

activities. Payment for the services of uniformed law enforcement in work zones may be included in the construction contract, or be provided by direct reimbursement from the highway agency to the law enforcement agency. When payment is included through the construction contract, the contractor will be responsible for reimbursing the law enforcement agency, and in turn will recover those costs through contract pay items. Direct interagency reimbursement may be made on a project-specific basis, or on a program-wide basis that considers the overall level of services to be provided by the law enforcement agency. Contract pay items for law enforcement service may be either unit price or lump sum items. Unit price items should be utilized when the highway agency can estimate and control the quantity of law enforcement services required on the project. The use of lump sum payment should be limited to situations where the quantity of services is directly affected by the contractor's choice of project scheduling and chosen manner of staging and performing the work. Innovative payment items may also be considered when they offer an advantage to both the highway agency and the contractor. When reimbursement to the law enforcement agency is made by interagency transfer of funds, the highway agency should establish a program-level or project-level budget that is adequate to meet anticipated program or project needs, and include provisions to address unplanned needs and other contingencies.

(e) *Work Vehicles and Equipment.* In addition to addressing risks to workers and road users from motorized traffic, the agency processes, procedures, and/or guidance established in accordance with 23 CFR 630.1006 should also address safe means for work vehicles and equipment to enter and exit traffic lanes and for delivery of construction materials to the work space, based on individual project characteristics and factors.

(f) *Payment for Traffic Control.* Consistent with the requirements of 23 CFR 630.1012, Project-level Procedures, project plans, specifications and estimates (PS&Es) shall include appropriate pay item provisions for implementing the project Transportation Management Plan (TMP), which includes a Temporary Traffic Control (TTC) plan, either through method or performance based specifications. Pay item provisions include, but are not limited to, the following:

(1) Payment for work zone traffic control features and operations shall not be incidental to the contract, or included in payment for other items of work not related to traffic control and safety;

(2) As a minimum, separate pay items shall be provided for major categories of traffic control devices, safety features, and work zone safety activities, including but not limited to positive protection devices, and uniformed law enforcement activities when funded through the project;

(3) For method based specifications, the specifications and other PS&E documents should provide sufficient details such that the quantity and types of devices and the overall effort required to implement and maintain the TMP can be determined;

(4) For method-based specifications, unit price pay items, lump sum pay items, or a combination thereof may be used;

(5) Lump sum payment should be limited to items for which an estimate of the actual quantity required is provided in the PS&E or for items where the actual quantity required is dependent upon the contractor's choice of work scheduling and methodology;

(6) For Lump Sum items, a contingency provision should be included such that additional payment is provided if the quantity or nature of the required work changes, either an increase or decrease, due to circumstances beyond the control of the contractor;

(7) Unit price payment should be provided for those items over which the contractor has little or no control over the quantity, and no firm estimate of quantities is provided in the PS&Es, but over which the highway agency has control of the actual quantity to be required during the project;

(8) Specifications should clearly indicate how placement, movement/relocation, and maintenance of traffic control devices and safety features will be compensated; and

(9) The specifications should include provisions to require and enforce contractor compliance with the contract provisions relative to implementation and maintenance of the project TMP and related traffic control items. Enforcement provisions may include remedies such as liquidated damages, work suspensions, or withholding payment for noncompliance.

#### **§ 630.1110 Maintenance of Temporary Traffic Control Devices.**

To provide for the continued effectiveness of temporary traffic control devices, each agency shall develop and

implement quality guidelines to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project. Agencies may choose to adopt existing quality guidelines such as those developed by the American Traffic Safety Services Association (ATSSA) or other state highway agencies.<sup>1</sup> A level of inspection necessary to provide ongoing compliance with the quality guidelines shall be provided.

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## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

#### 25 CFR Part 36

#### RIN 1076-AE51

#### Homeliving Programs

**AGENCY:** Bureau of Indian Education, BIA, Interior.

**ACTION:** Final Rule.

**SUMMARY:** Under the No Child Left Behind Act of 2001, the Secretary of the Interior is publishing final regulations addressing homeliving programs administered under the Bureau of Indian Education-funded school system.

**DATES:** *Effective Date:* January 4, 2008.

**FOR FURTHER INFORMATION CONTACT:** Kevin Skenandore, Director, Bureau of Indian Education, 1849 C Street NW., MS-3609, Washington, DC 20240, phone (202) 208-6123.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

##### *A. What Information Does This Section Address?*

This section addresses:—Requirements of the No Child Left Behind Act of 2001 (Pub. L. 107-110; enacted January 8, 2002; “NCLBA” or “the Act”), section 1122.

<sup>1</sup> The American Traffic Safety Services Association's (ATSSA) Quality Guidelines for Work Zone Traffic Control Devices uses photos and written descriptions to help judge when a traffic control device has outlived its usefulness. These guidelines are available for purchase from ATSSA through the following URL: [http://www.atssa.com/store/bc\\_item\\_detail.jsp?productId=1](http://www.atssa.com/store/bc_item_detail.jsp?productId=1). Similar guidelines are available from various State highway agencies. The Illinois Department of Transportation “Quality Standards for Work Zone Traffic Control Devices” is available online at <http://dot.state.il.us/workzone/wztc2004r.pdf>. The Minnesota Department of Transportation “Quality Standards—Methods to determine whether the various traffic control devices are Acceptable, Marginal, or Unacceptable” is available online at <http://www.dot.state.mn.us/trafficeng/otepubl/fieldmanual2007/FM-2007-QualityStandards.pdf>.

—Overview of the negotiated rulemaking process.  
 —How public comments were handled.

### *B. What Are the Negotiated Rulemaking Requirements of the Act?*

The Secretary of the Interior (“Secretary”) established a negotiated rulemaking committee (Committee) to develop proposed regulations to implement several sections of the Act related to the Bureau of Indian Education (Bureau)-funded school system. The Act required that the committee be comprised only of representatives of the Federal Government and representatives of tribes served by Bureau-funded schools. The Act also required that, to the maximum extent possible, the tribal representative membership reflect the proportionate share of students from tribes served by the Bureau-funded school system. The Secretary chartered the committee under the Federal Advisory Committee Act (5 U.S.C. Appendix (FACA)) on May 1, 2003. The committee was comprised of Federal representatives and representatives of tribes served by Bureau-funded schools who met in February 2006 to negotiate recommendations for proposed regulations under Section 1122 of the Act, 25 CFR part 36, Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations. As a basis for negotiations and for consensus, the committee used draft regulations proposed by the Bureau school and residential administrators.

### *C. What Was the Negotiated Rulemaking Process?*

As required by the No Child Left Behind Act of 2001 (Pub. L. 107–110; enacted January 8, 2002, referred to in this preamble as “NCLB” or “the Act”), the Department of the Interior established a Negotiated Rulemaking Committee to develop proposed rules to implement several sections of the Act relating to the Bureau of Indian Education-funded school system. Negotiated Rulemaking is a process sanctioned by Subchapter III, or Chapter 5, Title 5, United States Code and the Federal Advisory Committee Act, 5 U.S.C. Appendix (FACA), that employs Federal representatives and members of the public who will be affected by rules to jointly develop proposed rules.

In this case, the Act required the Secretary of the Interior to select representatives of Indian tribes and Bureau-funded schools as well as Federal Government representatives to serve on the Committee. The

Committee’s task was to draft proposed rules to recommend to the Secretary. Upon the Secretary’s approval, draft rules are published in the **Federal Register** for written public comments within a 120-day public comment period. After the close of the public comment period, the Committee will reconvene to review these comments and to recommend promulgation of final rules to the Secretary.

The Secretary chartered the Committee under the FACA on May 1, 2003. It is comprised of 19 members nominated by Indian tribes and tribally operated schools. The law required that, to the maximum extent possible, the tribal representative membership should reflect the proportionate share of students from tribes served by the Bureau-funded school system. The Secretary also appointed to the Committee six members from within the Department of the Interior. The Committee selected three tribal representatives and two Federal representatives as co-chairs. Six individuals were hired to facilitate all Committee meetings.

The Committee initially met in the months of June through October 2003 to develop regulations in six areas. Subsequently, the Department reconvened the Committee in February 2004 to develop regulations in the areas of closure and consolidation of schools and criteria for homeliving situations. The Committee met on several occasions and developed the proposed rules that were published on July 12, 2004 (69 FR 41770).

### *D. How Were Public Comments Handled?*

The Secretary published proposed regulations on July 12, 2004, for public comment. The public comment period ended on November 9, 2004. We received comments on this proposed rule from nine commenters, including tribal leaders, educators, and administrators. We reviewed all comments. Summaries of individual public comments and our responses are noted below. The final regulations are organized, as were the proposed regulations, under three broad categories: homeliving staffing; homeliving programs; and homeliving privacy. The final regulations, published as 25 CFR part 36—Homeliving Situations, reflect the public comments that were accepted. The Department still has under consideration the regulations for school closure and consolidation. At this time, the Department has made no final decision on issuing these rules.

## **II. Public Comments**

In this section we discuss the main public comments received. General comments are discussed first, followed by comments on specific sections of the rule. Our responses follow each comment.

### *Section 36.70 What Terms do I Need to Know?*

*Comment:* Several commenters suggested that we clarify or define the term “supplemental services” in § 36.70 and several others suggested that we clarify what “actually receiving supplemental services” means in § 36.70(2)(ii).

*Response:* We considered these comments and removed the obsolete reference to “supplemental services.”

*Comment:* Several commenters suggested we add definitions for the following terms: “behavioral health programs,” “behavioral health services,” and “behavioral health staff.”

*Response:* We accepted the comments and have added definitions for the terms.

*Comment:* A commenter recommended clarifying the definitions of “homeliving manager” and “homeliving supervisor” by switching the definitions to more accurately reflect what each position is responsible for. In the alternative, if the manager is to be responsible for physically supervising students, the commenter recommended changing the name of the “homeliving supervisor” to “homeliving administrator.”

*Response:* We considered this comment and made no change.

### *Section 36.71 What Is the Purpose of This Part?*

*Comment:* A commenter recommended changing the definition for “homeliving situation” to: “Any program where education instruction and residential services are provided for students enrolled in Bureau-funded schools, who are housed at a Bureau-funded school facility, and who receive care, before and after school hours, in a manner in which they do not have to depend on family or guardianship.”

*Response:* We considered this comment, but, determined no change was necessary.

*Comment:* A commenter suggested replacing the term “homeliving situations” with “homeliving programs.”

*Response:* We considered the comment and revised § 36.71.

*Section 36.75 What Qualifications Must Homeliving Staff Possess?*

*Comment:* A commenter suggested that the competency or professional standards of homeliving personnel should not be compromised in § 36.75. The commenter stated that agreements to operate a quality program with quality staff is between BIE and the tribal governing body and should not be discretionary at the school staff level. The commenter stated that it may be appropriate to waive such qualifications only where the employee is a trainee under the supervision of a fully qualified supervisor, and it is a tribal decision, not a Federal one.

*Response:* We considered the comment, but determined that no change was necessary because a tribe can instruct the school supervisor if the school is a tribally operated school.

*Comment:* A commenter stated that requirements for improved criteria for homeliving staff in § 36.75 should not be unfunded mandates. The commenter supports a complete overhaul of the current funding formula in order to create a universal therapeutic model in all BIE-funded schools.

*Response:* While the Committee was aware of the funding needs for Indian education, the scope of the Committee was to draft regulations to implement the statute. Therefore, while the Committee notes the commenter's general comments about the need for additional funding and different funding priorities, these comments are outside of the scope of the rulemaking. Therefore, we made no change to the regulations.

*Comment:* A commenter suggested that substance abuse education and prevention training should be added to required training in § 36.75.

*Response:* This is already required in § 36.86(c)(2).

*Comment:* A commenter suggested: (1) that a determination of good cause in § 36.75(b)(2) should be made at the Education Line Officer level, (2) that guidelines or standards be provided for determining what good cause means, and (3) that a timeframe for waivers be added.

*Response:* We considered the comment and accepted it in part and rejected it in part. We rejected the part of the comment that raised issues the Committee considered in its deliberations. We accepted the part of the comment on adding a timeframe for waivers and revised § 36.75(b)(2).

*Comment:* A commenter recommended that in § 36.75 the delay of the effective date for higher standards for homeliving staff apply to current

staff as well as to new hires, and that the effective date depend on the Department's securing additional funding.

*Response:* The Committee considered the effective date of the higher standards for homeliving staff. The comment does not raise new issues that the Committee did not consider. Therefore, we considered the comment, but we made no change to the regulations.

*Comment:* A commenter suggested changing § 36.75 to allow the homeliving supervisor rather than the "school supervisor" to grant a waiver for a showing of good cause.

*Response:* We considered the comment, but we believed the proposed language provides for the entity with decision-making authority to decide whether to grant the waiver. Therefore, we made no change to the regulations.

*Comment:* Several commenters suggested that some homeliving program staff may not need the same level of educational standards as others because they work at night when students are sleeping and recommended changing the required standards in § 36.75(a).

*Response:* In adopting these regulations, the Committee considered that there are different levels of homeliving program staff. The Committee considered and did not adopt different standards for night-duty. Therefore, we considered the comment, but made no change to the regulations.

*Comment:* A commenter recommended that § 36.75 include a certificate program in lieu of the 32-hour post-secondary semester hour requirement since BIE-operated boarding schools are unique. Another commenter suggested that § 36.75 provide for development of a residential certificate of training including at least 80 hours in topics such as child development, behavior management, working with students at risk, special education students, social interaction skills, etc., as an option to requiring 32/48 hours of college credit. The certificate would be updated every 3 years with at least 10 hours of training.

A second commenter recommended that distance education and computer modules be available to staff.

A third commenter recommended that § 36.75 provide that each facility is responsible to set its own appropriate training requirements to fit its specific needs. This commenter further suggested that requiring 32 hours of post-secondary semester hours in a field related to child development and at least 1 year of relevant experience will cause a drop in the applicant pool and

that a degree does not necessarily make an applicant competent for a position.

*Response:* We considered these comments and made no changes to the rule.

*Comment:* A commenter suggested that if the definitions for "homeliving manager" and "homeliving supervisor" are switched, the qualifications for the two positions should also be switched in § 36.75.

*Response:* We considered this comment and made no changes because the definitions were not switched.

*Comment:* A commenter recommended deleting § 36.75(b) "when this part is published in final" because it is unnecessary considering the 2009–2010 timeframe and could be interpreted to apply only to those persons employed at the time the rule becomes final.

*Response:* We accepted this comment and changed the text to delete the reference to the rule's publication date.

*Comment:* A commenter recommended that we clarify § 36.75(b)(2) by stating whether the supervisor empowered to grant waivers from new qualifications has procedural guidance to follow.

*Response:* We considered this comment and revised the paragraph to clarify the process. The paragraph now states that a person not meeting the qualifications, "may, upon showing good cause, petition the school supervisor (or the homeliving supervisor for peripheral dorms) for a waiver from the new qualifications."

*Comment:* A commenter stated that: (1) 32 hours of post-secondary semester hours for basic homeliving staff would dramatically reduce the applicant supply pool for those positions at the local level; (2) We should clarify whether new hires before SY 2009–2010 must meet the new requirements; (3) Funding should be made available for dormitory programs, for training and post-secondary credit hours for meeting the recommended qualification requirements, and for meeting the needs of the students being served.

*Response:* We considered the comment, but did not change the section. While the training requirement may reduce the number of applicants for these positions, dormitory staff must have more training because of new needs children are exhibiting in behavior, new diagnostic findings affecting learning skills, and changes in life styles affecting family concepts and step-parenting, among other issues.

*Comment:* A commenter stated that if "recreation staff" is included in "homeliving staff" that fact should be

stated and clarified in the definition of "homeliving staff."

*Response:* The committee considered this in its original deliberation and no new issues have been raised by this comment that were not already considered by the committee.

*Section 36.76 Who Is in Charge of all Homeliving Operations?*

*Comment:* A commenter stated that the purpose of § 36.76 is unclear. If the section means there will be clear lines of authority, the question should be revised to read: "Must there exist clear lines of authority?" and the answer should read: "Yes, clear lines of authority must be established through the development of an organizational chart approved by the local board \* \* \*". Or, if this section means to make a point other than establishing the requirement that an organizational chart be developed; the section needs to be rewritten for clarity.

*Response:* We accepted this comment and made corresponding changes to the rule.

*Section 36.77 What Are the Homeliving Program Staffing Requirements?*

*Comment:* Several commenters recommended that the delayed implementation of the homeliving staff-to-student ratios to school year 2009–10 in § 36.77 depend on the Department's securing the necessary funding to make the new ratios affordable.

*Response:* We considered this comment and revised the section title in response.

*Comment:* A commenter suggested that adult-to-child staffing ratios in dormitories for Native American children should be lower than 1:20–30 if other similar programs require lower adult-to-child staffing ratios.

*Response:* The Committee considered adult-to-child staffing ratios in drafting the regulations. The Committee discussed the pros and cons of changing staffing ratios and chose to adopt credentialing rather than changing staffing ratios. The comments raise no new issues to consider. Therefore, we made no change to the regulations.

*Comment:* A commenter recommended that § 36.77 should state what ratios will be effective until SY 2009–2010.

*Response:* We considered this comment, but made no changes to the regulation.

*Comment:* A commenter suggested that since § 36.75 requires higher quality staff, § 36.77 should provide that this staff be compensated appropriately, but

questioned how positions will be funded if IRG is cut.

*Response:* The Committee in its original deliberations considered the impact of these requirements and balanced them with the needs of the students. No new issues are raised by the commenter that were not considered in the original deliberations. Therefore, we made no change to the rule.

*Comment:* A commenter suggested that § 36.77 state that existing staff-to-student ratios remain in effect until the new requirements are effective.

*Response:* The Committee considered this issue at the time it negotiated the regulations and the comment raises no new issues. Therefore, we made no change to the regulations.

*Comment:* A commenter questioned whether it is necessary in § 36.77(b) to have three different staff-to-student ratios on weekends because weekend staff is presumably supervising rather than conducting structured programs.

*Response:* The Committee considered this issue at the time it negotiated the regulations and the comment raises no new issues. Therefore, we made no change to the regulations.

*Comment:* A commenter recommended revising § 36.77 by revising the question to: "What is the minimum acceptable staffing supervisory requirements necessary to adequately supervise students and provide a safe environment?" and eliminating the introductory sentence.

*Response:* We considered this comment and changed the section title to read, "What are the homeliving program staffing requirements?"

*Section 36.79 What Are the Homeliving Behavioral Staff/Student Ratio Requirements?*

*Comment:* A commenter suggested that the regulations define the term "behavioral staff." Another commenter suggested clarifying whether a behavioral health professional is the same as a certified counselor, either school or MSW, in § 36.79.

*Response:* We accepted these comments and defined "behavioral staff" at § 36.79.

*Comment:* A commenter stated that the regulations at § 36.79(b) change "should" to "must" for providing one full-time behavioral health professional for off-reservation boarding schools.

*Response:* We considered the comment, but we did not accept it. This issue was raised during the original Committee deliberations. In order to reach consensus the Committee adopted the provision that the homeliving program "should" consider providing these services. This comment does not

raise any new issues that were not considered by the committee when originally discussing this issue. Therefore, we made no change to the regulations.

*Comment:* A commenter recommended that § 36.79 be amended to delete a 20-hour minimum.

*Response:* We accepted this comment and added new paragraph (d) in response.

*Comment:* A commenter stated that funding increases are necessary to meet the criteria in § 36.79 for the number of and the educational level of behavioral health professionals who are necessary in homeliving programs to address issues such as abuse, neglect, trauma, cultural conflict, and lack of school success.

*Response:* Budget-related issues are fully addressed elsewhere in this preamble.

*Comment:* A commenter recommended revising § 36.79(b) to state "must," not "should" so that behavioral health may not be made optional and students who live off-reservation are not deprived of this requirement.

*Response:* This issue was raised during the original deliberations and, to reach consensus, the Committee adopted the provision that the homeliving program "should" consider providing these services. This comment does not raise any new issues that were not considered by the Committee when originally discussing this issue. Therefore, the comment is not accepted.

*Section 36.80 If a School Has Separated Boys' and Girls' Homeliving Programs, May the Same Behavioral Staff Be Used for Each Program?*

*Comment:* A commenter recommended clarifying the term "homeliving count period" in § 36.80.

*Response:* We considered the comment, but we are making no change to the regulations because the homeliving count period is defined in the funding formula regulations at 25 CFR 39.

*Section 36.81 May a Homeliving Program Use Support Staff or Teachers to Meet Behavioral Health Staffing Requirements?*

*Comment:* A commenter recommended revising the second sentence in § 36.81 to allow for flexibility in how a residential facility meets the behavioral health staffing requirements. The sentence is recommended to read: "The only exception is if the individual support staff employee or teacher has the appropriate behavioral health license or

certification or other appropriate training and supervision.”

*Response:* We accepted this comment in part and revised the second sentence to read as follows: “The only exception is if the individual support staff employee or teacher has the appropriate behavioral health license or certification.”

*Comment:* A commenter recommended eliminating the exception in § 36.81 or adding a requirement that the individual’s contract provide that the teaching and behavioral health services are not to be provided simultaneously.

*Response:* We considered this comment in conjunction with other comments on this issue. If teachers have the requisite training, then they may be able to provide the service as long as the provisions of § 36.82 have been met. Therefore, we made no change to the rule.

#### *Section 36.82 May Behavioral Health Staff Provide Services During the Academic School Day?*

*Comment:* A commenter recommended adding a provision for maximizing time the behavioral health staff is working with students during the time students are in the dorms, especially on weekends. Another commenter stated that we should amend § 36.82 to require that behavioral health staff provide services outside the academic school day except in emergencies and provide that schools have the necessary staff to handle emergency situations. The commenter suggested that behavioral health staff may observe students in their academic environment.

*Response:* In response to these comments, we revised § 36.82.

#### *Section 36.83 How Many Hours Can a Student be Taken Out of the Academic Setting to Receive Behavioral Health Services?*

*Comment:* A commenter suggested that § 36.83 be clarified so that schools may not use behavioral health staff outside their intended services.

*Response:* We considered the comment and addressed the suggested changes in § 32.82.

*Comment:* A commenter recommended that we amend § 36.83 to provide that students not be taken out of the academic setting to receive behavioral health services unless it is an emergency and to provide that schools have their own behavioral health professionals. The commenter recommended that Licensed Practicing Counselors not have a caseload of students. Another commenter

recommended revising § 36.83 to state: “should not spend more than” rather than “may spend no more than” in order to provide staff the needed flexibility to appropriately address each student’s individual needs and provide necessary services.

*Response:* We considered these comments and made changes consistent with the other comments on this section.

#### *Section 36.84 Can a Program Hire or Contract or Acquire by Other Means Behavioral Health Professionals to Meet Staffing Requirements?*

*Comment:* A commenter recommended that § 36.84 provide that instructional time be guarded. Each student should be able to go through an initial screening provided by the counselors.

*Response:* We considered this comment, but no change to the rule is necessary.

*Comment:* A commenter recommended delaying implementation of behavioral staff license requirement until additional appropriations are obtained and recommended revising § 36.84, paragraph (b) by changing “and” to “or.”

*Response:* We accepted this comment and changed the rule.

*Comment:* A commenter recommended that more instruction be provided so BIE-operated and grant/contract school programs can strategize with one another to maximize services to students and minimize the cost of services. In some locations distance is a factor and highly qualified people are in extreme demand and few agree to travel long distances and/or agree to provide services to a large number of identified students. Restrictions imposed by preferences of authority hinder meeting the needs of students. Schools must have strong working relationships.

*Response:* We revised this section to allow tribes and schools to work together to provide these services to students.

#### *Section 36.85 Is a Nurse Required To Be Available in the Evenings?*

*Comment:* A commenter recommended that we amend § 36.85 to require that nursing staff be on campus not only during the academic hours, but also outside of academic hours because more accidents are going to happen outside of academic hours. Another commenter recommended making the requirement in § 36.85 for having a RN or LPN available in the evenings when enrolment is over 300 mandatory.

*Response:* The committee considered the response but rejected it.

#### *Section 36.86 Are There Staff Training Requirements?*

*Comment:* A commenter agreed with the increase in educational requirements for new staff and homeliving managers and supervisors in § 36.86.

*Response:* We made no change to § 36.86 because the comment required no change.

*Comment:* A commenter stated that in § 36.86 (a)(4) confidentiality should follow the Family Education Right to Privacy Act, not just the Health Information Privacy Act.

*Response:* We considered the comment and revised § 36.86(a)(4).

*Comment:* A commenter recommended inserting “surrogate” before “parent training” in § 36.86(b)(4) because staff serves as surrogate parents in residential settings.

*Response:* We accepted the idea behind the comment and changed § 36.86(b)(4) to read:

(4) Parenting skills/child care.

*Comment:* A commenter recommended revising the question in § 36.86 as follows: “Are there homeliving staff training requirements?”

*Response:* We considered this comment and revised the section text, but not the title. To be more inclusive, the section states that all homeliving program staff and employees that supervise students participating in homeliving services and activities must have appropriate certification or requirements and receive annual training in specified topics.

*Comment:* A commenter suggested that the first paragraph in § 36.86, which applies to training that is “appropriate to the certification and licensing requirements,” is erroneous since none of the required training will result in licensing or certification, except in First Aid or CPR. Homeliving staff is not required to be licensed or certified (§ 36.75). The commenter recommended that this section be revised to provide flexibility so that residential programs may determine the frequency and timing of training as appropriate to their situations, including providing for refresher sessions for returning staff and training that may be completed over a 2- or 3-year period (lessening the financial impact) or more frequently as new developments occur (such as new or revised policy).

Another commenter suggested correcting the cite to “Health Information Patient Privacy Act” to “Health Insurance Portability and Accountability Act of 1996” in § 36.86(a)(4).

A commenter suggested changing the title in § 36.86(a)(7) to “Child Abuse

Reporting Requirements and Protection Procedures.”

Another commenter recommended that in § 36.86(b)(7) we clarify the term “child development” or make the terms applicable only to those residential programs with younger children in residence since some residential programs serve only high school age students. If paragraph (7) remains in this section, the commenter recommended adding “if appropriate to the student ages served.”

*Response:* We considered these comments and made some changes based upon them. We did not change the section title because changes that we made in response to other comments made this unnecessary. Similarly, other changes we made regarding licensure eliminated the need to consider that suggestion. On the issue of training being only a refresher for returning staff, the committee considered this issue in its original deliberations and this comment raised no new issues.

*Comment:* A commenter suggested that § 36.86 include a recommendation that courses be provided on dealing with the tween, pre-teen, and teenage adolescent years.

*Response:* We considered this comment, but these various developmental stages are covered under the broader title of child development. We revised this section to clarify this.

*Section 36.90 What Recreation, Academic Tutoring, Student Safety and Health Care Services Must Homeliving Programs Provide?*

*Comment:* A commenter suggested clarifying in § 36.90 what a “homeliving program board” is and whether it applies to schools with peripheral dorms.

*Response:* We accepted the comment and changed § 36.90 to read: “ \* \* \* as deemed necessary by the local school board or homeliving program board.”

*Comment:* A commenter suggested that if staff are required to provide these services in § 36.90, it should be required that students be assigned to participate in the service schedule.

*Response:* We considered this comment, but it is not something that should be addressed in regulations.

*Comment:* A commenter recommended that in § 36.90 we require that library and computer program requirements must be met in the dormitory facility because of the staff-to-student ratio, individual student needs, and academic needs in all subject areas and age/grade levels.

*Response:* These issues are addressed in § 36.102.

*Section 36.91 What Are the Program Requirements for Behavioral Health Services?*

*Comment:* A commenter suggested that requirements that a reiteration of the Intensive Residential Guidance program elements in § 36.91 is unnecessary because the IRG program was eliminated. Also, costs associated with some of the required services are prohibitive and not all students will require each of the enumerated services. The commenter recommended that this section be revised as follows: “ \* \* \* behavioral health program must include the following services as needed:”

*Response:* We considered this comment and clarified the rule to provide that the homeliving program should have the capacity to provide these services.

*Section 36.92 Are There Any Activities That Must be Offered by a Homeliving Program?*

*Comment:* A commenter recommended that we clarify § 36.92(a) by providing a requirement for one hour of scheduled, structured physical activity Monday through Thursday instead of through Friday since many residential programs dismiss students on Friday through Sunday. The commenter recommended requiring two hours total of physical or recreational activities for those present in the dorm on the weekend. Another commenter suggested revising § 36.92(b) to allow each tribe/school to decide whether to offer and to decide the content of any of these topics to ensure consistency with local community values.

*Response:* We accepted the comment regarding Monday through Thursday physical activity and changed the rule to reflect this. We partially accepted the suggestion regarding personal wellness, excluding the idea of consistency with tribal mores, since it is implicit in the ability to design a wellness program and some schools, such as off-reservation boarding schools, may not have local tribal mores.

*Comment:* A commenter recommended changing § 36.92(e) to refer to activities as “personal wellness,” since mandating “character” and “sex education” may not be congruent with the local values or belief systems of the community.

*Response:* We accepted the comment and modified § 36.92(e).

*Comment:* A commenter recommended deleting the term “structures” in § 36.92 since it is not clear whether a lesson plan is required or students may pick from a choice of activities.

*Response:* We considered this comment, but did not modify the rule. The goal of the committee was to have a structured organized physical activity without a program goal or plan. We believe that the term “structure” adequately connotes this.

*Section 36.93 Is a Homeliving Handbook Required?*

*Comment:* A commenter suggested that in § 36.93 we add the terms “school board approval.”

*Response:* We considered the comment and found the comment unpersuasive. Therefore, we made no change to the regulations.

*Comment:* A commenter recommended revising § 36.93 by requiring that the home living handbook be provided rather than referring to student rights and responsibilities and requiring that the handbook be provided during the first week the students are in residence rather than before the first day of school.

*Response:* We accepted this comment and revised the section accordingly.

*Comment:* A commenter recommended changing “school staff” to “homeliving staff” or “residential staff” in § 36.93(d).

*Response:* We considered limiting circulation of the handbook only to homeliving staff. However, we believe that all staff should receive a copy of the handbook.

*Section 36.94 What Must a Homeliving Handbook Contain?*

*Comment:* Commenters recommended the following changes to § 36.94: revise (i) to read “Personnel and position listing or a copy of the residential staff organizational chart”; revise

(l) to “Transportation Policy and Procedures”; revise (o) to read “Drug, Alcohol and Tobacco Products Policy” and revise (q) to read: “Medication Administration Policy.”

*Response:* We made several of the suggested changes, but did not require an organizational chart or transportation procedures. We do not see the need for requiring an organizational chart. The rule requires transportation policies, not procedures.

*Comment:* A commenter suggested that we add drug/alcohol policy and consequences and move up its priority in § 36.94.

*Response:* We accepted part of the comment and revised § 36.94(o) to read “drug/alcohol policy.” We rejected the rest of the comment because the list is a list of all items that must be included in the handbook and is not a priority list. Therefore, we did not make the change to the regulations.

*Section 36.95 What Sanitary Standards Must Homeliving Programs Meet?*

*Comment:* A commenter recommended changing the term “rooms” to “dorm rooms” for clarification in § 36.95, and adding “unless need arises sooner” at the end of paragraph (c). A commenter recommended that § 36.95(d) and (e) be revised to read that linens and toiletries “may be provided as needed.”

*Response:* We considered this change, but did not revise the rule because the existing is adequate.

*Comment:* A commenter recommended that § 36.95 require that dorms pass inspection by some entity, and that each site be visited at least once in five years to verify that health, safety and standards are met.

*Response:* We considered this comment and made no change because health and safety inspection requirements vary by locality.

*Section 36.96 May Students Be Required to Assist With Daily or Weekly Cleaning?*

*Comment:* A commenter noted that in § 36.96 students should be required to assist in cleaning the dorm.

*Response:* We considered the comment, but made no change because that rule already provides for students to assist with cleaning.

*Comment:* A commenter suggested we add a provision to § 36.96 for cleaning and maintaining a healthy environment by dorm staff as role models for students.

*Response:* We considered the comment and rejected it including any additional provisions on cleaning in § 36.96.

*Section 36.97 What Basic Requirements Must a Program’s Health Services Meet?*

*Comment:* A commenter recommended revising § 36.97(a) to also allow for agreements between a tribe or tribal school board and IHS.

*Response:* We accepted this comment and changed the rule accordingly.

*Section 36.98 Must the Homeliving Program Have an Isolation Room for Ill Children?*

*Comment:* A commenter recommended modifying § 36.98 to require that a sickroom be available, but space does not have to be dedicated to this use only. Another commenter recommended rewriting the question in § 36.98 to read: “Must the homeliving program provide special accommodations for ill children?” Using the singular reference to “an

isolation room,” coupled with the first sentence and the second sentence could cause confusion as to whether one or two rooms are required.

*Response:* We considered these comments and made appropriate changes to the rule.

*Section 36.100 Are There Minimum Requirements for Student Attendance Checks?*

*Comment:* A commenter recommended revising § 36.100(d) to state that night time physical checks will be made once every hour, except high school student rooms which will be checked every two hours.

*Response:* We considered the comment, but did not change the rule. High school students are just as likely, or even more likely, to be out of their rooms at night.

*Comment:* A commenter recommended revising § 36.100(f) to make it applicable only when residential staff knows that a student will be absent from school.

*Response:* We accepted this comment and changed the rule accordingly.

*Comment:* A commenter suggested that § 36.100 provide that each child accepted into the dorm should agree to undergo drug and alcohol screening if needed.

*Response:* We considered the comment and made no change to the rule. Schools should develop their own drug and alcohol policies.

*Section 36.102 What Student Resources Must be Provided by A Homeliving Program?*

*Comment:* A commenter recommended that we clarify the terms “library resources” and “reasonable access” in § 36.102.

*Response:* We considered the comment, but found no change to the rule necessary.

*Comment:* A commenter recommended adding at the beginning of § 36.102(b): “To the extent the student does have their own \* \* \*”

*Response:* We considered the comment, but made no change, as the committee believes it is in the best interest of students to have textbooks available after hours.

*Section 36.110 Must Programs Provide Space for Storing Personal Effects?*

*Comment:* A commenter recommended adding the following after the first sentence in § 36.110: “This requirement is met if a residential room door can be locked” because some residential facilities will have difficulty meeting the lockable storage space requirement due to space limitations and/or age of the facility.

*Response:* We considered this comment, but made no change. The committee wanted the students to have one lockable space, such as a drawer, closet, or storage bin.

*Section 36.111 Can a Tribe, Tribal Governing Body, or Local School Board Waive the Homeliving Standards?*

*Comment:* A commenter suggested that in § 36.111 we clarify how 60 days are calculated and recommended that a school board or tribal body submit a proposed waiver by January 1 of the year preceding implementation in order to provide time for revisions and for starting the year with alternative standards in place.

*Response:* We considered the comment and rejected it in part because the regulatory section is based on statutory language. We accepted some of the comment and made the following changes:

A tribal governing body or local school board may waive some or all of the standards established in this part by adopting a written resolution that determines that the standards are inappropriate for the needs of the tribe’s students. The approved alternative standards are effective on the first day of the following school year.

*Section 36.112 What Are the Consequences for Failing to Meet the Requirements of This Part?*

*Comment:* A commenter suggested adding a new question after § 36.112: “What happens to a school that does not meet these standards?”

*Response:* We considered the comment, but made no changes because this question is limited to whether the school can be closed or consolidated for failing to meet these standards and not for other reasons that are addressed in other regulations.

*Section 36.120 What Type of Reporting Is Required to Ensure Accountability?*

*Comment:* A commenter recommended that we identify a specific time for reporting enrolment figures in § 36.120.

*Response:* We accepted the comment and revised § 36.120(c) and (d).

*Comment:* A commenter recommended adding a requirement in § 36.120 that the report be filed 45 days after the end of the school year and a statement that the accountability report is the only report a residential program is required to file.

*Response:* We accepted the suggestions to add a 45-day filing period.

*Comment:* A commenter recommended adding a provision in § 36.120 to require that the report also be submitted to the Division of Residential Life in BIE.

Response: We did not accept this comment. The BIE already receives the report, and there is no reason to require in the rule that the report go to a particular division within the office.

### III. Procedural Matters

#### A. Regulatory Planning and Review (E.O. 12866)

This document is a significant rule and the Office of Management and Budget (OMB) has reviewed the rule under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The rule deals exclusively with homeliving programs and is not expected to have a significant effect on budgets.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule has been prepared in consultation with the U.S. Department of Education.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule spells out student rights, the procedures for their dissemination, and the procedures for implementing them. The rule is not expected to have a significant effect on budgets.

(4) Office of Management and Budget has determined that this rule raises novel legal or policy issues. For this reason review is required under E.O. 12866.

#### B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### C. Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. Nothing in the rule proposes rules of private property rights, constitutional or otherwise, or invokes the Federal condemnation power or alters any use of Federal land held in trust. The focus of this rule is homeliving programs. A takings implication assessment is not required.

#### D. Federalism (E.O. 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Nothing in this rule has substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not implicate State government. A Federalism Assessment is not required.

#### E. Consultation With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, we have identified potential effects on federally recognized Indian tribes that will result from this rule. Accordingly: (1) We have consulted with the affected tribe(s) on a government-to-government basis. The consultations have been open and candid to allow the affected tribe(s) to fully evaluate the potential effect of the rule on trust resources. (2) We have fully considered tribal views in drafting this final rule. (3) We have consulted with the appropriate bureaus and offices of the Department about the political effects of this rule on Indian tribes. The BIE and the Office of the Assistant Secretary—Indian Affairs have been consulted.

#### F. Paperwork Reduction Act

This rulemaking requires information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is required. Accordingly, the Department prepared submissions on these collections for review and approval by OMB. Having reviewed the Department's submissions, along with any comments that were submitted by the reviewing public, OMB has approved the information collection requirements in this rulemaking and has assigned the OMB control number 1076-0164. In addition to this number, the information collections in part 39 are also covered by OMB control numbers 1076-0134 and 1076-0122.

The information collected will be used to enable the Bureau to better administer Bureau-funded schools subject to this rulemaking. In all instances, the Department has striven to lessen the burden on the public and ask for only information essential to administering the responsibility to federally recognized tribes. The public may make additional comments on the accuracy of our burden estimates (which are explained in detail in the preamble

to the proposed rule published on February 25, 2004, at 69 FR 8752) and any suggestions for reducing this burden to the OMB Interior Desk Officer, Docket Number 1076-AE49, Office of Information and Regulatory Affairs, 202/395-6566 (facsimile); email: [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov).

#### G. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required.

#### H. Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Department has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

#### List of Subjects in 25 CFR Part 36

Indians—Education, Schools, Elementary and secondary education programs, grant programs—Indians, Government programs—education.

Dated: October 19, 2007.

**Carl J. Artman,**

*Assistant Secretary—Indian Affairs.*

■ For the reasons given in the preamble, part 36 of Title 25 of the Code of Federal Regulations is amended by revising subpart G to read as follows:

#### PART 36—MINIMUM ACADEMIC STANDARDS FOR THE BASIC EDUCATION OF INDIAN CHILDREN AND NATIONAL CRITERIA FOR DORMITORY SITUATIONS

##### Subpart G—Homeliving Programs

Sec.

§ 36.70 What terms do I need to know?

§ 36.71 What is the purpose of this part?

##### Staffing

§ 36.75 What qualifications must homeliving staff possess?

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§ 36.77 What are the homeliving staffing requirements?

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- § 36.83 How many hours can a student be taken out of the academic setting to receive behavioral health services?
- § 36.84 Can a program hire or contract or acquire by other means behavioral health professionals to meet staffing requirements?
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- § 36.86 Are there staff training requirements?

**Program Requirements**

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- § 36.99 Are immunizations required for residential program students?
- § 36.100 Are there minimum requirements for student attendance checks?
- § 36.101 How often must students who have been separated for emergency health or behavioral reasons be supervised?
- § 36.102 What student resources must be provided by a homeliving program?
- § 36.103 Are there requirements for multipurpose spaces in homeliving programs?

**Privacy**

- § 36.110 Must programs provide space for storing personal effects?

**Waivers and Accountability**

- § 36.111 Can a tribe, tribal governing body or local school board waive the homeliving standards?

- § 36.112 Can a homeliving program be closed, transferred, consolidated, or substantially curtailed for failure to meet these standards?
- § 36.120 What type of reporting is required to ensure accountability?

**Subpart G—Homeliving Programs**

**Authority:** 25 U.S.C. 13; 25 U.S.C. 2008; Pub. L. 107–110 (115 Stat. 1425).

**§ 36.70 What terms do I need to know?**

The following definitions apply to this subpart:  
*Behavioral health professional* means a State licensed or State certified Social Worker, School Counselor, Drug and Alcohol Counselor, School Psychologist, or School Psychometrist responsible for coordinating a broad range of needs including:

- (1) Support groups;
- (2) Individual counseling;
- (3) Crisis intervention;
- (4) Preventive activities; and
- (5) Coordination of referrals and outside services with appropriate providers.

*Behavioral Health Program* means a homeliving based service designed to decrease barriers to learning or increase positive, personal well-being by:

- (1) Providing early intervention services, coordinating crisis intervention and prevention services;
- (2) Promoting a positive social and emotional environment;
- (3) Reducing the incidence of problems; and
- (4) Referring students with behavioral needs that require professional medical care to an appropriate residential care facility.

*Behavioral health services* means the services provided by a school behavioral health program as defined in this section.

*Homeliving Manager* means the employee responsible for direct supervision of the homeliving program staff and students.

*Homeliving Program* means a program that provides room and board in a boarding school or dormitory to residents who are either:

- (1) Enrolled in and are current members of a public school in the community in which they reside; or
- (2) Members of the instructional program in the same boarding school in which they are counted as residents and:

- (i) Are officially enrolled in the residential program of a Bureau-operated or funded school; and
- (ii) Are actually receiving a homeliving program provided to all students who are provided room and board in a boarding school or dormitory.

*Homeliving Program Staff* means the employee(s) responsible for direct supervision of students in the homeliving area.

*Homeliving Supervisor* means the employee with overall administrative responsibility for supervising students, programs, and personnel in the homeliving area.

**§ 36.71 What is the purpose of this part?**

The purpose of this part is to establish standards for homeliving programs.

**Staffing**

**§ 36.75 What qualifications must homeliving staff possess?**

- (a) Homeliving staff must possess the qualifications shown in the following table:

Position	Required training
(1) Homeliving Supervisor ....	Must be qualified based on size and complexity of the school, but at minimum possess a bachelor's degree.
(2) Homeliving Manager .....	Must be qualified based on the size and complexity of the student body but must at a minimum have an associate's degree no later than 2008.
(3) Homeliving Program Staff	Must have at least 32 post-secondary semester hours (or 48 quarter hours) in an applicable academic discipline, including fields related to working with children, such as, child development, education, behavioral sciences and cultural studies.

(b) A person employed as a homeliving program staff:

- (1) Should meet the requirements of paragraph (a) of this section by the 2009–2010 school year; and
- (2) May, upon showing good cause, petition the school supervisor (or the homeliving supervisor for peripheral dorms) for a waiver from the new qualifications.

**§ 36.76 Who is in charge of all homeliving operations?**

One staff member who has the authority to ensure the successful functioning of all phases of the homeliving program should be designated as in charge of all homeliving operations. All staff should be advised of the lines of authority through an organizational chart approved by the local board responsible

for operations of the homeliving program.

**§ 36.77 What are the homeliving staffing requirements?**

Homeliving programs must meet the staffing requirements of this section.

- (a) Effective with the 2009–2010 school year, each homeliving program must maintain the following student minimum supervisory requirements on weekdays:

Grade level	Time of day	Ratio	Grade level	Time of day	Ratio	Grade level	Time of day	Ratio
Elementary (Grade 1–6).	Morning .....	1:20.	High School (Gr. 7–12).	Night .....	1:40.		Evening .....	1:30.
	During school	As school needs.		Morning .....	1:20.		Night .....	1:50.
	Evening .....	1:20.		During school	As school needs.			

(b) The following staffing ratios apply on weekends:

Grade level	Time of day	Ratio
Elementary (Grade 1–6) .....	Morning/day .....	1:20.
	Evening .....	1:20.
	Night .....	1:40.
High School (Gr. 7–12) .....	Morning/day .....	1:40.
	Evening .....	1:40.
	Night .....	1:50.

**§ 36.78 What are the staffing requirements for homeliving programs offering less than 5 nights service?**

For homeliving programs providing less than 5 nights service, the staffing levels from § 36.77 apply. To fill this requirement, the program must use only employees who work a minimum of 20 hours per week.

**§ 36.79 What are the homeliving behavioral professional staff/student ratio requirements?**

Behavioral health professional(s) is necessary in homeliving programs to address issues, such as abuse, neglect, trauma, cultural conflict, and lack of school success. Each homeliving program must provide a minimum of one half-time behavioral health professional for every 50 students.

(a) The program may fill the staffing requirements of this section by using contract services, other agencies (including the Indian Health Service) or private/nonprofit volunteer service organizations.

(b) Off-reservation homeliving programs should consider providing one full-time behavioral health professional for every 50 students.

(c) For purposes of this section, a one half-time behavioral health professional is one that works for the homeliving program a minimum of 20 hours per week.

(d) For purposes of this section, in instances where the behavioral health services are obtained through other programs, the behavioral health professional must be available at the request of the homeliving program.

**§ 36.80 If a school or dormitory has separated boys' and girls' homeliving programs, may the same behavioral professional be used for each program?**

Yes, a program may use the same behavioral professional for both boys' and girls' programs. However, behavioral health staffing requirements

are based on the combined enrollment during the homeliving count period.

**§ 36.81 May a homeliving program use support staff or teachers to meet behavioral health staffing requirements?**

No, a homeliving program must not use support staff or teachers to meet behavioral health staffing requirements. The only exception is if the individual support staff employee or teacher has the appropriate behavioral health license or certification.

**§ 36.82 May behavioral health professional(s) provide services during the academic school day?**

Behavioral health professional(s) must average at least 75 percent of their work hours with students in their dormitories. These work hours must occur outside of the academic school day, except in emergency situations as deemed by the administrative head of the homeliving program or designee. The purpose of this requirement is to maximize contact time with students in their homeliving setting.

**§ 36.83 How many hours can a student be taken out of the academic setting to receive behavioral health services?**

A student may spend no more than 5 hours per week out of the academic setting to receive behavioral health services from the homeliving behavioral health professional(s), except for emergency situations.

**§ 36.84 Can a program hire or contract or acquire by other means behavioral health professionals to meet staffing requirements?**

A program may hire or contract behavioral health professionals to meet staffing requirements or acquire such services by other means such as through a Memorandum of Understanding with other programs.

(a) At least one individual must be a licensed or certified school counselor or

a social worker who is licensed/certified to practice at the location where the services are provided.

(b) For additional staffing, other individuals with appropriate certifications or licenses are acceptable to meet staffing requirements.

**§ 36.85 Is a nurse required to be available in the evenings?**

No, a program is not required to make a nurse (LPN or RN) available in the evenings. However, this is encouraged for homeliving programs with an enrollment greater than 300 or for programs that are more than 50 miles from available services.

**§ 36.86 Are there staff training requirements?**

(a) All homeliving program staff as well as all employees that supervise students participating in homeliving services and activities must have the appropriate certification or licensing requirements up to date and on file. Programs must provide annual and continuous professional training and development appropriate to the certification and licensing requirements.

(b) All homeliving program staff as well as all employees who supervise students participating in homeliving services and activities must receive annual training in the topics set out in this section before the first day of student occupancy for the year.

- (1) First Aid/Safety/Emergency & Crisis Preparedness;
- (2) CPR—Automated External Defibrillator;
- (3) Student Checkout Policy;
- (4) Confidentiality (Health Information Privacy Act and the Family Education Right to Privacy Act.);
- (5) Medication Administration;
- (6) Student Rights;
- (7) Child Abuse Reporting Requirements and Protection Procedures; and
- (8) Suicide Prevention.

(c) Homeliving staff as well as all employees that supervise students participating in homeliving services and activities must be given the following training annually:

- (1) De-escalation/Conflict Resolution;
- (2) Substance Abuse Issues;
- (3) Ethics;
- (4) Parenting skills/Child Care;
- (5) Special Education and Working with Students with Disabilities;
- (6) Student Supervision Skills;
- (7) Child Development (recognizes various stages of development in the student population);
- (8) Basic Counseling Skills; and
- (9) Continuity of Operations Plan (COOP).

#### Program Requirements

##### **§ 36.90 What recreation, academic tutoring, student safety, and health care services must homeliving programs provide?**

All homeliving programs must provide for appropriate student safety, academic tutoring, recreation, and health care services for their students, as deemed necessary by the local school board or homeliving board.

##### **§ 36.91 What are the program requirements for behavioral health services?**

(a) The homeliving behavioral health program must make available the following services:

- (1) Behavioral Health Screening/Assessment;
- (2) Diagnosis;
- (3) Treatment Plan;
- (4) Treatment and Placement;
- (5) Evaluation; and
- (6) Record of Services (if applicable, in coordination with the student's Individual Education Plan).

(b) Each homeliving behavioral health program must have written procedures for dealing with emergency behavioral health care issues.

(c) Parents or guardians may opt out of any non-emergency behavioral health services by submitting a written request.

(d) Parents or guardians must be consulted before a child is prescribed behavioral health.

(e) Medication in a non-emergency situation.

##### **§ 36.92 Are there any activities that must be offered by a homeliving program?**

Yes, a homeliving program must make available the following activities:

- (a) One hour per day of scheduled, structured physical activity Monday through Thursday, and two hours of scheduled physical activities on the weekends for any students who are in residence on the weekends;

(b) One hour per day of scheduled, structured study at least four days per week for all students, and additional study time for students who are failing any classes;

- (c) Tutoring during study time;
- (d) Native language or cultural activities; and

(e) Wellness program that may include character, health, wellness, and sex education.

##### **§ 36.93 Is a homeliving handbook required?**

Yes, each program must publish a homeliving handbook, which may be incorporated into a general student handbook. During the first week the students and staff are in the dormitory, the homeliving program must:

(a) Provide each student with a copy of the handbook that contains all the provisions in § 36.94;

(b) Provide all staff, students, and parents or guardians with a current and updated copy of student rights and responsibilities;

(c) Conduct an orientation for all students on the handbook and student rights and responsibilities; and

(d) Ensure that all students, school staff, and to the extent possible, parents and guardians confirm in writing that they have received a copy of and understand the homeliving handbook.

##### **§ 36.94 What must a homeliving handbook contain?**

A homeliving handbook must contain all of the following, and may include additional information:

- (a) Mission/Vision Statement;
- (b) Discipline Policy;
- (c) Parent/Student Rights and Responsibilities;
- (d) Confidentiality;
- (e) Sexual Harassment Policy;
- (f) Violence/Bullying Policy;
- (g) Homeliving Policies and Procedures;
- (h) Services Available;
- (i) Personnel and Position Listing;
- (j) Emergency Procedures and Contact Numbers;
- (k) Bank Procedures;
- (l) Transportation Policy;
- (m) Check-Out Procedures;
- (n) Dress Code;
- (o) Drug/Alcohol Policy;
- (p) Computer Usage Policy;
- (q) Medication Administration Policy and Procedure; and
- (r) Isolation/Separation Policy.

##### **§ 36.95 What sanitary standards must homeliving programs meet?**

Each homeliving program must meet all of the following standards:

- (a) Restrooms, showers, and common areas must be cleaned daily;

(b) Rooms must be cleaned daily;

(c) Linens must be changed and cleaned weekly;

(d) Linens are to be provided;

(e) Basic Toiletries must be provided; and

(f) Functional washing machines and dryers must be provided.

##### **§ 36.96 May students be required to assist with daily or weekly cleaning?**

Yes, students can be required to assist with daily or weekly cleaning. However, the ultimate responsibility of cleanliness rests with the homeliving supervisor and local law or rules regarding chemical use must be followed.

##### **§ 36.97 What basic requirements must a program's health services meet?**

(a) A homeliving program must make available basic medical, dental, vision, and other necessary health services for all students residing in the homeliving program, subject to agreements between the BIE and the Indian Health Service or between a tribally-operated homeliving program and the Indian Health Service or tribal health program.

(b) A homeliving program must have written procedures for dealing with emergency health care issues.

(c) Parents or guardians may opt out of any non-emergency services by submitting a written request.

(d) The homeliving supervisor or designee must act *in loco parentis* when the parent or guardian cannot be found.

##### **§ 36.98 Must the homeliving program have an isolation room for ill children?**

Yes, the homeliving program must have an isolation room(s) available for ill students. The isolation room (or rooms, if needed) must be made available for use by students with contagious conditions. Contagious boys and girls should have separate rooms. The isolation room(s) should have a separate access to shower and restroom facilities. Students isolated for contagious illness must be supervised as frequently and as closely as the circumstances and protocols require, but at least every 30 minutes.

##### **§ 36.99 Are immunizations required for residential program students?**

Each student must have all immunizations required by State, local, or tribal governments before being admitted to a homeliving program. Annual flu shots are not required, but are encouraged.

##### **§ 36.100 Are there minimum requirements for student attendance checks?**

Yes, there are minimum requirements for student attendance checks as follows:

(a) All students must be physically accounted for four times daily;

(b) Each count must be at least two hours apart;

(c) If students are on an off-campus activity, physical accounts of students must be made at least once every two hours or at other reasonable times depending on the activity;

(d) At night all student rooms should be physically checked at least once every hour;

(e) If a student is unaccounted for, the homeliving program must follow its established search procedures; and

(f) When homeliving staff is aware of a student who is going to be absent from school, the homeliving program is required to notify the school.

**§ 36.101 How often must students who have been separated for emergency health or behavioral reasons be supervised?**

Students who have been separated for emergency behavioral or health reasons must be supervised as frequently and as closely as the circumstances and protocols require. No student will be left unsupervised for any period until such factors as the student's health based on a medical assessment, the safety of the student, and any other applicable guidance for dealing with behavior or health emergencies are considered.

**§ 36.102 What student resources must be provided by a homeliving program?**

The following minimum resources must be available at all homeliving programs:

(a) Library resources such as access to books and resource materials, including school libraries and public libraries which are conveniently available;

(b) A copy of each textbook used by the academic program or the equivalent for peripheral dorms; and

(c) Reasonable access to a computer with Internet access to facilitate homework and study.

**§ 36.103 What are the requirements for multi-purpose spaces in homeliving programs?**

Homeliving programs must provide adequate areas for sleeping, study, recreation, and related activities.

**Privacy**

**§ 36.110 Must programs provide space for storing personal effects?**

Yes, students are entitled to private personal spaces for storing their own personal effects, including at least one lockable closet, dresser drawer, or storage space. However, all drawers, dressers, storage space, or lockable space are the property of the homeliving program and are subject to random search.

**Waivers and Accountability**

**§ 36.111 Can a tribe, tribal governing body, or local school board waive the homeliving standards?**

A tribal governing body or local school board may waive some or all of the standards established by this part if the body or board determines that the standards are inappropriate for the needs of the tribe's students.

(a) If a tribal governing body or school board waives standards under this section, it must, within 60 days, submit proposed alternative standards to the Director, BIE.

(b) Within 90 days of receiving a waiver and proposal under paragraph (a) of this section, the Director must either:

(1) Approve the submission; or

(2) Deliver to the governing body or school board a written explanation of the good cause for rejecting the submission.

(c) If the Director rejects a submission under paragraph (c) of this section, the governing body or school board may submit another waiver and proposal for approval. The standards in this part remain in effect until the Director approves alternative standards.

**§ 36.112 Can a homeliving program be closed, transferred, consolidated, or substantially curtailed for failure to meet these standards?**

No, a homeliving program cannot be closed, transferred to any other authority, consolidated, or its programs substantially curtailed for failure to meet these standards.

**§ 36.120 What type of reporting is required to ensure accountability?**

The homeliving program must provide to the appropriate local school board or alternative board such as a homeliving board, the tribal governing body, BIE, and the Secretary of the Interior, an annual accountability report within 45 days following the end of the school year consisting of:

(a) Enrollment figures identified by the homeliving count period;

(b) A brief description of programs offered;

(c) A statement of compliance with the requirements of this part and, if the program is not in compliance, recommendations for achieving compliance; and

(d) Recommendations to improve the homeliving program including identification of issues and needs.

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**NATIONAL LABOR RELATIONS BOARD**

**29 CFR Part 102**

**Revisions of Regulations Concerning Procedures for Filing Appeals to Denial in Whole or Part of Initial FOIA Requests**

**AGENCY:** National Labor Relations Board (NLRB).

**ACTION:** Final Rule.

**SUMMARY:** The National Labor Relations Board (NLRB) is amending regulations concerning the procedures for filing an appeal to adverse FOIA determinations. The revisions require that appeals be filed within 28 calendar days of the service of the notification of the adverse determination.

**EFFECTIVE DATE:** December 5, 2007.

**FOR FURTHER INFORMATION CONTACT:** Lester A. Heltzer, Executive Secretary, National Labor Relations Board, Room 11600, 1099 14th Street NW., Washington, DC 20570-0001, Telephone (202) 273-1067, e-mail address [Lester.Heltzer@nlrb.gov](mailto:Lester.Heltzer@nlrb.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Current regulation**

Section 102.117(c)(2)(v) provides in part that "An appeal from an adverse determination made pursuant to paragraph (c)(2)(iii) of this section must be filed within 20 working days of the receipt by the person making the request of the notification of the adverse determination where the request is denied in its entirety; or, in the case of a partial denial, within 20 working days of the receipt of any records being made available pursuant to the request."

**II. Proposed revision**

Since the Agency does not send such determinations on initial requests by certified mail, it has no objective means of determining when a requestor receives an adverse determination. Therefore, it is impossible to know from which date to compute time periods from adverse FOIA determinations.

Other agencies' practices support using the date of service rather than date of receipt as the appropriate date for computing timeliness of FOIA appeals. Under 28 CFR Ch. 1, Sec. 16.9, appeals from adverse Department of Justice FOIA determinations must be filed "within 60 days of the date of the letter denying" the request. See also, *Center for Biological Diversity v. Gutierrez*, 451 F. Supp.2d 57 (D.D.C. 2006)(Department of Commerce regulations provide that appeals from adverse determinations must be received by 5 p.m. EST on the