

(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.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.158 What procedures apply to the Secretary's review of an initial decision?

When the Secretary reviews an initial decision, the Secretary—

(a) Notifies the applicant in writing that it may file a written statement or comments; and

(b) Mails to each party written notice of the Secretary's final decision.

(Authority: 20 U.S.C. 7711(a))

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.159 When and where does a party seek judicial review?

If an LEA or a State that is aggrieved by the Secretary's final decision following an administrative hearing proceeding under this subpart wishes to seek judicial review, the LEA or State must, within 60 days after receiving notice of the Secretary's final decision, file with the United States Court of Appeals for the circuit in which that LEA or State is located a petition for review of the final agency action, in accordance with section 8011(b) of the Act.

(Authority: 20 U.S.C. 7711(b))

Subpart K—Determinations Under Section 8009 of the Act

§ 222.160 What are the scope and purpose of this subpart?

(a) *Scope.* This subpart applies to determinations made by the Secretary under section 8009 of the Act.

(b) *Purpose.* The sole purpose of the regulations in this subpart is to implement the provisions of section 8009. The definitions and standards contained in this subpart apply only with respect to section 8009 and do not establish definitions and standards for any other purpose.

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

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

(a) *General rules.* (1) A State may take into consideration payments under sections 8002 and 8003(b) of the Act (including hold harmless payments calculated under section 8003(e)) in allocating State aid if that State has a State aid program that qualifies under § 222.162, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency (LEA) only in the proportion described in § 222.163.

(ii) A State may not take into consideration that portion of an LEA's payment that is generated by the portion of a weight in excess of one under section 8003(a)(2)(B) of the Act (children residing on Indian lands) or payments under section 8003(d) of the Act (children with disabilities), section 8003(f) of the Act (heavily impacted LEAs) and section 8003(g) of the Act (LEAs with high concentrations of children with severe disabilities).

(iii) A State may not take into consideration increases in payment under the following subsections of section 3(d) of Pub. L. 81-874:

(A) Section 3(d)(2)(B) (increase for heavily impacted LEAs).

(B) Section 3(d)(2)(C) (increase for children with disabilities and children with specific learning disabilities).

(C) Section 3(d)(2)(D) (increase for children residing on Indian lands).

(D) Section 3(d)(3)(B)(ii) (increase for unusual geographical factors).

(2) No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

(3) No State, whether or not it has an equalization program that qualifies under § 222.162, may, in allocating State aid, take into consideration an LEA's eligibility for payments under the Act if that LEA does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 8009 in allocating State aid to LEAs

must reimburse any LEA for any amounts taken into consideration for any fiscal year to the extent that the LEA did not in fact receive payments in those amounts during that fiscal year.

(5) A State may not take into consideration payments under the Act or under Public Law 874 before the State's State aid program has been certified by the Secretary.

(b) *Data for determinations.* (1) Except as provided in paragraph (b)(2) of this section, determinations under this subpart requiring the submission of financial or school population data must be made on the basis of final data for the second fiscal year preceding the fiscal year for which the determination is made if substantially the same program was then in effect.

(2)(i) If the Secretary determines that the State has substantially revised its State aid program, the Secretary may certify that program for any fiscal year only if—

(A) The Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in § 222.162 for the fiscal year for which the determination is made; and

(B) The State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met that standard for the fiscal year for which the determination is made, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA.

(ii) Data projections submitted by a State must set forth the assumptions upon which the data projections are founded, be accompanied by an assurance as to their accuracy, and be adjusted by actual data for the fiscal year of determination that must be submitted to the Secretary as soon as these data are available.

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

Current expenditures means the total charges incurred for the benefit of the school year in an elementary (including pre-kindergarten) or secondary school program. "Current expenditures" does not include—

(1) Expenditures for capital outlay;

(2) Expenditures for debt service for capital outlay;

(3) Expenditures from State sources for special cost differentials of the type specified in § 222.162(c)(2);

(4) Expenditures of revenues from local or intermediate sources that are designated for special cost differentials of the type specified in § 222.162(c)(2);

(5) Expenditures of funds received by the agency under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) or under Pub. L. 81-874 that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.163; or

(6) Expenditures of funds received by the agency under Pub. L. 81-874 that were not taken into consideration under the State aid program and exceed the proportion of funds the State was permitted to take into consideration under that law.

Equalize expenditures means to meet the standard set forth in § 222.162.

Local tax revenues means compulsory charges levied by an LEA or by an intermediate school district or other local governmental entity on behalf of an LEA for current expenditures for educational services. "Local tax revenues" include the proceeds of ad valorem taxes, sales and use taxes, income taxes and other taxes. Where a State funding formula requires a local contribution equivalent to a specified mill tax levy on taxable real or personal property or both, "local tax revenues" include any revenues recognized by the State as satisfying that local contribution requirement.

Local tax revenues covered under a State equalization program means "local tax revenues" as defined in paragraph (c) of this section contributed to or taken into consideration in a State aid program subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

Revenue means an addition to assets that does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other

liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds. Furthermore, the term "revenue" includes only revenue for current expenditures.

State aid means any contribution, no repayment for which is expected, made by a State to or on behalf of LEAs within the State for current expenditures for the provision of free public education.

Total local tax revenues means all "local tax revenues" as defined in paragraph (c) of this section, including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

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

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

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

(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calcu-

lating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses "weighted pupil," "classroom," "instructional unit," or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Revenues and current expenditures included in determinations.* All revenues or current expenditures must be included for each LEA in the State in determining the percentage of disparity under paragraph (a) of this section.

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

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections