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Part IV

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34 CFR Part 222

Office of Elementary and Secondary Education; Impact Aid Program; Proposed Rules

DEPARTMENT OF EDUCATION

34 CFR Part 222

RIN 1810–AA84

Office of Elementary and Secondary Education; Impact Aid Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to issue regulations governing the Impact Aid Program under title VIII of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Improving America's Schools Act of 1994 (IASA). The program, in general, provides assistance for maintenance and operations costs to local educational agencies (LEAs) that are affected by Federal activities. These proposed regulations are needed to implement a number of changes from the previous Impact Aid laws, Public Law 81–874 and Public Law 81–815, which were repealed when title VIII of the ESEA was enacted, and clarify and improve the administration of the program.

DATES: Written comments must be received on or before December 6, 1996.

ADDRESSES: All comments concerning the proposed regulations should be addressed to Catherine Schagh, U.S. Department of Education, Impact Aid Program, 600 Independence Avenue, S.W., Room 4200, Portals Building, Washington, DC 20202–6244. The fax number for submitting these comments is (202) 205–0088. Comments may also be sent through the Internet to Catherine__Schagh@ed.gov.

To ensure that public comments have maximum effect in developing the final regulations, the Department urges that each comment clearly identify the specific section or sections of the proposed regulations that the comment addresses and that comments be in the same order as the proposed regulations.

A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: For further information on this part, please contact Catherine Schagh. Telephone: (202) 260–3858. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On October 20, 1994, the President signed into law the IASA (Pub. L. 103–382). The IASA reauthorized the Impact Aid Program as title VIII of the ESEA, and made a number of changes to the program. Under the Impact Aid Program, assistance is provided for maintenance and operations costs to LEAs affected by Federal activities, including the presence of tax-exempt Federal property and an increased student population due to Federal property ownership or activities.

On March 4, 1995, President Clinton issued a regulatory reinvention initiative directing heads of departments and agencies to review all existing regulations to eliminate those that are outdated and modify others to increase flexibility and reduce burden. The Department has undertaken a thorough review of the existing Impact Aid Program regulations in light of this initiative. In addition, Department staff have met on numerous occasions with Impact Aid applicants and other interested parties at National Association for Federally Impacted Schools meetings to converse and solicit views about possible changes to the current regulations due both to statutory changes and burden reduction.

As a part of that process, the Secretary published in the Federal Register on September 29, 1995, a final regulation removing regulations that were obsolete due to changes made in the statute by the IASA, or that were unnecessary because they simply repeated statutory provisions. In addition, in that regulation, the Secretary reorganized, streamlined, and revised the remaining regulations so that they were more logically organized, clearly stated, and easier to use. Except where changes were necessary to conform the previous regulations to the new Impact Aid law (title VIII of the ESEA), and for a few minor procedural changes, those final regulations contained the same substantive provisions as the previous regulations.

The Secretary indicated in those technical regulations that he intended to publish a notice of proposed rulemaking (NRPM) in the future to implement provisions of the new law that were not included in those final regulations, and to make any substantive changes that were identified as needed under the Secretary's reinvention review. The Secretary now is publishing this NPRM to accomplish those objectives.

Summary of Provisions

General

In subpart A (general provisions), § 222.4 would be revised to be consistent with the proof of mailing requirements under the Education Department General Administrative Regulations that apply to other Department programs. Under this provision, private metered postmarks or mail receipts that are not dated by the U.S. Postal Service would not be accepted as proof of mailing.

Implementation of New Statutory Provisions

1. *Overpayment forgiveness provision (section 8012 of the ESEA).* New §§ 222.12–222.15 would be added to subpart A to implement the Secretary's new authority in section 8012 of the ESEA to forgive Impact Aid overpayments under certain circumstances. Proposed § 222.12 would specify what overpayments the Secretary considers eligible for forgiveness under section 8012. As described in proposed § 222.12(a)(1), the provision generally would apply to funds received by an LEA in excess of the amount the LEA was eligible to receive under Pub. L. 81–874, Pub. L. 81–815, or title VIII of the ESEA, but only to the extent that a balance is owed on or after the effective date of the final regulations. The provision would apply to a full overpayment under those laws (including any portion of the overpayment that has been repaid) if the overpayment is the subject of a written request for forgiveness filed by the LEA before the effective date of the final regulations, or of a timely written request for an administrative hearing or reconsideration. This is because these requests generally preserve the full overpayment debt pending resolution of the disputed action.

The Secretary would not extend application of this forgiveness provision to the limited portions of the program that require LEAs to expend the Federal funds for specific purposes other than general maintenance and operations (such as for disaster assistance under section 7 of Public Law 81–874 or section 16 of Public Law 81–815, or to provide a free appropriate education for federally connected children with disabilities under section 8003(d) of the ESEA or section 3(d)(2)(C) of Pub. L. 81–874). Unlike most other ESEA programs, Congress has not granted authority in the Impact Aid program statute to the Secretary to grant waivers of certain programmatic requirements, such as for the required use of funds.

Accordingly, proposed § 222.12(a)(2) specifies that the provision would not apply to overpayments under section 7 of Public Law 81–874 or section 16 of Public Law 81–815 (disaster assistance program). This is because these overpayments generally are due either to an LEA's misexpenditure of funds or to its receipt of funds in excess of its actual eligible disaster assistance costs. Likewise, this provision would not apply to overpayments resulting from an LEA's failure to expend or account for funds properly under section 8003(d) of the ESEA (subpart D of the regulations) or its predecessor provision, section 3(d)(2)(C) of Public Law 81–874, for certain federally connected children with disabilities, or under section 8003(g) of the ESEA for certain federally connected children with severe disabilities (subpart F of these proposed regulations).

Proposed § 222.12(a)(2) also specifies that the forgiveness provision would not apply to amounts received by an LEA that, as determined under section 8003(g) of the ESEA (authorizing payments to LEAs for costs associated with certain federally connected children with severe disabilities), were in excess of the maximum basic support payment for which the LEA was eligible under section 8003(b) of the ESEA. Under section 8003(g), if an LEA receives Federal funds for Impact Aid purposes from sources other than the Impact Aid program (*e.g.*, the Department of Defense), and the total of the funds from other sources and the LEA's payment under section 8003(b) exceeds the maximum basic support payment for which the LEA was eligible, the excess amount must be made available for redistribution to LEAs that provide an education to certain federally connected children with severe disabilities.

Proposed § 222.13 sets forth the basic requirements that an LEA must meet for an eligible overpayment to be forgiven in whole or part. Section 222.13(a)(1) provides that the Secretary would forgive an eligible overpayment in whole or part only if an LEA timely files a request for forgiveness and certain information and documentation. In addition, as specified in proposed § 222.13(a)(2), the Secretary must determine in accordance with proposed § 222.14, in the case either of an LEA's or the Department's error, that repayment of the LEA's total eligible overpayments will result in an undue financial hardship on the LEA and seriously harm the LEA's educational program. In the case of Department error, an overpayment also would qualify if the Secretary determined, on a case-by-case basis, that repayment would be manifestly unjust.

Proposed § 222.13(b) specifies the time limits within which an LEA must file its forgiveness request and supporting information and documentation. Under that proposed provision, an LEA generally must file a forgiveness request in writing within 30 days of its initial receipt of a notice of an overpayment. For an overpayment for which an LEA has submitted a written forgiveness request before the effective date of the final regulations, the LEA would be required to file the supporting information and documentation within 30 days from the effective date of the regulations. For all other overpayments, proposed § 222.13(b)(3) specifies that an LEA would be required to provide the specific information and documentation concerning financial hardship within the same time period that applies to the forgiveness request. In either case, the Secretary may grant a written extension of the applicable time period for the submission of the information and documentation due to lack of availability of that data.

Proposed § 222.13(c)(1) specifies the types of information and documentation that an LEA must provide in support of its written forgiveness request. All LEAs would be required to provide the following (as applicable) for the LEA's fiscal year preceding the date of the request: A copy of the LEA's annual financial report to the State; the LEA's local real property tax rate for current expenditure purposes; the maximum local real property tax rate for current expenditure purposes allowed by State law, or if there is no State maximum, the average local real property tax rate of all LEAs in the State; and the LEA's equalized assessed valuation of real property per pupil (EAVPP) (or other measure of fiscal capacity as defined by the State), and the average of that measure for all LEAs in the State. The Secretary believes this is the minimum information necessary to determine an LEA's eligibility for overpayment forgiveness under the standard proposed in § 222.14, and the amount to be forgiven under proposed § 222.15.

For an LEA whose boundaries are the same as a Federal military installation, the LEA also would be required to provide the average per pupil expenditure (PPE) of the LEA, and the average PPE in all LEAs in the State. In addition, proposed § 222.13(c)(2) requires an LEA requesting forgiveness under the manifestly unjust repayment exception (proposed § 222.13(a)(2)(ii)), or based upon no present or prospective ability to repay the debt (proposed § 222.14(a)(2)), to submit additional information and documentation in support of its request for forgiveness under those special provisions.

Proposed § 222.13(d)(1) clarifies that, like a request for reconsideration, a request for forgiveness of an overpayment does not extend the time within which an applicant must file an administrative hearing request under § 222.151, unless the Secretary (or Secretary's delegatee) extends that time limit in writing. Similarly, proposed § 222.13(d)(2) provides that a request for an administrative hearing or for reconsideration does not extend the time within which an applicant must file a request for forgiveness under §§ 222.12–222.15, unless the Secretary (or the Secretary's delegatee) extends that time limit in writing.

Proposed § 222.14 describes how the Secretary will determine whether repayment of an eligible overpayment would result in undue financial hardship and seriously harm the LEA's educational program. It is the Secretary's intent in publishing these regulations to establish a reasonable measure of undue financial hardship that may be objectively applied, and that fairly balances the competing interests of applicants eligible for redistribution of overpaid Impact Aid funds with the interests of those districts applying for forgiveness. Comments and suggestions are invited on whether these proposed regulations achieve that balance and reasonably measure undue financial hardship.

As described in proposed § 222.14(a)(1)(i), to meet this standard the total eligible overpayments of the LEA must be at least $10,000. The Secretary believes that an LEA could repay a total eligible debt of less than $10,000, in installments if necessary, without undue financial hardship.

In addition, under proposed § 222.14(a)(1)(ii), for an LEA in a State with a maximum local real property rate (other than an LEA with boundaries that are the same as a Federal military installation), the LEA's local real property tax rate for current expenditure purposes for the preceding fiscal year would be required to be at least 90 percent of the maximum rate allowed by State law. The Secretary believes that this is a reasonable level of effort to require an LEA to make to repay its debts. For such an LEA in a State without a maximum local real property tax rate, the LEA's local real property tax rate for current expenditure purposes, for the preceding fiscal year, would be required to be at least equal to the State average local real property tax rate.

Under proposed § 222.14(b), the Secretary would use the same method to determine an LEA's tax rate for current expenditure purposes as the Secretary uses for eligibility and payments under section 8003(f) of the Act (heavily impacted LEAs).

Because an LEA's capacity to raise local revenues is determined by the level of the assessed values of its real property, as well as by the tax rate it levies, the Secretary also would consider the fiscal capacity of these LEAs under proposed § 222.14(a)(1)(iii). The Secretary would define ''fiscal capacity'' for this purpose (under proposed § 222.14(c)) to mean the equalized assessed valuation of real property per pupil (EAVPP), unless otherwise defined by State law. Under this proposed standard, the fiscal capacity of these LEAs for the preceding fiscal year would be required to be below the State average. The Secretary believes that if an LEA's fiscal capacity is greater than the State average, it would not be an undue financial burden on the LEA to increase its local revenues to repay the Impact Aid debt. The Secretary is interested in receiving comments on this fiscal capacity measure and its threshold.

Under proposed § 222.14(a)(1), an LEA with boundaries that are the same as a Federal military installation (''coterminous LEA'') would not be required to meet the local effort standards under proposed § 222.14(a)(1)(ii) and (iii). This is because most of the real property in coterminous LEAs is not subject to local real property taxes. Therefore, for these coterminous LEAs, the Secretary would consider instead their average per pupil expenditure. Under proposed § 222.14(a)(1)(iv), a coterminous LEA would qualify only if its average per pupil expenditure (PPE) for the preceding fiscal year did not exceed 125 percent of the average PPE in all LEAs in the State for that preceding fiscal year.

Finally, under proposed § 222.14(a)(2), any LEA would meet the undue financial hardship standard if the Secretary determined that neither the successor nor the predecessor LEA has the present or prospective ability to repay the eligible overpayment. The Secretary anticipates that this provision will be applicable only in extremely limited situations, such as when a debtor LEA has no present revenue and is not expected to have any future revenue.

Proposed § 222.15 describes the amount of an eligible overpayment that the Secretary forgives once an LEA has timely filed a forgiveness request and the required information and documentation. Under § 222.15(a), the Secretary would forgive an eligible overpayment in whole if the Secretary has determined that the LEA meets the undue financial hardship test under § 222.14 and the LEA's preceding year's current expenditure closing balance was five percent or less of its preceding fiscal year's total current expenditures.

The Secretary considers five percent of an LEA's total current expenditures to be a reasonable minimal amount for an LEA to carry over for a smooth transition from the end of one year to the beginning of the next. Unless an LEA has more than that amount of funds at the end of the year, the Secretary believes that it would impose an undue financial burden on the LEA to be required to repay the eligible overpayment. Therefore, for an eligible LEA with five percent or less in carryover funds at the end of the LEA's fiscal year preceding the date of the forgiveness request, the Secretary would forgive an eligible overpayment in whole.

In addition, under proposed § 222.15(a) the Secretary would forgive an eligible overpayment in whole if, in the case of an error by the Secretary, the Secretary determines that repayment by the LEA would be manifestly unjust. The Secretary anticipates that an LEA would qualify for forgiveness in whole under this special provision only on the rare occasion in which an LEA received an overpayment due to an error on the part of the Secretary that an LEA could not reasonably be expected to identify and report. For example, if the Secretary calculated a payment for an LEA using an incorrect local contribution rate, and the LEA did not know nor could it reasonably have known that the local contribution rate was too high, the resulting overpayment would be forgiven in whole by the Secretary under this standard.

Proposed § 222.15(b)(1) specifies that the Secretary will forgive an eligible overpayment in part if an LEA otherwise meets the requirements for forgiveness and the undue financial hardship test, but the LEA's preceding fiscal year's current expenditure closing balance was more than five percent of its preceding fiscal year's total current expenditures. In cases where an LEA has more than five percent carryover at the end of its preceding fiscal year, the Secretary believes that it would not be an undue financial burden for an LEA to repay all or a portion of the excess Federal funds it received. Under § 222.15(b)(2), if an LEA qualifies for forgiveness of a debt in part, the LEA would be expected to repay the amount by which its preceding fiscal year's closing balance exceeded five percent of its preceding fiscal year's total current expenditures. The Secretary would forgive the remaining amount of the LEA's eligible overpayment balance.

2. *Payments for Federal property (section 8002 of the ESEA).* In subpart B, the Secretary proposes two revisions to § 222.22, a portion of which implements the new statutory requirement that the Secretary must deduct from an LEA's section 8002 payment the amount of revenue that an LEA received during the previous fiscal year from activities conducted on eligible Federal property. The Secretary is proposing these revisions in response to public request for clarification. Paragraph (c) would be revised to clarify that the Secretary deducts these revenues from the LEA's section 8002 maximum payment amount, rather than from an LEA's section 8002 payment after any proration due to insufficient appropriations. Paragraph (d) would be revised to clarify that the Secretary does not consider Federal payments-in-lieu-of-taxes (PILOT or PILT), such as PILTs for Federal entitlement lands under Public Law 97–258 (31 U.S.C. 6901–6906), to be revenues from activities on Federal property for the purpose of this section. This is because, historically in the Impact Aid Program, Congress has not considered these types of payments as revenue resulting from activities conducted on Federal property.

In addition, a new § 222.23 would be added to subpart B to implement the new statutory method in section 8002(b)(3) of the ESEA for valuing the Federal property that is the basis for payments under section 8002 (previously section 2 of Public Law 81–874). Under section 8002(b)(3), the aggregate assessed value of eligible Federal property must be determined, by the local official responsible for assessing the value of real property in the LEA, on the basis of the current ''highest and best use'' of taxable properties ''adjacent'' to the parcel of eligible Federal property.

Proposed § 222.23(a) would require a local official first to determine a fair market value for the eligible Federal property based upon the highest and best use of the adjacent taxable parcels. The official then would be required to adjust that fair market value by any percentage, ratio, index, or other factor that the official would use, if the eligible Federal property were taxable, to determine its assessed value for the purpose of generating local real property tax revenues for current expenditures. The proposed regulation also clarifies that the official may assume that there was a transfer of ownership of the

eligible Federal property for the year for which the section 8002 assessed value is being determined.

Numerous section 8002 applicants have requested the Department to establish regulatory parameters for the ''highest and best use'' standard. In response to that request, proposed § 222.23(b) would define the terms ''adjacent'' and ''highest and best use.''

In doing so, the proposed regulation provides maximum flexibility to States and localities by basing the local official's determination of fair market value upon State or local law or guidelines if available, and by allowing consideration of the most developed and profitable use for which adjacent taxable property is physically adaptable and for which there is a need or demand for such use in the near future. The standards for ''highest and best use'' in these proposed regulations are based upon the *Uniform Appraisal Standards for Federal Land Acquisitions* (Washington, D.C.: U.S. Printing Office, 1992), which are developed by the Interagency Land Acquisition Conference and establish guidelines for Federal land acquisitions appraisals.

To address concerns articulated by applicants that this degree of flexibility could be subject to abuse by applicants, in accordance with the *Uniform Appraisal Standards* the proposed regulation also provides that a local official may not consider speculative or remote potential uses of adjacent property. In addition, if the highest and best uses of all adjacent properties are not the same, § 222.23(b) would require the local official to take into consideration the different potential uses of adjacent properties. For example, an official could not base the valuation of the entire Federal property only on the highest valued adjacent property (such as commercial property) if other adjacent properties had different potential uses (such as residential or agricultural property).

3. *Payments for children with severe disabilities (section 8003(g) of the ESEA).* A new subpart F would be added to implement the new authority in section 8003(g) of the ESEA for payments to certain LEAs for children with severe disabilities. In that subpart, proposed § 222.80 defines ''children with severe disabilities'' in a manner consistent with the definition of the term in 34 CFR § 315.4(d) of the regulations implementing the Individuals with Disabilities Education Act. Proposed § 222.81 describes the requirements that an LEA must meet to be eligible for and receive a payment under section 8003(g), including that the LEA must be eligible for a payment under section 8003(d) of the ESEA (payments for federally connected children with disabilities) for those children to be claimed as the basis for a payment under section 8003(g). Section 8003(g) specifies that eligible children must have a parent on active duty in the uniformed services with a compassionate post assignment. However, proposed § 222.81 does not include the term ''compassionate post assignment'' because no standard policy or definition regarding that term could be ascertained. Comments are invited on any measurable standard that could be used for the term.

Proposed § 222.82 explains how the Secretary would calculate the total amount of funds available for payments under section 8003(g) under the limited circumstances in which those funds are available. Proposed § 222.83 provides that the Secretary will give written notice to all potentially eligible LEAs if funds are available for payments under section 8003(g), and explains how an LEA would apply to the Secretary for those funds. Under this proposed regulation, to apply for section 8003(g) funds, an LEA would be required to submit documentation to the Secretary, within 60 days of the date of the Secretary's notice to the LEA that funds are available, detailing the total costs to the LEA of providing a free appropriate public education for the eligible children with severe disabilities.

Proposed § 222.84 establishes how the Secretary would calculate an LEA's payment under section 8003(g). Under that method, to avoid double payment for the same child, the Secretary would subtract the amount that the LEA received under section 8003(d) of the ESEA for that child. Finally, proposed § 222.85 clarifies that an LEA must use the funds it receives under section 8003(g) for the reimbursement of total costs, reported in its section 8003(g) application, of providing an educational program outside the schools of the LEA for the federally connected children with severe disabilities claimed under section 8003(g).

4. *Withholding and related procedures for Indian policies and procedures (sections 8004(d)(2) and 8004(e) (8)–(9) of the ESEA).* Proposed §§ 222.114–222.122 would be added to subpart G to implement the Secretary's expanded enforcement authority for Indian policies and procedures in sections 8004(d)(2) and 8004(e) (8)–(9) of the ESEA. Section 8004(a) of the ESEA, like the previous Impact Aid law, requires LEAs to establish certain Indian policies and procedures (IPPs), including policies and procedures to ensure that children residing on Indian lands participate in programs and activities on an equal basis with all other children, and that parents of the children residing on Indian lands and Indian tribes have an opportunity to present their views on those programs and activities.

Section 8004(d)(2) has expanded the Secretary's previous authority to enforce the implementation of IPPs. Under section 8004(d)(2), the Secretary may now take any appropriate action to enforce the IPP requirements, including withholding section 8003 funds from the LEA, after affording an opportunity for interested parties to present their views. In addition, section 8004(e)(8) has expanded the Secretary's previous withholding authority by requiring the Secretary to withhold an LEA's entire section 8003 payment, rather than only the portion of that payment that represents an increase due to a federally connected child's residence on Indian lands.

Because most IPP issues are resolved through technical assistance provided by the Impact Aid Program, the Secretary does not believe that it will be necessary to exercise this withholding authority in most cases. However, the Secretary's intent in publishing these regulations is to adopt clear and fair withholding procedures for LEAs and Indian tribes in the event of a withholding action. Comments and suggestions are invited on whether these proposed regulations are clear and whether they could be simplified.

To implement these expanded enforcement provisions, the Secretary proposes to revise § 222.95(g) of the current regulations, and to add new §§ 222.114–222.122. Section 222.95(g) currently requires an LEA that amends its IPPs following its annual review of those policies and procedures to send a copy of the amended IPPs to the Impact Aid Program Director for approval and to the affected tribe or tribes. That section would be revised to establish a definite time limit within which the LEA must send a copy of the amended IPPs to the Director and affected tribe or tribes, which would be within 30 days of the LEA's amendment.

New §§ 222.114–222.122 would describe withholding procedures implementing sections 8004(d)(2) and 8004(e)(8) of the ESEA. Proposed § 222.114 provides that the Assistant Secretary uses any appropriate actions to enforce IPP statutory and regulatory requirements, including the withholding of funds in accordance with §§ 222.115–222.122, after affording an opportunity to the affected LEA, parents, and Indian tribe or tribes to present their views.

Proposed § 222.115 describes the circumstances under which the Assistant Secretary will withhold payments that an LEA otherwise is eligible to receive under section 8003 of the Act. As described in proposed § 222.115(a), payments are withheld if the Assistant Secretary determines it is necessary to enforce IPP statutory or regulatory requirements. In addition, where a tribal complaint has resulted in an IPP hearing, proposed § 222.115(b) explains that the Assistant Secretary withholds payments if an LEA rejects the final determination of the Assistant Secretary, or refuses to implement the required remedy within the time established and the Assistant Secretary determines that the LEA would not otherwise undertake the required remedy within a reasonable time.

Proposed § 222.115 also clarifies that, with either type of a withholding action (that is, with or without a previous IPP hearing), the Assistant Secretary would not withhold payments under the specific circumstances described in proposed § 222.120. Those circumstances would include: (1) where the LEA has received a waiver from compliance with the IPP requirements from the affected tribe or tribes because of satisfaction with the LEA's provision of educational services to its federally connected children (§ 222.120(a)); where the tribe submits to the Assistant Secretary a written request not to withhold the LEA's section 8003 payments (§ 222.120(b)); where the Assistant Secretary determines that withholding section 8003 payments during the course of the school year would substantially disrupt the educational programs of the LEA (§ 222.120(c)); or where the LEA rejects the final determination of the Assistant Secretary and the tribe elects to have educational services provided by a Bureau of Indian Affairs School but some Indian students remain at the LEA (§ 222.120(d)).

Proposed § 222.116 describes how the Assistant Secretary initiates an IPP withholding proceeding. Under the proposed process, the Assistant Secretary would send a written notice of intent to withhold payments to the LEA and the affected Indian tribe or tribes, describing how the LEA has failed to comply with the applicable IPP requirements and advising the LEA of its rights under the withholding procedures.

Proposed § 222.117 describes the procedures the Assistant Secretary follows after issuing a notice of intent to withhold payments to an LEA. Proposed § 222.117(b) clarifies that an LEA that receives a notice of intent to withhold payments from the Assistant Secretary is not entitled to an administrative hearing under section 8011 of the ESEA and subpart J of the regulations.

Proposed § 222.117(c) provides that an LEA that already has participated in an IPP hearing, but rejects or refuses to implement the Assistant Secretary's final determination, would have the opportunity to justify by a timely filed written explanation with the Assistant Secretary why that withholding should not occur. The written explanation and any supporting documentation would be required to be filed within 10 days from the date of the LEA's receipt of the Assistant Secretary's written notice of intent to withhold funds.

On the other hand, if an LEA has not yet participated in a hearing concerning its compliance with IPP requirements, § 222.117(d) would permit the LEA an opportunity for a withholding hearing. An LEA would be required to file a written hearing request within 30 days from the date of its receipt of the Assistant Secretary's notice of intent to withhold funds.

Proposed § 222.118 describes how IPP withholding hearings will be conducted, which will be by a hearing examiner, with the opportunity for the parties to present their views in writing or orally. Under these procedures, the hearing examiner would make an initial withholding decision based upon written findings, which would be sent to both parties and to the affected tribe or tribes (§ 222.118(f)). That initial withholding determination would constitute the Secretary's final withholding decision without any further proceedings, unless one of the parties to the withholding hearing requests the Secretary's review of the hearing examiner's initial decision or the Secretary otherwise determines to review the decision.

Proposed § 222.119 describes which payments are subject to being withheld due to noncompliance with IPP requirements. Once a final withholding decision has been issued, all of an LEA—s section 8003 payments would be withheld under this provision, regardless of fiscal year, until the LEA either documents compliance, or exemption from compliance under proposed § 222.120.

As discussed previously, proposed § 222.120 clarifies the circumstances that exempt an LEA from a withholding action. One of those circumstances arises if the affected tribe or tribes files a written request that an LEA's section 8003 payments not be withheld. The Secretary encourages Indian tribes to make any such request as promptly as possible after receiving a notice of intent of withholding, to avoid any unnecessary administrative withholding proceedings and possible disruption to the LEA—s payments. If an Indian tribe wishes to make such a request, proposed § 222.121 explains the requirements that apply.

Finally, proposed § 222.122 clarifies the procedures that are followed if the Assistant Secretary determines not to withhold an LEA—s funds. The Assistant Secretary would notify the LEA and the affected Indian tribe or tribes in writing that the payments will be not be withheld, with an explanation of the reasons for that decision.

5. *Determinations under section 8009 of the ESEA.* Section 222.161 of subpart K would be revised to implement new terms used in section 8009 of the ESEA by adding definitions of the following three terms: local tax revenues, local tax revenues covered under a State equalization program, and total local tax revenues. Under section 8009, a State may take into consideration certain Impact Aid payments in allocating State aid if the Secretary determines that the State has a State aid program that is designed to equalize expenditures among the LEAs in the State.

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

In addition, the term ''local tax revenues covered under a State equalization program'' would be defined as local tax revenues contributed to or taken into consideration in a State aid program, but excluding all revenues from State and Federal sources. Finally, a definition would be added of the term ''total local tax revenues'' to mean all local tax revenues including revenues for education programs for children needing special services, vocational education, transportation, and the like but excluding all revenues from State and Federal sources.

Administrative Procedures

1. *Administrative hearings and judicial review (section 8011 of the ESEA).* Several changes would be made in subpart J to improve or clarify the administration of Impact Aid

administrative hearings. Section 222.151 would be revised to require an applicant's written request for an administrative hearing following an adverse action to be filed within 30 days of notice of that action, rather than within 60 days as is currently allowed. This change is proposed to expedite the Department's debt collection process so that the recovered funds can be redistributed more quickly to all eligible Impact Aid applicants. Because this provision would limit the current time period in which applicants adversely affected by Departmental action must file a hearing request, but could provide an overall benefit to all eligible Impact Aid applicants, the Secretary is particularly interested in receiving comments on this proposed provision.

Section 222.152, concerning requested reconsiderations, would be revised to clarify that either the Secretary, or the Secretary's delegate (such as the Assistant Secretary for Elementary and Secondary Education or the Director of the Impact Aid Program), could make reconsideration determinations. In addition, § 222.154 would be revised to require any party filing a written submission by facsimile transmission (FAX) in the course of an Impact Aid administrative hearing proceeding to file a follow-up hard copy within a reasonable period of time. This is a change from the current regulations, which permit the Secretary or an administrative law judge (ALJ) to request such a copy, but do not require a hard copy in all instances. The change is proposed to facilitate the operation of Impact Aid administrative hearing procedures and ensure that original signed documents are consistently in the hearing record.

Section 222.157 would be revised in paragraph (a) to require an ALJ to issue an initial, rather than a recommended, decision. This is a change from the current regulations, which allow an ALJ to issue either an initial decision that becomes final without further Secretarial review (in the absence of an appeal or independent Secretarial review), or a recommended decision requiring Secretarial review. This change would expedite the administrative hearing process for applicants and provide more consistency to the administrative hearing procedures, while still preserving the parties' appeal rights. Section 222.157(a) also would clarify that when an initial decision becomes final without Secretarial review, the Department's Office of Hearings and Appeals will notify the parties of the finality of that decision. In addition, in accordance with the Department's longstanding policy, § 222.157(b) would be revised to clarify that any party (not just the applicant) may request Secretarial review of an initial decision.

Finally, § 222.158 would be revised correspondingly to reflect that the Secretary's review would be of an ALJ's initial decision, and to clarify that the Secretary mails to each party written notice of the final decision.

2. *Determinations under section 8009 of the ESEA.* Subpart K of the regulations (Determinations under Section 8009 of the Act) would be revised to clarify the specific procedures to be followed when a proceeding is initiated under section 8009 of the ESEA. Section 222.164 would be amended in paragraph (a)(2) to provide that whenever a proceeding is initiated under section 8009 of the ESEA, the initiating party would be required to 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 would be required to 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 before the Secretary makes a determination.

These steps would enable the Department to make more timely certification determinations. Section 8009(b)(1) of the ESEA is changed from the previous Impact Aid law (section 5(d)(2) of Pub. L. 81–874), in that section 8009(b)(1) prohibits a State from reducing its State aid payments due to Impact Aid before certification by the Secretary. Therefore, to enable States to make timely State aid payments to LEAs without unnecessary adjustments, it is essential that the Department make certification determinations as rapidly as possible once a proceeding is initiated.

Section 222.164(b)(5) would be revised to clarify the predetermination procedures that the Secretary follows when a party requests the opportunity to present views before the Secretary makes a determination. Specifically, upon receipt of a timely request for a predetermination hearing, the Secretary would notify all LEAs and the State of the time and place of the predetermination hearing. The proposed regulation clarifies that predetermination hearings are informal and any LEA and the State are free to participate whether or not they requested the predetermination hearing. Under this proposed regulation, at the conclusion of the predetermination hearing, the Secretary would hold the record open for 15 days for the submission of post-hearing comments. The Secretary could extend the period for post-hearing comments for good cause for up to an additional 15 days.

In addition, the proposed revisions to § 222.164(b)(5) would clarify the Secretary's flexible approach to predetermination hearings for States and local school districts, under which an alternative to a predetermination hearing is allowed for the presentation of views, under certain circumstances, before the Secretary makes a determination. Under this alternative procedure, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. This procedure saves the State and LEAs both time and cost, and reflects the current practice of the Secretary. Under this proposed regulation, the Secretary would notify all LEAs and the State that this alternative procedure is being followed. The proposed regulation would give those LEAs and the State up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State would be permitted to submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

Finally, proposed § 222.165, concerning administrative appeals of section 8009 determinations, would be revised. Section 222.165(e) would be revised in accordance with applicable legal principles to specify that the ALJ conducting the appeal is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

Section 222.165(f) would be revised to clarify that a follow-up hard copy of a facsimile transmission must be filed within a reasonable period of time following that transmission. Currently there is no time requirement for the filing of a follow-up hard copy. This change is proposed to be consistent with other Impact Aid facsimile transmission filing requirements.

In addition, § 222.165(h) would be revised generally to provide a more expedited hearing process for States and LEAs, and at the same time preserve their appeal rights. That provision would specify that appeals to the Secretary of initial decisions and the finality of initial decisions under section 8009 of the ESEA would be governed by §§ 222.157(b), 222.158 and 222.159 of the general Impact Aid administrative hearing procedures in subpart J. Under those procedures, an ALJ's initial decision automatically constitutes the Secretary's final decision

without any further proceedings unless the decision is appealed by a party or the Secretary decides to review the initial decision. This would be a change from current hearing practice under section 5(d)(2) of Pub. L. 81–874 and section 8009 of the ESEA, under which an ALJ's decision must be certified to the Secretary before it becomes final.

Executive Order 12866

1. Assessment of Costs and Benefits

These proposed regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order, the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs and benefits associated with the proposed regulations are minimal and to the extent there are costs, the costs result from the statutory requirements and regulations determined by the Secretary to be necessary for administering these programs effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these proposed regulations, the Secretary has determined that the benefits of the proposed regulations justify the costs. A further discussion of the potential costs and benefits of these proposed regulations is contained in the summary below.

The Secretary also has determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

To assist the Department in complying with the specific requirements of Executive Order 12866, the Secretary invites comments on whether there may be further opportunities to reduce any potential costs or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the program.

Summary of Potential Costs and Benefits of Regulatory Provisions Discussed Above

The following is a summary of the potential costs and benefits of these proposed regulations:

Overpayment Forgiveness Requests (§ 222.13(c))

This proposed provision would require an LEA seeking forgiveness of an overpayment to provide certain financial and real property taxation information in support of its request. The statutory authority to forgive Impact Aid overpayments applies only in exceptional circumstances—error of the Secretary, or error of an LEA where repayment would result in undue financial hardship and seriously harm the LEA's educational program. In exercising this permissive authority, it is important for all applicants that the Secretary establish a reasonable test to measure undue hardship and financial harm that may be objectively and uniformly applied.

Many alternative and complex standards could be proposed. However, because most LEAs derive revenue from real property taxes, the proposed test (where possible) focuses simply on an LEA's ability to raise to revenues from real property taxation to repay the debt, and requests the minimum data necessary for the Secretary to make a decision on that basis. The potential benefit to an LEA of this provision, which is the partial or total forgiveness of a debt owed to the Department, far outweighs the minimal burden of providing this information.

Valuation of Federal Property for Section 8002 Purposes (§ 222.23)

This proposed regulation standardizes the method local officials to use in valuing Federal property for the purposes of an LEA's section 8002 application. The statute requires that the aggregate assessed value of the Federal property be determined by a local official on the basis of the current highest and best of the adjacent property and provided to the Secretary.

Section 8002 applicants have expressed significant concern to the Department that there is no consistent method for local officials to follow in valuing the Federal property in their various jurisdictions, and that the limited section 8002 funds therefore will be inequitably distributed. This regulation addresses the concerns of those LEAs by providing a standard method for local officials to follow in determining the aggregate assessed value of the Federal property, and standard definitions for two critical terms, ''adjacent'' and ''highest and best use.'' In defining the latter term, the proposed regulation provides maximum flexibility to States and localities by basing the local official's determination of fair market value upon State or local guidelines if available.

Although there may some increased burden on local officials if they are not currently using any particular method to arrive at a valuation of the Federal property, the benefit to all section 8002 applicants in having a minimally uniform standard that allows for local differences and will result in a fair distribution of funds far outweighs any potential burden on those local officials.

Withholding and Related Procedures for Indian Policies and Procedures (§§ 222.114–222.122)

These proposed regulations implement the Secretary's expanded enforcement authority for Indian policies and procedures in sections 8004(a)(2) and 8004(e)(8)–(9) of the ESEA, which includes the authority to withhold section 8003 payments from LEAs under certain circumstances. On September 29, 1995, the Secretary published final technical rules in the Federal Register (60 FR 50774–50800), which contained detailed rules governing IPPs. Those rules included complaint and hearing procedures (§§ 222.102–222.113) that are available to Indian tribes if an LEA has not complied with IPP requirements. They did not provide specific procedures for the Secretary to follow, however, if it became necessary to withhold section 8003 payments from an LEA to obtain that compliance.

Because the Impact Aid Program provides technical assistance to LEAs, parents, and Indian tribes to assure compliance with IPP requirements, the Secretary does not anticipate that it will be necessary to use these proposed withholding procedures in most cases. In the past, few complaints have been filed and all have been resolved without the necessity for reaching a withholding determination.

In the unlikely event that it becomes necessary for the Secretary to issue a withholding determination, however, these procedures would be necessary so that the affected LEA and Indian tribe or tribes clearly know what procedures to follow. Any burden caused by these procedures is outweighed by the benefit to both LEAs and Indian tribes of having these procedures in place.

Requests for an Administrative Hearing Following an Adverse Action (§ 222.151)

This provision would change the time within which an LEA may file a request for an administrative hearing following an adverse action from 60 days to 30 days. This change is being proposed to expedite the Department's debt collection process so that funds recovered from Impact Aid overpayments may be redistributed more rapidly to all eligible Impact Aid applicants. Thirty days is a reasonable time period for LEAs to preserve their appeal rights, and any burden caused by this shorter period is outweighed by the benefit to all applicants of receiving a more rapid redistribution of funds.

Notification of Initiation of Section 8009 Proceeding (§ 222.164(a)(2))

This proposed regulation would require any party initiating a certification determination under section 8009 of the ESEA to give notice of the initiation of that proceeding to the State and LEAs in the State, and to provide those entities with a complete copy of the submission initiating the proceeding. Currently, when a proceeding is initiated, the Impact Aid Program provides notice of the initiation, and any interested LEA (or State) must contact the initiating party independently to obtain a copy of the initiating submission (including the equalization data). This process can be cumbersome and time-consuming.

The statute now has been amended to prohibit a State from reducing its State aid payments due to Impact Aid before certification by the Secretary. Therefore, to enable States to make timely State aid payments to LEAs without unnecessary adjustments, it is essential that the Department make certification determinations as rapidly as possible once a proceeding is initiated. Although requiring the initiating party to provide notice of that initiation and a copy of its submission to the State and all LEAs will cause some burden, that burden is outweighed by more rapid certification determinations and the consequent ability of the State to make State aid payments on a more timely basis.

2. Clarity of the Regulations

Executive Order 12866 requires each Federal agency to write regulations that are easy to understand.

The Secretary invites comment on how to make these regulations easier to understand, including answers to questions such as the following: (1) Are the requirements in the regulations clearly stated? (2) Do the regulations contain technical terms or other wording that interferes with the clarity? (3) Does the format of the regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity? Would the regulations be easier to understand if they were divided into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§ '' and a numbered heading; for example ''§ 222.1 *What is the scope of this part?*'') (4) Is the description of the proposed regulations in the ''Supplementary Information'' section of this preamble helpful in understanding the proposed regulations? How could this description be more helpful in making the proposed regulations easier to understand? (5) What else could the Department do to make the regulations easier to understand?

A copy of any comments that concern whether these proposed regulations are easy to understand should also be sent to Stanley M. Cohen, Regulations Quality Officer, U.S. Department of Education, 600 Independence Avenue, S.W. (Room 5121, FOB–10), Washington, DC, 20202–2241.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

The small entities that would be affected by these proposed regulations are small LEAs receiving Federal funds under this program. The proposed regulations would not have a significant economic impact on the small entities affected because the proposed regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision. The proposed regulations would impose minimal requirements to ensure the proper expenditure of program funds.

Paperwork Reduction Act of 1995

As described below, proposed §§ 222.83(b) and (c), 222.95(g), and 222.164(a)(2) and (b), contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review under that Act.

Collection of Information: Impact Aid: Payments to Local Educational Agencies for Children with Severe Disabilities under Section 8003(g) of the Act (Part 222, Subpart F): Under proposed § 222.83(b) and (c) (How does an eligible LEA apply for a payment under section 8003(g)?), an LEA that wishes to apply under section 8003(g) of the ESEA for special funds that may be available for certain federally connected children with severe disabilities is required to submit to the Secretary information detailing the total costs to the LEA of providing a free appropriate public education for those children. That information may include: (1) for the costs of the outside entity providing the educational program for those children, copies of invoices, vouchers, tuition contracts, and other similar documents showing the signature of an official or authorized employee of the outside entity; and (2) for the additional costs, if any, of the LEA related to that educational program, copies of invoices, check receipts, contracts, and other similar documents showing the signature of an official or authorized employee of the LEA.

The likely respondents to this collection of information are LEAs that have federally connected children with severe disabilities whose parents are on active duty in the uniformed services and the outside entity or institution providing the educational program for those children. The information submitted is used to calculate the amount of the LEA's payment under section 8003(g) of the Act.

We estimate that approximately 24 LEAs may apply for funds under section 8003(g), and each application will take an average of 2 hours to prepare. Therefore, the total annual reporting and recordkeeping burden that will result from the collection of this information is 48 burden hours (24 LEAs, multiplied by 1 application, multiplied by 2 burden hours for preparing each application).

Collection of Information: Impact Aid: Special Provisions for Local Educational Agencies that Claim Children Residing on Indian Lands (Part 222, Subpart G): An LEA is required, as a part of its application for funds under section 8003 of the ESEA, to submit certain policies and procedures in accordance with section 8004 of the ESEA to ensure equal participation of Indian children and consultation with and involvement of their parents and Indian tribes (IPPs). Under proposed § 222.95(g) (How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?), an LEA would have 30 days to send a copy of any amendment to its IPPs to the Director of the Impact Aid Program and the affected Indian tribe or tribes. This provision would not change the paperwork burden for IPPs, which was approved previously as a part of the section 8003 application under OMB #1810–0036 (942,915 total annual hours for all applicants, as revised downward due to changes in the Impact Aid law (based upon an average of .109 annual hours per parent response per child, and an average of 303 annual hours per LEA annual response per application)).

Collection of Information: Impact Aid: Determinations under Section 8009 of the Act (Part 222, Subpart K): Under proposed § 222.164(a)(2) (What procedures does the Secretary follow in making a determination under section 8009?), the party initiating an equalization proceeding under section 8009 of the ESEA must provide the State and all LEAs in the State with a complete copy of the submission initiating the proceeding. In addition, the party initiating the proceeding must notify the State and all LEAs in the State

of their right to request from the Secretary the opportunity to present their views to the Secretary before the Secretary makes a determination.

The likely respondents to these third-party disclosure requirements are States and LEAs that may initiate equalization proceedings. The information that they are required to disclose is used by interested parties to determine whether to request the opportunity to present their views as to whether the State meets the statutory equalization criteria. If a State meets that criteria, it may reduce State aid payments to LEAs that receive Impact Aid funds.

We estimate that equalization proceedings will be initiated in an average of four States per year, which have an average of 125 LEAs to which the required information must be disclosed, and that the disclosure will require an average of .02 hour per disclosure to prepare and mail. Therefore, the total annual reporting and recordkeeping burden that will result from this disclosure requirement is 10.0 burden hours (4 States, multiplied by 125 LEAs, multiplied by .02 hour for preparing and mailing each notice).

In addition, when an equalization proceeding is initiated, certain information must be submitted to the Secretary under proposed § 222.164(b) to enable the Secretary to determine whether the State meets the statutory standard for certification. The likely respondents to this collection requirement are States seeking certification of their equalization plans. The information that they are required to submit is used by the Secretary to determine whether the State's equalization plan meets the statutory requirements for certification so that the State may take Impact Aid payments into account in distributing State aid.

We estimate that equalization proceedings will be initiated in an average of 4 States per year, and that the data submission to the Secretary will require an average of 45.25 hours per collection. Therefore, the total annual reporting and recordkeeping burden that will result from this collection requirement is 181.0 burden hours (4 States, multiplied by 1 annual submission, multiplied by 45.25 hours for preparation and mailing of each submission).

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education.

The Department considers comments by the public on these proposed collections of information in:

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other form of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulations.

Invitation to Comment: Interested persons are invited to submit comments and recommendations regarding these proposed regulations. The Secretary is particularly interested in comments on proposed §§ 222.12–222.15 (implementing the overpayment forgiveness provision), § 222.81 (describing eligibility standards for payments for children with severe disabilities); §§ 222.114–222.122 (implementing Indian policy and procedures withholding proceedings), and § 222.151(b)(1) (changing the time within which an administrative hearing request must be filed from 60 to 30 days following an adverse action).

All comments submitted in response to these proposed regulations will be available for public inspection during and after the comment period, in Room 4200, Portals Building, 1250 Maryland Avenue, S.W., Washington, DC., between the hours of 8:30 a.m. and 4 p.m., Monday through Friday of each week except Federal holidays.

List of Subjects in 34 CFR Part 222

Education, Education of children with disabilities, Elementary and secondary education, Federally affected areas, Grant programs—education, Indians—education, Public housing, Reports and recordkeeping requirements, School construction.

Dated: October 1, 1996.

(Catalog of Federal Domestic Assistance Number 84.041, Impact Aid)

Richard W. Riley,

Secretary of Education.

The Secretary proposes to amend Part 222 of Title 34 of the Code of Federal Regulations as follows:

PART 222—IMPACT AID PROGRAMS

1.–2. The authority citation for Part 222 continues to read as follows:

Authority: 20 U.S.C. 7701–7714, unless otherwise noted.

3. Section 222.4 is revised to read as follows:

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

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

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

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

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

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

(Authority: 20 U.S.C. 7705)

Note to Paragraph (b)(1): 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.

§ 222.11 [Amended]

4. In § 222.11, the introductory language is amended by removing ''Except as otherwise provided in section 8012'', and by adding in its place ''Except as otherwise provided in § 222.12,''.

5. Section 222.13 is redesignated as § 222.16, and new §§ 222.12–222.15 are added to read as follows:

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

(a)(1) Except as provided in paragraph (a)(2) of this section, the Secretary considers the following overpayments as eligible for forgiveness under section 8012 of the Act (''eligible overpayment''):

(i) An overpayment balance that remains owing on or after [insert the 30th day from the date of publication of the final regulations in the Federal Register], and that is more than a local educational agency (LEA) was eligible to receive for a particular fiscal year under Public Law 81–874, Public Law 81–815, or the Act.

(ii) An overpayment amount that is more than an LEA was eligible to receive for a particular fiscal year under Public Law 81–874, Public Law 81–815, or the Act, and that—

(A) Is the subject of a written request for forgiveness filed by the LEA before [insert the 30th day from the date of publication of the final regulations in the Federal Register]; or

(B) Is the subject of a timely written request for an administrative hearing or reconsideration, and has not previously been reviewed under §§ 222.12–222.15.

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

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

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

(iii) Any overpayment received under the following provisions that was caused by an LEA's failure to expend or account for funds properly in accordance with the applicable law and regulations:

(A) Section 8003(d) of the Act (implemented in subpart D of these regulations) or section 3(d)(2)(C) of Public Law 81–874 for certain federally connected children with disabilities.

(B) Section 8003(g) of the Act.

(b) The Secretary applies §§ 222.13–222.15 in forgiving, in whole or part, an LEA's obligation to repay an eligible overpayment that resulted from error either by the LEA or the Secretary.

(Authority: 20 U.S.C. 7712)

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

(a) The Secretary forgives an eligible overpayment, in whole or part as described in § 222.15, if—

(1) The LEA files, in accordance with paragraph (b) of this section—

(i) A request for forgiveness; and

(ii) The information and documentation described in paragraph (c) of this section; and

(2)(i) The Secretary determines under § 222.14, in the case either of an LEA's or the Department's error, that repayment of the LEA's total eligible overpayments will result in an undue financial hardship on the LEA and seriously harm the LEA's educational program; or

(ii) In the case of the Department's error, the Secretary determines on a case-by-case basis that repayment would be manifestly unjust (''manifestly unjust repayment exception'').

(b)(1) Except for an overpayment described in paragraph (2) of this section, an LEA must submit to the Impact Aid Program a written request for forgiveness no later than 30 days from the LEA's initial receipt of a written notice of the overpayment.

(2) For an overpayment for which an LEA has submitted a written request for forgiveness before [insert the 30th day from the date of publication of the final regulations in the Federal Register], the information and documentation described in paragraph (c) of this section must be submitted no later than [insert the 60th day from the date of publication of the final regulations in the Federal Register].

(3) An LEA must submit the information and documentation described in paragraph (c) of this section no later than the applicable time limits described in paragraph (b)(1) or (2) of this section, or other time limit established in writing by the Secretary due to lack of availability of the information and documentation.

(c)(1) Every LEA requesting forgiveness must submit the following information and documentation (as applicable) for the fiscal year immediately preceding the date of the request for forgiveness (''preceding fiscal year''):

(i) A copy of the LEA's annual financial report to the State.

(ii) The LEA's local real property tax rate for current expenditure purposes, as described in § 222.14(b).

(iii) The maximum local real property tax rate for current expenditure purposes allowed by State law, or if there is no State maximum, the average local real property tax rate of all LEAs in the State.

(iv) For an LEA whose boundaries are the same as a Federal military installation—

(A) The average per pupil expenditure (PPE) of the LEA; and

(B) The average PPE in all LEAs in the State.

(v) The equalized assessed valuation of real property per pupil (EAVPP) (or other measure of fiscal capacity as defined by the State) for the LEA, and the average of that measure for all LEAs in the State.

(2) An LEA requesting forgiveness under § 222.13(a)(2)(ii) (manifestly unjust repayment exception), or § 222.14(a)(2) (no present or prospective ability to repay), must submit written information and documentation (in addition to that described in paragraph (c)(1) of this section) in support of its request for forgiveness under those provisions.

(d)(1) A request for forgiveness of an overpayment under this section does not extend the time within which an applicant must file a request for an administrative hearing under § 222.151, unless the Secretary (or the Secretary's delegatee) extends that time limit in writing.

(2) A request for an administrative hearing under § 222.151, or for reconsideration under § 222.152, does not extend the time within which an applicant must file a request for forgiveness under this section, unless the Secretary (or the Secretary's delegatee) extends that time limit in writing.

(Authority: 20 U.S.C. 7712)

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

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

(1) An LEA qualifies under paragraph (a) of this section if—

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

(ii)(A) For an LEA in a State with a maximum local real property tax rate (except for an LEA described in paragraph (a)(1)(iv) of this section), the LEA's local real property tax rate for current expenditure purposes, for the preceding fiscal year, is at least 90% of the maximum rate allowed by State law; or

(B) For an LEA in a State without a maximum local real property tax rate (except for an LEA described in paragraph (a)(1)(iv) of this section), the LEA's local real property tax rate for current expenditure purposes, for the preceding fiscal year, is at least equal to the State average local real property tax rate;

(iii) For an LEA described in paragraph (a)(1)(ii) of this section, the LEA's fiscal capacity, for the preceding fiscal year, is below the State average; and

(iv) For an LEA with boundaries that are the same as a Federal military installation, the average per pupil expenditure (PPE) of the LEA for the preceding fiscal year does not exceed 125% of the average PPE in all LEAs in the State for that preceding fiscal year.

(2) In the alternative, an LEA qualifies under paragraph (a) of this section if neither the successor nor the predecessor LEA has the present or prospective ability to repay the eligible overpayment.

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

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

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

(c) ''Fiscal capacity'' for the purpose of paragraph (a)(1)(v) of this section means the equalized assessed valuation of real property per pupil (EAVPP), unless otherwise defined by the State.

(Authority: 20 U.S.C. 7712)

§ 222.15 What amount does the Secretary forgive?

For an LEA that meets the requirements of § 222.13(b) (timely filed forgiveness request and information and documentation), the Secretary forgives an eligible overpayment as follows:

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

(1) The requirements of § 222.14 (undue financial hardship), and the LEA's current expenditure closing balance for the LEA's fiscal year immediately preceding the date of its request for forgiveness (''preceding fiscal year'') is five percent or less of its total current expenditures (TCE) for that year; or

(2) The manifestly unjust repayment exception in § 222.13(a)(2)(ii).

(b) *Forgiveness in part.* (1) The Secretary forgives the eligible overpayment in part if the Secretary determines that the LEA meets the requirements of § 222.14 (undue financial hardship), but the LEA's preceding fiscal year's current expenditure closing balance is more than five percent of its total current expenditures (TCE) for that year.

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

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

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

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

Example: An LEA that timely requests forgiveness has two overpayments of which portions remain owing on the date of its request—one of $200,000 and one of $300,000. Its preceding fiscal year's closing balance is $250,000 (before a revocable transfer to a capital outlay or debt service account); and 5 percent of its TCE for the preceding fiscal year is $150,000.

The Secretary calculates the amount that the LEA must repay by determining the amount by which the preceding fiscal year's closing balance exceeds 5 percent of the preceding year's TCE. This calculation is made by subtracting 5 percent of the LEA's TCE ($150,000) from the closing balance ($250,000), resulting in a difference of $100,000 that the LEA must repay. The Secretary then totals the eligible overpayment amounts ($200,000 + $300,000), resulting in a total amount of $500,000. The Secretary subtracts the calculated repayment amount ($100,000) from the total of the two overpayment balances ($500,000), resulting in $400,000 that the Secretary forgives.

(Authority: 20 U.S.C. 7712)

6. Section 222.22 is amended by revising paragraphs (c) and (d) to read as follows:

§ 222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?

* * * * *

(c) If an LEA described in paragraph (a) of this section received revenue described in paragraph (b)(1) of this section during the preceding fiscal year that is less than the maximum payment amount under section 8002(b) for the fiscal year for which the LEA seeks assistance, the Secretary reduces that maximum payment amount by the amount of that revenue received by the LEA.

(d) For purposes of this section, the amount of revenue that an LEA receives during the previous fiscal year from activities conducted on Federal property does not include the following:

(1) Payments received by the agency from the Secretary of Defense to support—

(i) The operation of a domestic dependent elementary or secondary school; or

(ii) The provision of a free public education to dependents of members of the Armed Forces residing on or near a military installation.

(2) Federal payments-in-lieu-of-taxes (PILOTs or PILTs), including PILTs for Federal entitlement lands authorized by Public Law 97–258, 31 U.S.C. §§ 6901–6906.

* * * * *

7. A new § 222.23 is added to read as follows:

§ 222.23 How does a local official determine the aggregate assessed value of eligible Federal property for the purpose of a local educational agency's section 8002 payment?

(a) The aggregate assessed value of eligible Federal property for the purpose of an LEA's section 8002 payment must be determined, by a local official responsible for assessing the value of real property located in the jurisdiction of the LEA for the purpose of levying a property tax, as follows:

(1) The local official first determines a fair market value (FMV) for the eligible Federal property in each Federal installation or other federally owned property (e.g., Federal forest), based on the highest and best use of taxable properties adjacent to the eligible Federal property.

(2) The local official then determines a section 8002 assessed value for each Federal installation or federally owned property by adjusting the FMV established in paragraph (a)(1) of this section by any percentage, ratio, index, or other factor that the official would use, if the eligible Federal property were taxable, to determine its assessed value for the purpose of generating local real property tax revenues for current expenditures. In making this adjustment, the official may assume that there was a transfer of ownership of the eligible Federal property for the year for which the section 8002 assessed value is being determined.

(3) The local assessor then calculates the aggregate section 8002 assessed value for all eligible Federal property in the LEA by adding the section 8002 assessed values for each different Federal installation or federally owned property determined in paragraph (a)(2) of this section.

Example: Two different Federal properties are located within a LEA—a Federal forest, and a naval facility. Based upon the highest and best use of taxable properties adjacent to the eligible Federal property, the local assessor establishes an FMV for the Federal forest of $1 million (woodland), and an FMV for the naval facility of $3 million (50 percent residential and 50 percent commercial/industrial). Assessed values in that taxing jurisdiction are determined by multiplying the FMV of property by an assessment ratio—the assessment ratio for woodland property is 30 percent of FMV, for residential 60 percent of FMV, and for commercial 75 percent of FMV.

To determine the section 8002 assessed value of the Federal forest, the assessor multiplies the FMV for that property ($1,000,000) by 30 percent (the assessment ratio for woodland property), resulting in a section 8002 assessed value of $300,000.

To determine the section 8002 assessed value for the naval facility, the assessor first must determine the portion of the total FMV attributable to each property type if that portion has not already been established. To make this determination for the residential portion, the assessor could multiply the total FMV ($3,000,000) for the naval facility by 50 percent (the portion of residential property), resulting in a $1.5 million FMV for the residential property. To determine a section 8002 assessed value for this residential portion, the assessor then would multiply the $1.5 million by 60 percent (assessment ratio for residential property), resulting in $900,000.

Similarly, to determine the portion of the FMV for the naval facility attributable to the commercial/industrial property, the assessor could multiply the total FMV ($3,000,000) by 50 percent (the portion of commercial/industrial property), resulting in $1.5 million. To determine the section 8002 assessed value for this commercial/industrial portion, the official then would multiply the $1.5 million by 75 percent (the assessment ratio for commercial/industrial property), resulting in $1,025,000. The assessor then must add the section 8002 assessed value figures for the residential portion ($900,000) and for the commercial/industrial portion ($1,025,000), resulting in a total section 8002 assessed value for the entire naval facility of $1,925,000.

Finally, the assessor determines the aggregate section 8002 assessed value for the LEA by adding the section 8002 assessed value for the Federal forest ($300,000), and the section 8002 assessed value for the naval facility ($1,925,000), resulting in an aggregate assessed value of $2,325,000.

(b) For the purpose of this section, the terms listed below have the following meanings:

(1) ''Adjacent'' means next to or close to the eligible Federal property. In most cases, this will be the closest taxable parcels.

(2)(i) ''Highest and best use'' of a parcel of adjacent property means the FMV of that parcel determined based upon a ''highest and best use'' standard in accordance with State or local law or guidelines if available. To the extent that State or local law or guidelines are not available, ''highest and best use'' generally will be a reasonable fair market value based upon the current use of those properties. However, the local official may also consider the most developed and profitable use for which the adjacent taxable property is physically adaptable and for which there is a need or demand for that use in the near future.

(ii) A local official may not base the ''highest and best use'' value of adjacent taxable property upon potential uses that are speculative or remote.

(iii) If the taxable properties adjacent to the eligible Federal property have different highest and best uses, these different uses must enter into the local official's determination of the FMV of the eligible Federal property under paragraph (a)(1) of this section.

Example: If a portion of a Federal installation to be valued has road or highway frontage with adjacent properties that are used for residential and commercial purposes, but the rest of the Federal installation is rural and vacant with adjacent properties that are agricultural, the local official must take into consideration the various uses of the adjacent properties (residential, commercial, and agricultural) in determining the FMV of the Federal property under paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 7702)

8. New §§ 222.80 through 222.85 are added as subpart F (Payments to Local Educational Agencies for Children with Severe Disabilities under Section 8003(g) of the Act) to read as follows:

Subpart F—Payments to Local Educational Agencies for Children with Severe Disabilities under Section 8003(g) of the Act

222.80 What definitions apply to this subpart?
222.81 What requirements must a local educational agency meet to be eligible for a payment under section 8003(g) of the Act?
222.82 How does the Secretary calculate the total amount of funds available for payments under section 8003(g)?
222.83 How does an eligible local educational agency apply for a payment under section 8003(g)?
222.84 How does the Secretary calculate payments under section 8003(g) for eligible local educational agencies?
222.85 How may a local educational agency use funds that it receives under section 8003(g)?

Subpart F—Payments to Local Educational Agencies for Children with Severe Disabilities under Section 8003(g) of the Act

§ 222.80 What definitions apply to this subpart?

(a) The definitions in §§ 222.2 and 222.50 apply to this subpart.

(b) In addition, the following term applies to this subpart:

Children with severe disabilities means children with disabilities who because of the intensity of their physical, mental, or emotional problems, need highly specialized education, social, psychological, and medical services in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment. The term includes those children with disabilities with severe emotional disturbance (including schizophrenia), autism, severe and profound mental retardation, and those who have two or more serious disabilities such as deaf-blindness, mental retardation and blindness, and cerebral-palsy and deafness.

(Authority: 20 U.S.C. 1400 *et seq.*, 7703(g))

§ 222.81 What requirements must a local educational agency meet to be eligible for a payment under section 8003(g) of the Act?

An LEA is eligible for a payment under section 8003(g) of the Act if it—

(a) Is eligible for and receives a payment under section 8003(d) of the Act for children identified in paragraph (b) of this section and meets the requirements of §§ 222.52 and 222.83(b) and (c); and

(b) Incurs costs of providing a free appropriate public education to at least two children with severe disabilities whose educational program is being provided by an entity outside the schools of the LEA, and who each have a parent on active duty in the uniformed services.

(Authority: 20 U.S.C. 1221e–3, 1400 *et seq.*, 7703(a), (d), (g))

§ 222.82 How does the Secretary calculate the total amount of funds available for payments under section 8003(g)?

(a) In any fiscal year in which Federal funds other than funds available under the Act are provided to an LEA to meet the purposes of the Act, the Secretary—

(1) Calculates the sum of the amount of other Federal funds provided to an LEA to meet the purposes of the Act and the amount of the payment that the LEA

received for that fiscal year under section 8003(b) of the Act; and

(2) Determines whether the sum calculated under paragraph (a)(1) of this section exceeds the maximum basic support payment for which the LEA is eligible under section 8003(b), and, if so, subtracts from the amount of any payment received under section 8003(b), any amount in excess of the maximum basic support payment for which the LEA is eligible.

(b) The sum of all excess amounts determined in paragraph (a)(2) of this section is available for payments under section 8003(g) to eligible LEAs.

(Authority: 20 U.S.C. 7703(b), (g))

§ 222.83 How does an eligible local educational agency apply for a payment under section 8003(g)?

(a) In fiscal years in which funds are available for payments under section 8003(g), the Secretary provides notice to all potentially eligible LEAs that funds will be available.

(b) An LEA applies for a payment under section 8003(g) by submitting to the Secretary documentation detailing the total costs to the LEA of providing a free appropriate public education to the children identified in § 222.81, during the LEA's preceding fiscal year, including the following:

(1) For the costs of the outside entity providing the educational program for those children, copies of all invoices, vouchers, tuition contracts, and other similar documents showing the signature of an official or authorized employee of the outside entity; and

(2) For any additional costs (such as transportation) of the LEA related to providing an educational program for those children in an outside entity, copies of invoices, check receipts, contracts, and other similar documents showing the signature of an official or authorized employee of the LEA.

(c) An LEA applying for a payment must submit to the Secretary the information required under paragraph (b) of this section within 60 days of the date of the notice that funds will be available.

(Authority: 20 U.S.C. 1221e–3, 7703(g)(2))

§ 222.84 How does the Secretary calculate payments under section 8003(g) for eligible local educational agencies?

For any fiscal year in which the Secretary has determined, under § 222.82, that funds are available for payments under section 8003(g), the Secretary calculates payments to eligible LEAs under section 8003(g) as follows:

(a) For each eligible LEA, the Secretary subtracts an amount equal to that portion of the payment the LEA received under section 8003(d) of the Act for that fiscal year, attributable to children described in § 222.81, from the LEA's total costs of providing a free appropriate public education to those children, as submitted to the Secretary pursuant to § 222.83(b). The remainder is the amount that the LEA is eligible to receive under section 8003(g).

(b) If the total of the amounts for all eligible LEAs determined in paragraph (a) of this section is equal to or less than the amount of funds available for payment as determined in § 222.82, the Secretary provides each eligible LEA with the entire amount that it is eligible to receive, as determined in paragraph (a) of this section.

(c) If the total of the amounts for all eligible LEAs determined in paragraph (a) of this section exceeds the amount of funds available for payment as determined in § 222.82, the Secretary ratably reduces payments under section 8003(g) to eligible LEAs.

(d) If the total of the amounts for all eligible LEAs determined in paragraph (a) of this section is less than the amount of funds available for payment as determined in § 222.82, the Secretary pays the remaining amount to LEAs under section 8003(d). An LEA that receives such a payment shall use the funds for expenditures in accordance with the requirements of section 8003(d) and subpart D of these regulations.

(Authority: 20 U.S.C. 1221e–3, 7703(d) and (g))

§ 222.85 How may a local educational agency use funds that it receives under section 8003(g)?

An LEA that receives a payment under section 8003(g) shall use the funds for reimbursement of costs reported in the application that it submitted to the Secretary under § 222.83(b).

(Authority: 20 U.S.C. 7703(g)(2))

9. Section 222.95 is amended by revising the paragraph (g) introductory text to read as follows:

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

* * * * *

(g) An LEA that amends its IPPs shall, within 30 days, send a copy of the amended IPPs to—

* * * * *

10. New §§ 222.114 through 222.122 are added to subpart G, with a heading preceding them, to read as follows:

Withholding and Related Procedures for Indian Policies and Procedures

222.114 How does the Assistant Secretary implement the provisions of this subpart?
222.115 When does the Assistant Secretary withhold payments from a local educational agency under this subpart?
222.116 How are withholding procedures initiated under this subpart?
222.117 What procedures are followed after the Assistant Secretary issues a notice of intent to withhold payments?
222.118 How are withholding hearings conducted in this subpart?
222.119 What is the effect of withholding under this subpart?
222.120 When is a local educational agency exempt from withholding of payments?
222.121 How does the affected Indian tribe or tribes request that payments to a local educational agency not be withheld?
222.122 What procedures are followed if it is determined that the local educational agency's funds will not be withheld under this subpart?
222.123–222.129 [Reserved]

Withholding and Related Procedures for Indian Policies and Procedures

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

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

(Authority: 20 U.S.C. 7704(d)(2), (e)(8)–(9))

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

Except as provided in § 222.120, the Assistant Secretary withholds payments to an LEA if—

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

(b) After a hearing has been conducted under section 8004(e) of the Act and §§ 222.102–222.113 (IPP hearing)—

(1) The LEA rejects the final determination of the Assistant Secretary; or

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

(Authority: 20 U.S.C. 7704(a), (b), (d)(2), (e)(8)–(9))

§ 222.116 How are withholding procedures initiated under this subpart?

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

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

(1) Describes how the LEA failed to comply with the requirements at issue; and

(2)(i) Advises an LEA that has participated in an IPP hearing that it may request, in accordance with § 222.117(c), that its payments not be withheld; or

(ii) Advises an LEA that has not participated in an IPP hearing that it may request a withholding hearing in accordance with § 222.117(d).

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

(Authority: 20 U.S.C. 1221e–3(a)(1); 20 U.S.C. 7704(a), (b), (d)(2), and (e)(8)–(9))

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Authority: 20 U.S.C. 1221e–3; 7704(a), (b), (d)(2), and (e)(8)–(9))

§ 222.118 How are withholding hearings conducted in this subpart?

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

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

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

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

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

(4) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

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

(6) Each party may be represented by counsel.

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

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

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

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

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

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

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

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

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

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

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

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

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

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

(f) *Decision of the hearing examiner.* (1) The hearing examiner—

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

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

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

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

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

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

(g) *Administrative appeal of an initial decision.*

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

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

(2) The Secretary may—

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

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

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

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

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

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

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

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

(Authority: 20 U.S.C. 7704)

§ 222.119 What is the effect of withholding under this subpart?

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

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

(Authority: 20 U.S.C. 7704(a), (b), (d)(2), (e)(8)–(9))

§ 222.120 When is an LEA exempt from withholding of payments?

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

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

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

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

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

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

(Authority: 20 U.S.C. 7703(a), 7704(c),(d)(2) and (e)(8))

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

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

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

(Authority: 20 U.S.C. 7704(d)(2) and (e)(8))

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

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

(Authority: 20 U.S.C. 7704(d)–(e))

§ 222.150 [Amended]

11. In § 222.150, paragraph (b)(1) is amended by removing ''§§ 222.90–222.114'', and adding in its place ''§§ 222.90–222.122''.

12. Section 222.151 is amended by revising the title and paragraph (b)(1) to read as follows:

§ 222.151 When is an administrative hearing provided to a local educational agency?

* * * * *

(b) * * *

(1) The applicant files a written request for an administrative hearing within 30 days of its receipt of written notice of the adverse action; and

* * * * *

13. Section 222.152 is amended by revising paragraphs (b) and (c) to read as follows:

§ 222.152 When may a local educational agency request reconsideration of a determination?

* * * * *

(b) The Secretary's (or the Secretary's delegatee's) consideration of a request for reconsideration is not prejudiced by a pending request for an administrative hearing on the same matter, or the fact that a matter has been scheduled for a hearing. The Secretary (or the Secretary's delegatee) may, but is not required to, postpone the administrative hearing due to a request for reconsideration.

(c) The Secretary (or the Secretary's delegatee) may reconsider any determination under the Act or Pub. L. 81–874 concerning a particular party unless the determination has been the subject of an administrative hearing under this part with respect to that party.

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

14. Section 222.154 is amended by revising paragraph (e) to read as follows:

§ 222.154 How must written submissions under this subpart be filed?

* * * * *

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

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

§ 222.156 [Amended]

15. In § 222.156, paragraph (g) is amended by removing ''hearing examiner'', and adding in its place ''ALJ''.

16. Section 222.157 is amended by revising the title and paragraphs (a) and (b)(1) to read as follows:

§ 222.157 What procedures apply for issuing or appealing an administrative law judge's decision?

(a) *Decision.* (1) The ALJ—

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

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) An ALJ's initial decision constitutes the Secretary's final decision without any further proceedings unless—

(i) A party, within the time limits stated in paragraph (b)(1) of this section, requests the Secretary to review the decision and that request is granted; or

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

(3) When an initial decision becomes the Secretary's final decision without any further proceedings, the Department's Office of Hearings and Appeals notifies the parties of the finality of the decision.

(b) *Administrative appeal of an initial decision.*

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

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

* * * * *

17. In § 222.158, the title, introductory language, and paragraph (b), are revised to read as follows:

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

When the Secretary reviews an initial decision, the Secretary—

* * * * *

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

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

18. In § 222.161, paragraph (c) is revised by removing the paragraph designations before each definition, reordering the definitions in alphabetical order, and adding in alphabetical order the following new definitions of ''Local tax revenues,'' ''Local tax revenues covered under a State equalization program,'' and ''Total local tax revenues'':

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

* * * * *

(c) *Definitions.* * * *

* * * * *

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.

* * * * *

Total local tax revenues means all ''local tax revenues'' as defined in paragraph (c) of this section, including 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.

* * * * *

19. In § 222.164, paragraphs (a)(2) and (b) are revised to read as follows:

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

8009? (a) * * *

(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.

* * * * *

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

20. In § 222.165, paragraphs (e), (f), and (h) are revised to read as follows:

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

* * * * *

(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 filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

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

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

* * * * *

(h) *Decisions.* (1) The ALJ—

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

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) Appeals to the Secretary and the finality of initial decisions under section 8009 are governed by §§ 222.157(b), 222.158 and 222.159 of subpart J.

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

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