

**§ 222.164**

**34 CFR Ch. II (7-1-08 Edition)**

8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

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

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709(d)(1)(B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 may be applied by a State to actual receipts of those payments or payments under Pub. L. 81-874.

(Authority: 20 U.S.C. 7709(d)(1)(B))

**§ 222.164 What procedures does the Secretary follow in making a determination under section 8009?**

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to the State and all LEAs in the State and provide them with a complete copy of the submission initiating the proceeding. In addition, the party initiating the proceeding shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

(b) *Submission.* (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2)(i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable

period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an opportunity to present their views as follows:

(i) Upon receipt of a timely request for a predetermination hearing, the Secretary notifies all LEAs and the State of the time and place of the predetermination hearing.

(ii) Predetermination hearings are informal and any LEA and the State may participate whether or not they requested the predetermination hearing.

(iii) At the conclusion of the predetermination hearing, the Secretary holds the record open for 15 days for the submission of post-hearing comments. The Secretary may extend the period for post-hearing comments for good cause for up to an additional 15 days.

(iv) Instead of a predetermination hearing, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. In such a case, the Secretary notifies all LEAs and the State that this alternative procedure is being followed and that they have up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State may submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

(c) *Determinations.* The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a

hearing to the State or any LEA adversely affected by the determination.

(Approved by the Office of Management and Budget under control number 1810-0036)

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

NOTE TO PARAGRAPH (b)(2) OF THIS SECTION: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

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

**§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?**

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 30 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* (1) The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(2) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(f) *Filing requirements.* (1) Any written submission under this section must be