (1) or (2) of this section, an applicant LEA must either--

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

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

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

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

(C) In its application, have federally connected children identified under section 8003(a)(1)(A)-(G) who were eligible under Sec. 222.36 to be counted as the basis for payment under section 8003 equal to at least 50 percent of its total ADA.

(4) In the case of an applicant LEA that meets either of the requirements contained in paragraph (c)(3) of this section, the SEA, in consultation with the LEA, may select 10 or more generally comparable LEAs that share one or more common factors of general comparability with the eligible applicant LEA, as follows:

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

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

(ii) The SEA must apply the factor or factors of general comparability recommended under paragraph (c)(4)(i)(A) of this section in one of the following ways in order to identify 10 or more generally comparable LEAs for the eligible applicant LEA, none of which may be significantly impacted LEAs:

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

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

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

Example 1. An eligible applicant LEA serves an unusually high percentage of children with disabilities, and the SEA recommends "proportion of children with disabilities" as an additional comparability factor. From the group of LEAs under paragraph (a)(2) of this section that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of children with disabilities enrolled in each of the LEAs. The SEA divides the list of LEAs into four groups containing equal numbers of LEAs. The group containing the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

Example 2. An eligible applicant LEA serves an unusually high percentage of minority children, and the SEA recommends "proportion of minority children" as an additional comparability factor. From the group of LEAs under paragraph (a)(2) of this section that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of minority children enrolled in each of the LEAs. The SEA chooses from the list of LEAs the 15 LEAs whose percentages of minority children are closest to the eligible applicant LEA's. These 15 LEAs will be the eligible applicant LEA's new group of generally comparable LEAs.

(C) The SEA may recommend and apply more than one factor of general comparability in

selecting a new group of 10 or more generally comparable LEAs for the eligible applicant LEA. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding significantly impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The LCR for the eligible applicant LEA shall be computed using the data from all of the LEAs in the subgroup except the eligible applicant LEA.

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

- (4) (i) Using the new group of generally comparable LEAs selected under paragraph (c)(4) of this section, the SEA shall compute the LCR for the eligible applicant LEA according to the provisions of Sec. 222.41.
- (ii) The SEA shall submit the resulting LCR to the Secretary and provide the Secretary a description of the additional factor or factors of general comparability and the data used to identify the new group of generally comparable LEAs.
- (iii) The Secretary reviews the data submitted by the SEA, and accepts the LCR for the purpose of use under section 8003(b)(1)(C)(iii) in determining the LEA's maximum payment under section 8003 if the Secretary determines that it meets the purposes and requirements of the Act and this part.

- (d) This section does not apply to applicant LEAs located in--
 - (1) Puerto Rico;
 - (2) Wake Island;
 - (3) Guam;
 - (4) American Samoa;
 - (5) Any outlying area; and
 - (6) Any State in which there is only one LEA.

222.40 How does a local educational agency select a local contribution rate based on generally comparable local educational agencies?

(a) In selecting an LCR based upon generally comparable LEAs, an LEA shall use the following steps:

(1) Step 1. The LEA shall select the factor or factors in Sec. 222.39 the LEA wishes to use as the basis for general comparability.

(2) Step 2. Using State-supplied data, the LEA shall identify within the State the entire group of LEAs (containing at least 10 LEAs exclusive of significantly impacted LEAs described in Sec. 222.39(b)(1)) that matches the factor or factors selected in Step 1 and that contains the applicant LEA or would contain the applicant LEA if it were not significantly impacted.

(3) Step 3. The LEA shall recommend to the Secretary the LCR, which the SEA has computed according to the provisions of Sec. 222.39, based on the group identified in Step 2.

(b) A significantly impacted LEA described in Sec. 222.39(b)(1) may--

- (1) Apply for assistance under this program; and
- (2) Under the generally comparable LEA method, recommend for itself the LCR of any group in which it would be included based on grade span/legal classification, size, location, or a combination of these factors, if it were not excluded as significantly impacted in Sec. 222.39(b)(1).

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

1. Characteristics of Applicant LEA

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

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

The applicant LEA is located outside an MSA.

2. Characteristics of Other LEAs Serving Same Grade Span

The SEA of the applicant's State groups all LEAs in its State according to the factors in Sec. 222.39.

(a) The SEA identifies the following groups:

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

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

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

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

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

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

3. Selection of Generally Comparable LEAs

The applicant LEA selects the group of generally comparable LEAs matching the factor or factors it wishes to use as the basis for general comparability. Under the requirements of Sec. 222.39, the applicant LEA must begin with the group that includes all LEAs with its grade span, and, if relevant and sufficiently different, legal classification. In this case, grade span and legal classification happen to be the same. Thus, the group would include 100 LEAs, after excluding the one significantly impacted LEA. The applicant LEA then has several options:

(a) Option 1. The applicant LEA may select as its group of generally comparable LEAs on which to base its recommended LCR the entire group of 100 LEAs serving K-8, after excluding the one significantly impacted LEA. The applicant LEA then recommends to the Secretary as its LCR the rate computed for this group by the SEA.

(b) Option 2. Instead of selecting the group of 100, the applicant LEA may select as its generally comparable group only those LEAs within the 101 (the significantly impacted LEA must be included initially for the purpose of determining the median ADA) that have an ADA above the median ADA, that is, the group of 50. The applicant LEA then recommends to the Secretary as its LCR the rate computed for the group by the SEA.

(c) Option 3. Instead of selecting either of the groups described in Options 1 and 2, the applicant LEA may select as its generally comparable group only those LEAs within the 100 that are outside an MSA; that is, the group of 36, after excluding the one significantly impacted LEA. The applicant LEA then recommends to the Secretary as its LCR the rate computed for this group by the SEA.

(d) Option 4. Instead of selecting any of the groups described in Options 1, 2, and 3, the applicant LEA may select as its generally comparable group only those LEAs that both have an ADA above the median ADA for the 101 and are outside an MSA; that is, the group of 15. The applicant LEA then

recommends to the Secretary as its LCR the rate computed for this group by the SEA. However, as provided in Sec. 222.39(b)(2), if the SEA were to have identified fewer than 10 LEAs under any factor or combination of factors, the SEA would not have computed a rate for such a group. Therefore, an applicant LEA included in such a group would not be able to use this factor or combination of factors in recommending its LCR to the Secretary. The significantly impacted LEA described in Sec. 222.39(b)(1), while included for determining the median ADA, is excluded from the computation of any group's LCR. However, the significantly impacted LEA may recommend for itself the LCR of any group it matches in grade span/legal classification, size, location, or a combination of these factors, (that is, in the case of the significantly impacted LEA referred to in this example, below the median ADA and outside an MSA), provided the group contains at least 10 LEAs that are not significantly impacted.

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

Except as otherwise specified in the Act, the SEA, subject to the Secretary's review and approval, shall compute an LCR for each group of generally comparable LEAs within its State that was identified using the factors in Sec. 222.39, as follows:

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

Secs. 222.42-222.49 [Reserved]

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

General

222.90 What definitions apply to this subpart?

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

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

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

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

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

- (a) Meet the application and eligibility requirements in section 8003 and subparts A and C of these regulations;
- (b) Develop and implement policies and procedures in accordance with the provisions of section 8004(a) of the Act; and
- (c) Include in its application for payments under section 8003--
 - (1) An assurance that the LEA established these policies and procedures in consultation with and based on information from tribal officials and parents of those children residing on Indian lands who are Indian children; and
 - (2) A copy of the policies and procedures or documentation that the LEA has received a waiver in accordance with the provisions of section 8004(c).

222.92 What additional statutes and regulations apply to this subpart?

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

- (1) The General Education Provisions Act (GEPA) in 20 U.S.C. 1221 et seq., unless otherwise noted.
- (2) Other relevant regulations in this part.

- (b) The following statutes, rules, and regulations do not apply to any hearing proceedings under this subpart:
- (1) Administrative Procedure Act.
 - (2) Federal Rules of Civil Procedure.
 - (3) Federal Rules of Evidence.
 - (4) GEPA, part E.
 - (5) 34 CFR part 81.

Sec. 222.93 [Reserved]

Indian Policies and Procedures

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

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

- (b) Tribes and parents of Indian children may assess the effectiveness of their input regarding the participation of Indian children in the LEA's education programs and activities and the development and implementation of the IPPs, and share the results of that assessment with the LEA.

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

- (a) The Director of the Impact Aid Program (Director) periodically reviews applicant LEAs' IPPs to ensure that they comply with the provisions of section 8004(a) and Sec. 222.94.
- (b) If the Director determines either that the LEA's IPPs do not comply with the minimum standards of section 8004(a), or that the IPPs have not been implemented in accordance with Sec. 222.94, the Director provides the LEA with written notification of the deficiencies related to its IPPs and requires that the LEA take appropriate action.
- (c) An LEA shall make the necessary changes within 60 days of receipt of written notification from the Director.
- (d) If the LEA fails to make the necessary adjustments or changes within the prescribed period of time, the Director may withhold all payments that the LEA is eligible to receive under section 8003.
- (e) Each LEA that has developed IPPs shall review those IPPs annually to ensure that they--
- (1) Comply with the provisions in section 8004(a); and
 - (2) Are implemented by the LEA in accordance with Sec. 222.94.
- (f) If an LEA determines that its IPPs do not meet the requirements in paragraphs (e) (1) and (2) of this section, the LEA shall amend its IPPs to conform with those requirements within 60 days of its determination.
- (g) An LEA that amends its IPPs shall, within 30 days, send a copy of the amended IPPs to--
- (1) The Director for approval; and
 - (2) The affected tribe or tribes.

Secs. 222.96-222.101 [Reserved]

Indian Policies and Procedures Complaint and Hearing Procedures

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

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

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

222.103 What must be included in a complaint?

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

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

222.104 When does the Assistant Secretary consider a complaint received?

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

- (1) Satisfies the requirements in Secs. 222.102 and 222.103; and
- (2) Is in writing and signed by the tribal chairman or the tribe's authorized designee.

(b) If the Assistant Secretary determines that a complaint fails to meet the requirements in Secs. 222.102-222.103, the Assistant Secretary notifies the tribe or its designee in writing that the complaint has been dismissed for purposes of invoking the hearing procedures in Secs. 222.102-222.113.

(c) Any notification that a complaint has been dismissed includes the reasons why the Assistant Secretary determined that the complaint did not meet the requirements in Secs. 222.102 and 222.103.

(d) Notification that a complaint has been dismissed does not preclude other efforts to investigate or resolve the issues raised in the complaint, including the filing of an amended complaint.

Sec. 222.105-222.107 [Reserved]

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

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

- (a) Designates a hearing examiner to conduct a hearing;
- (b) Designates a time for the hearing that is no more than 30 days after the designation of a hearing examiner;
- (c) Designates a place for the hearing that, to the extent possible, is--

- (1) Near the LEA; or
- (2) At another location convenient to the tribe and the LEA, if it is determined that there is good cause to designate another location;

(d) Notifies the tribe and the LEA of the time, place, and nature of the hearing; and

(e) Transmits copies of the complaint to the LEA and the affected tribe or tribes.

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

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

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

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

- (a) The hearing must be open to the public.
- (b) Parties may be represented by counsel.
- (c) (1) Each party may submit oral and written testimony that is relevant to the issues in the proceeding and make recommendations concerning appropriate remedial actions.
(2) A party may object to evidence it considers to be irrelevant or unduly repetitious.
- (d) No party shall communicate orally or in writing with the hearing examiner or the Assistant Secretary on matters under review, except minor procedural matters, unless all parties to the complaint are given--
 - (1) Timely and adequate notice of the communication; and
 - (2) Reasonable opportunity to respond.
- (e) For each document that a party submits, the party shall--
 - (1) File one copy for inclusion in the record of the proceeding; and
 - (2) Provide a copy to each of the other parties to the proceeding.
- (f) Each party shall bear only its own costs in the proceeding.

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

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

- (a) The hearing examiner may--

- (1) Clarify, simplify, or define the issues or consider other matters that may aid in the disposition of the complaint;
- (2) Direct the parties to exchange relevant documents or information; and
- (3) Examine witnesses.

(b) The hearing examiner--

- (1) Regulates the course of proceedings and conduct of the parties;
- (2) Arranges for the preparation of a transcript of each hearing and provides one copy to each party;
- (3) Schedules the submission of oral and documentary evidence;
- (4) Receives, rules on, excludes, or limits evidence;
- (5) Establishes and maintains a record of the proceeding, including any transcripts referenced above;
- (6) Establishes reasonable rules governing public attendance at the proceeding; and
- (7) Is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

222.112 What procedures are followed after the hearing?

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

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

- (1) Makes, on the basis of the record, written findings of fact and recommendations concerning any appropriate remedial action that should be taken;
- (2) Submits those findings and recommendations, along with the hearing record, to the Assistant Secretary; and
- (3) Sends a copy of those findings and recommendations to each party.

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

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

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

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

- (1) Any appropriate remedial action that the LEA must take;
- (2) A schedule for completing any remedial action; and
- (3) The reasons for the Assistant Secretary's decision.

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

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

Withholding and Related Procedures for Indian Policies and Procedures

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

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

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

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

Except as provided in Sec. 222.120, the Assistant Secretary withholds payments to an LEA if--

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

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

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

222.116 How are withholding procedures initiated under this subpart?

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

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

- (1) Describes how the LEA failed to comply with the requirements at issue; and
- (2) (i) Advises an LEA that has participated in an IPP hearing that it may request, in accordance with Sec. 222.117(c), that its payments not be withheld; or
- (ii) Advises an LEA that has not participated in an IPP hearing that it may request a withholding hearing in accordance with Sec. 222.117(d).

(c) The Assistant Secretary sends a copy of the written notice of intent to withhold payments to the LEA and the affected Indian tribe or tribes by certified mail with return receipt requested.

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

(a) The withholding of payments authorized by section 8004 of the Act is conducted in accordance with section 8004 (d)(2) or (e)(8)-(9) of the Act and the regulations in this subpart.

(b) An LEA that receives a notice of intent to withhold payments from the Assistant Secretary is not entitled to an Impact Aid hearing under the provisions of section 8011 of the Act and subpart J of this part.

(c) After an IPP hearing.

(1) An LEA that rejects or fails to implement the final determination of the Assistant Secretary after an IPP hearing has 10 days from the date of the LEA's receipt of the written notice of intent to withhold funds to provide the Assistant Secretary with a written explanation and documentation in support of the reasons why its payments should not be withheld. The Assistant Secretary provides the affected Indian tribe or tribes with an opportunity to respond to the LEA's submission.

(2) If after reviewing an LEA's written explanation and supporting documentation, and any response from the Indian tribe or tribes, the Assistant Secretary determines to withhold an LEA's payments, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes of the withholding determination in writing by certified mail with return receipt requested prior to withholding the payments.

(3) In the withholding determination, the Assistant Secretary states the facts supporting the determination that the LEA failed to comply with the legal requirements at issue, and why the provisions of Sec. 222.120 (provisions governing circumstances when an LEA is exempt from the withholding of payments) are inapplicable. This determination is the final decision of the Department.

(d) An LEA that has not participated in an IPP hearing.

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

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

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

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

Assistant Secretary's written notice, the LEA's request for a withholding hearing, and any other relevant documents.

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

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

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

222.118 How are withholding hearings conducted in this subpart?

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

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

(c) Proceeding.

(1) The parties to the withholding hearing are the Assistant Secretary and the affected LEA. An affected Indian tribe is not a party, but, at the discretion of the hearing examiner, may participate in the hearing and present its views on the issues relevant to the withholding determination.

(2) The parties may introduce all relevant evidence on the issues stated in the LEA's request for withholding hearing or other issues determined by the hearing examiner during the proceeding. The Assistant Secretary's notice of intent to withhold, the LEA's request for a withholding hearing, and all amendments and exhibits to those documents, must be made part of the hearing record.

(3) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the hearing examiner may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

(4) Each party may examine all documents and other evidence offered or accepted for the record, and may have

the opportunity to refute facts and arguments advanced on either side of the issues.

(5) A transcript must be made of the oral evidence unless the parties agree otherwise.

(6) Each party may be represented by counsel.

(7) The hearing examiner is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(e) Filing requirements.

(1) All written submissions must be filed with the hearing examiner by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, a party may serve a document upon the other party by facsimile transmission.

(3) The filing date for a written submission under this subpart is the date the document is--

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was timely received by the hearing examiner.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(f) Procedural rules.

(1) If the hearing examiner determines that no dispute exists as to a material fact or that the resolution of any disputes as to material facts would not be materially assisted by oral testimony, the hearing examiner shall afford each party an opportunity to present its case--

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to withholding hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing examiner shall afford to each party--

(i) Sufficient notice of the issues to be considered at the hearing;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(g) Decision of the hearing examiner.

(1) The hearing examiner--

(i) Makes written findings and an initial withholding decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party and to the affected Indian tribe or tribes, a copy of the written findings and initial withholding decision.

(2) A hearing examiner's initial withholding decision constitutes the Secretary's final withholding decision without any further proceedings unless--

(i) Either party to the withholding hearing, within 30 days of the date of its receipt of the initial withholding decision, requests the Secretary to review the decision and that request is granted; or

(ii) The Secretary otherwise determines, within the time limits stated in paragraph (g)(2)(ii) of this section, to review the initial withholding decision.

(3) When an initial withholding decision becomes the Secretary's final decision without any further proceedings, the Department notifies the parties and the affected Indian tribe or tribes of the finality of the decision.

(h) Administrative appeal of an initial decision.

(1) (i) Any party may request the Secretary to review an initial withholding decision.

(ii) A party must file this request for review within 30 days of the party's receipt of the initial withholding decision.

(2) The Secretary may--

(i) Grant or deny a timely request for review of an initial withholding decision; or

(ii) Otherwise determine to review the decision, so long as that determination is made within 45 days of the date of receipt of the initial decision by the Secretary.

(3) The Secretary mails to each party and the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of--

(i) The Secretary's action granting or denying a request for review of an initial decision; or

(ii) The Secretary's determination to review an initial decision.

(i) Secretary's review of an initial withholding decision.

(1) When the Secretary reviews an initial withholding decision, the Secretary notifies each party and the affected Indian tribe or tribes in writing, by certified mail with return receipt requested, that it may file a written statement or comments; and

(2) Mails to each party and to the affected Indian tribe or tribes, by certified mail with return receipt requested, written notice of the Secretary's final withholding decision.

222.119 What is the effect of withholding under this subpart?

(a) The withholding provisions in this subpart apply to all payments that an LEA is otherwise eligible to receive under section 8003 of the Act for any fiscal year.

(b) The Assistant Secretary withholds funds after completion of any administrative proceedings under Secs. 222.116-222.118 until the LEA documents either compliance or exemption from compliance with the requirements in section 8004 of the Act and this subpart.

222.120 When is a local educational agency exempt from withholding of payments?

Except as provided in paragraph (d)(2) of this section, the Assistant Secretary does not withhold payments to an LEA under the following circumstances:

(a) The LEA documents that it has received a written statement from the affected Indian tribe or tribes that the LEA need not comply with section 8004 (a) and (b) of the Act, because the affected Indian tribe or tribes is satisfied with the provision of educational services by the LEA to the children claimed on the LEA's application for assistance under section 8003 of the Act.

(b) The Assistant Secretary receives from the affected Indian tribe or tribes a written request that meets the requirements of Sec. 222.121 not to withhold payments from an LEA.

(c) The Assistant Secretary, on the basis of documentation provided by the LEA, determines that withholding payments during the course of the school year would substantially disrupt the educational programs of the LEA.

(d) (1) The affected Indian tribe or tribes elects to have educational services provided by the Bureau of Indian Affairs under section 1101(d) of the Education Amendments of 1978.

(2) For an LEA described in paragraph (d)(1) of this section, the Secretary recalculates the section 8003 payment that the LEA is otherwise eligible to receive to reflect the number of students who remain in attendance at the LEA.

222.121 How does the affected Indian tribe or tribes request that payments to a local educational agency not be withheld?

(a) The affected Indian tribe or tribes may submit to the Assistant Secretary a formal request not to withhold payments from an LEA.

(b) The formal request must be in writing and signed by the tribal chairman or authorized designee.

222.122 What procedures are followed if it is determined that the local educational agency's funds will not be withheld under this subpart?

If the Secretary determines that an LEA's payments will not be withheld under this subpart, the Assistant Secretary notifies the LEA and the affected Indian tribe or tribes, in writing, by certified mail with return receipt requested, of the reasons why the payments will not be withheld.

222.123-222.129 [Reserved]