

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Parts 30, 37, 39, 42, 44, 47****RIN 1076-AE49****Implementation of the No Child Left Behind Act of 2001****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Proposed rule.

**SUMMARY:** As required by the No Child Left Behind Act of 2001, the Secretary of the Interior has developed proposed regulations using negotiated rulemaking that address the following issues: Defining adequate yearly progress, which is the measurement for determining that schools are providing quality education; establishing separate geographic attendance areas for Bureau-funded schools; establishing a formula for determining the minimum amount necessary to fund Bureau-funded schools; establishing a system of direct funding and support of all Bureau-funded schools under the formula established in the Act; establishing guidelines to ensure the Constitutional and civil rights of Indian students; and establishing a method for administering grants to tribally controlled schools.

**DATES:** Comments on the proposed rule must be received on or before June 24, 2004. Comments on the information collections in the proposed rule should be submitted to the Office of Management and Budget by March 26, 2004.

**ADDRESSES:** Submit comments to one of the following addresses. Mail: Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153, Attention: RIN 1076-AE49. Personal or messenger delivery: 1620 L Street, NW., Room 401, Washington, DC 20036. Direct Internet response: [www.blm.gov/nhp/news/regulatory/index.html](http://www.blm.gov/nhp/news/regulatory/index.html), or at <http://www.blm.gov>, or at [regulations.gov](http://regulations.gov) under Indian Affairs Bureau. Send comments on the information collections in the proposal to: Interior Desk Officer (1076-AE49), Office of Information and Regulatory Affairs, 202/395-6566 (facsimile); e-mail: [oira\\_docket@omb.eop.gov](mailto:oira_docket@omb.eop.gov).

**FOR FURTHER INFORMATION CONTACT:** Catherine Freels, Designated Federal Official, PO Box 1430, Albuquerque, NM 87103-1430; Phone: 505-248-7240; e-mail: [cfreels@bia.edu](mailto:cfreels@bia.edu).

**SUPPLEMENTARY INFORMATION:**

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**I. Overview of Process**

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

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

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

The Committee met in five week-long sessions in the months of June through October 2003. Each session was preceded by a **Federal Register** notice

stating the location and dates of the meetings and inviting members of the public to attend. The Committee divided the areas subject to regulation among four work groups. These workgroups prepared written products for review, revision and approval by the full Committee. Committee decisions were made by consensus. All Committee and workgroup meetings were open to the public, and members of the public were afforded the opportunity to make oral comments at each session and to submit written comments.

The Act provisions for which the Committee prepared proposed rules are:

1. *Section 1116(g) of NCLB:* Develops a definition of “Adequate Yearly Progress” for the bureau-funded school system.

2. *Section 1124 of the Education Amendments of 1978, as amended by NCLB:* Attendance boundaries for bureau-funded schools.

3. *Section 1127 of the Education Amendments of 1978, as amended by NCLB:* A determination of the funds needed to sustain bureau-funded schools and a formula to allocate the current funds.

4. *Section 1130 of the Education Amendments of 1978, as amended by NCLB:* The direct funding and support of bureau-funded schools.

5. *Section 1136 of the Education Amendments of 1978, as amended by NCLB:* The rights of students in the bureau-funded school system.

6. *Section 1043 the Tribally Controlled Schools Act (TCSA) of 1988, as amended by NCLB:* Discharge of the Secretary's responsibilities under this law through which tribes and tribal school boards can operate bureau-funded schools under the grant mechanism established in the Tribally Controlled Schools Act.

Sections II through VII are of this preamble detailed discussions of each of the individual rules listed above.

**II. Part 30—Adequate Yearly Progress**

NCLB requires each State to submit a plan to the Secretary of Education which demonstrates that the State, through its State Educational Agency (SEA), has adopted challenging academic content standards and challenging student academic achievement standards applicable to all schools in the State, and to develop assessment devices through which student achievement will be measured. For purposes of adequate yearly progress (AYP), the Bureau of Indian Affairs is considered the SEA for the bureau-funded school system.

The Act requires each SEA to define Adequate Yearly Progress (AYP). The

definition of AYP will establish intermediate (annual) student achievement goals in math and reading/language arts. If a school meets the intermediate goal, it has made AYP for that year. Failure of a school to meet AYP for two or more consecutive years triggers remedial actions described in the Act. The Act requires that, by 2014, all students must be achieving at the "proficient" level, as measured by the State's accountability system.

NCLB requires a State and the Bureau of Indian Affairs to define AYP in a manner that achieves the following requirements:

- Applies the same high standards of academic achievement to all schools;
- Is statistically valid and reliable;
- Results in continuous and substantial academic improvement for all students;
- Measures progress of the SEA (BIA) and schools based primarily on the academic assessments; and
- Includes separate measurable annual goals for continuous and substantial improvement in the academic achievement of (1) all students in the school; (2) economically disadvantaged students; (3) students from major racial and ethnic groups; (4) students with disabilities; and (5) students with limited English proficiency.

The AYP definition must also include "additional indicators." For high schools, the additional indicator must be graduation rates. The SEA must select one additional indicator applicable to schools without a graduating class. An SEA may also identify additional optional indicators of student progress to include in its definition of AYP.

To define Adequate Yearly Progress (AYP) for Bureau-funded schools, the Committee first had to master an understanding of all of the components of Adequate Yearly Progress under the Act and how they interrelate with a final definition of AYP. While the workgroup had to look at the curriculum, standards, and assessments that Bureau-funded schools were using, the Committee did not negotiate these items. The negotiation was limited to the definition of AYP.

The AYP workgroup initially considered a definition that would require all Bureau-funded schools to show that a set percentage of students (e.g., 11 percent) progressed annually from the "basic" achievement level to the "proficient" or "advanced" achievement levels. This idea was abandoned, however, because the Department of Education, which

supplied resource consultants to the Committee, advised that this methodology would not be statistically reliable. The Department of Education notes that it is not statistically reliable to aggregate the Bureau-funded school assessment data to make AYP determinations because each school uses a different assessment system and also because, collectively, the assessments in use did not meet the requirements of NCLB set forth in section 1111(b)(3)(C)(ii). Therefore, the committee needed to develop a definition of AYP that was based on a uniform assessment system. As the Committee discovered, BIA had abandoned requiring uniform curriculum and assessments and had instead allowed schools to align their curriculum with the State in which the school was located. Thus, the Committee appeared to be left with two options:

- Selecting a single State's system with one set of curriculum, standards, and assessments; or
- Allowing each Bureau-funded school to follow the definition of the State in which it is located.

After Congress passed Goals 2000, States had to set standards for student achievement. The Bureau chose to adopt national standards, but most schools chose to align with the standards of the State where they were located. The committee found that the Bureau of Indian Affairs has traditionally allowed tribes to follow State's curricula, standards, and assessments. Originally, the Bureau had attempted to create a system in which all of the tribes would follow one set of curriculum, standards, and assessments. Some tribes expressed concern over this approach. Tribes suggested that the students of Bureau-funded schools would be better served by allowing the schools to follow the State's curriculum, standards, and assessments because the Bureau-funded school students are traditionally more transient and sometimes move between Bureau-funded schools and public schools. Therefore, Bureau-funded schools began aligning their curriculum, standards, and assessments with the State in which they were located.

The Committee revised its initial plan and decided to adopt as the Bureau definition of AYP the definition of the State in which a school is located (§ 30.104). However, a tribal governing body or school board can develop an alternative AYP definition and submit it to the Secretary for approval (§ 30.105). This decision implements section 1116(g) of the Act, which expressly permits a tribe or school board to waive

the Bureau's AYP definition and develop its own. The Secretary is required to approve an alternative definition as long as it is consistent with section 1111(b) of NCLB, taking into account the unique circumstances and needs of the schools and the students served (§ 30.106).

Tribal representatives on the Committee expressed serious objection to adopting State AYP definitions as the Bureau's definition instead of establishing a Bureau-specific definition, which some tribes and school boards might prefer. There was concern that requiring use of a State's definition would imply that Bureau-funded schools were subject to State jurisdiction, would signal abandonment of the Federal Government's trust responsibility for Indian education, and could diminish tribal sovereignty. In recognition of these concerns, the Committee developed language for the proposed rules that expressly states that nothing in the rules diminishes the Secretary's trust responsibility for Indian education or any statutory rights; affects in any way the sovereign rights of an Indian tribe, or subjects Bureau-funded schools to State jurisdiction (§ 30.100).

A detailed procedure for submission of an alternative AYP definition by a tribe or school board, and for review/approval of that definition by the Secretary of the Interior is included in §§ 30.106 through 30.108. The Department is required by § 30.109 to provide technical assistance for development of an alternative definition upon the request of a tribe or school board.

The Department of Education has expressed concern that § 30.107(a) does not include any mention of rewards and sanctions. While the Department of the Interior feels that the Act leaves responsibility for determining rewards and sanctions with the State (which, in this case, is the Bureau of Indian Affairs), we invite comments on this issue. The Department of Education also expressed concern over the inclusion of science in the subjects that an alternate definition of AYP must measure. The committee included science based on the requirements of section 1111(b)(3)(A) of the Act, but invites comments on the appropriateness of including science in the list of subjects to be measured.

The Department of Education feels that, in § 30.115, it is inaccurate to say that schools must include performance data for grades 10 through 12 in AYP. We disagree, based upon the language in section 1111(b)(3)(C)(v)(I)(cc), which states:

Except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during grades 10 through 12.

We invite comments on this issue.

The consequences of failing to make AYP are described in § 30.117. While the remedial status of “school improvement,” “corrective action,” and “restructuring” applicable to public schools also apply to Bureau-funded schools, the latter are exempt from two requirements—school choice and supplemental educational services—that apply to public schools (see § 30.120). These exemptions are expressly stated in the regulation. The regulation also reiterates in § 30.119 the tribally operated school board’s responsibility to implement remedial actions, while the Bureau is responsible for implementing these remedial actions at Bureau-operated schools.

The rule specifies in § 30.121 the Bureau’s responsibilities under the Act to provide funding and technical assistance to schools who fail to make AYP, and in § 30.122 the Bureau’s responsibility to provide ongoing support to all schools to assist them in making AYP. The proposed regulation also details the Bureau’s reporting responsibilities in § 30.126.

### III. Part 37—Geographic Boundaries

The No Child Left Behind Act requires that all Bureau-funded schools have designated separate geographic boundaries. The statute permits tribes to have input in that process. It was the committee’s opinion that the statute extensively prescribed the input tribes may have in establishing school boundaries. The statute left very few gaps for the committee to fill with regulations. The workgroup did, however, feel that the statute was somewhat confusing with regards to what roles Tribes could fill and when. The following section-by-section analysis explains the committee’s recommendations on geographic boundaries.

*Section 37.100.* This part provides guidance for the process of creating attendance boundaries. The intent of this part is to clarify the role Tribes may have in establishing and revising geographic attendance boundaries. Overall, the group wanted to reserve for Tribes the opportunity to participate in all decisions regarding attendance boundaries and related policies where not statutorily prohibited.

*Section 37.101.* This section defines key terms unique to this section of the proposed rule. If a term is not defined

in this section or this part, the definition of the local school board should be applied.

*Section 37.102.* Much of this section is a restatement of the statute, put in clearer organizational structure. This section is intended to clarify the structure. The workgroup discussed ways to assist readers find the pertinent portions of the regulation applicable to their particular type of school. Specifically, the group recognized that day on-reservation schools would be subject to some different boundary determinations than off-reservation boarding schools (ORBS). Subsequently the group started by dividing the rule into two parts. In doing this, the group discovered that some areas of potential interest applied equally to all schools, whether on-or off-reservation. Ultimately the group decided, and the committee approved, a structure that answered questions applicable to all schools first. If a school does not find answers in the section applicable to all schools, they should turn to the section applicable to their particular type of school. For this reason, this part is organized as follows:

*Subpart A—All Schools:* This paragraph answers questions for any Bureau-funded school, including ORBS.

*Subpart B—Day schools, On-Reservation Boarding Schools, and Peripheral Dorms:* This section answers only questions for the schools listed. Nothing in this paragraph addresses ORBS unique situation.

*Subpart C—Off Reservation Boarding Schools:* This section addresses questions uniquely applicable to ORBS. Nothing in this paragraph applies to on-reservation schools of any type.

#### *Subpart A—All Schools*

*Section 37.110.* This section highlights for tribes their authority to participate in the process of establishing school boundaries. Additionally, this section serves as a reminder that, if a Tribe chooses not to establish their own school boundaries, the Secretary must draw the boundaries for them. The Secretary is charged with ensuring all schools have boundaries.

*Section 37.111.* This section clarifies that Tribes may have a role in establishing geographic boundaries. Specifically, the proposed rule highlights the Tribe’s ability to authorize transportation funding for their member-students attending schools outside of their designated geographic boundary. A student’s designated geographic boundary is the geographic attendance area of the school that covers the student’s primary residence. The Bureau will not

automatically provide transportation for students who choose to attend a school outside of their designated geographic attendance area. The Bureau may only provide transportation funding for students attending outside of their designated geographic attendance area when the student’s Tribe authorizes such expenditure.

This section is of particular importance to tribes that seek to control where their students enroll in school. The committee was aware of some Tribes seeking to prevent their member-students from attending other Tribes’ schools. Initially, the group had proposed rule that more thoroughly emphasized the Tribe’s authority to authorize or withhold transportation funding. The group discussed an interpretation of the statute that permitted Tribes to pass resolutions restricting parental choice. However, a key component of the No Child Left Behind Act is parental choice. Though the group tried, they were unable to draft a regulation that observed Tribal restrictions on attendance, yet still permitted parental choice, as required by statute. Ultimately, the committee agreed to a more succinct explanation that emphasized Tribal authority to open school boundaries.

Absent from this section is a prescription on how a tribe authorizes transportation funding. Originally the group suggested manners in which a Tribe would provide this authorization. In the committee-at-large discussion, the group’s description of authorization was deemed unclear and unnecessary. Additionally, the sentiment was expressed that the tribe should determine how to authorize funding.

*Section 37.112.* All schools must have boundaries. This section was included to serve to further notify tribes that, if they fail to act and set their own school boundaries, the Secretary must and will do it for them.

#### *Subpart B—Day schools, On-Reservation Boarding Schools, and Peripheral Dorms*

*Section 37.120.* This section was provided to put Tribes on notice of the opportunity to establish and revise current school boundaries. This section clarifies that the established boundaries currently in use will remain in place unless revised by the appropriate Tribal governing body. This section is intended to encourage Tribes to review existing boundaries and use the processes defined in this Part to make changes to meet current needs.

*Section 37.121.* Who establishes geographic attendance boundaries under this part? This section reiterates the

statutory prescription for when a Tribe may establish geographic attendance boundaries for its schools. The work group felt that the statutory language was unclear and may inadvertently preclude Tribes from acting to change school boundaries.

*Section 37.122.* Tribes have ongoing authority to suggest changes to and participate in the revision of geographic attendance boundaries. This section explains the process Tribes must use to change geographic attendance boundaries, regardless of when the Tribe suggests such changes.

This section is also a restatement of the statutory language. Again, the work group felt that the statutory language alone may not sufficiently inform Tribes of the process for changing school boundaries. Specifically, the group sought to clarify some of the limitations on the Secretary's ability to change school boundaries and highlight the weight and importance the Tribe's views have in the boundary setting process.

(a) The group restated the limitations placed on the Secretary's ability to change existing school geographic attendance boundaries. After notice of the Secretary's intention to modify school boundaries, Tribes must be given 6 months notice before changes become effective. In that time the Tribes have an opportunity to suggest different modifications to the Secretary's proposed changes. The restatement of this limitation is intended to inform Tribes of their role in boundary determinations.

(b) This paragraph signifies the impact of Tribal views in the boundary setting and revision process. If a Tribe determines that the geographic attendance boundaries of a school is not meeting the needs of the Tribe or the students, the Tribe may request that the Secretary modify the boundaries. The group determined that the letter requesting the modification should go to the Director of the Office of Education Programs. The Office of Indian Education Programs must respond to the Tribal requests for a boundary modification after consulting with the Secretary of the Interior and the Assistant Secretary-Indian Affairs. If the Tribe's suggestion is rejected, a written explanation must be provided detailing why the proposed changes do not meet the needs of the Indian students to be served and how the proposed changes would affect the affected programs. Such requirements will ensure that Tribes will have an opportunity to give meaningful input into setting school boundaries and the process is transparent.

*Section 37.123.* This section highlights the authority of the Tribe to create their own processes to develop and revise geographic attendance boundaries. The committee wanted to place as few prescriptions on Tribes as possible. The group was careful to craft a regulation which respected Tribal autonomy and sovereignty concerning education. Consequently, the group did not want to tell Tribes who to consult when revising school boundaries. It was the intention of this section to emphasize coordination among entities involved in the education of the student when setting boundaries. The referenced "entities" with which consultation should be made were not specifically listed as it was thought the individual Tribes could best determine who should be included in the consultation process.

*Section 37.124.* At the time of drafting this rule (2003), a moratorium existed on construction of new Bureau-funded schools. Despite the moratorium, provisions of the No Child Left Behind Act could be interpreted to specifically include and apply to new Bureau-funded schools. In consideration for such an interpretation, this section of this Part was included in the regulations. Nothing in this rule, however, provides authorization for additional Bureau-funded schools to be constructed absent Congressional authorization. Should such schools be established in the future, this section would apply.

*Section 37.125.* This section explains the authority of Tribes to determine whether student tribal members may receive transportation funding when such students desire to attend a Bureau-funded school outside of the student's designated geographical attendance boundary. This section also explains the process by which transportation funding may be authorized for students living off the reservation of the Tribe in which the student is enrolled. The drafters desired to preserve the maximum degree of discretion, within the bounds of tribal jurisdiction, for Tribes to exercise in addressing determinations of transportation funding.

Where possible schools should provide services to eligible students living near the reservation though such students are not included in the schools' geographic attendance boundary. This section recognizes prior practices that permitted eligible students who resided near the reservation to enroll in Bureau-funded schools.

#### *Subpart C—Off-Reservation Boarding Schools*

*Section 37.130.* The Secretary of the Interior determines the boundaries for ORBS. While the Secretary should consult with all tribes that fall within the boundaries of a particular off-reservation boarding school, it is the Secretary and not the ORBS or Tribe who establish the boundary. The group discussed stating in the regulation that the Secretary could not establish overlapping boundaries for ORBS. Examination of the map of boundaries currently in use revealed that, currently, no ORBS boundaries overlap. Though the group desired to mitigate some of the cross-country student recruitment by ORBS, the committee felt that the restriction placed on transportation funding was a sufficient hindrance. Initially, the group had included a specific subsection clarifying that students were only entitled transportation funding to attend the student's designated ORBS. That section was taken out in the committee-at-large discussion. Transportation funding pertains to all students, whether attending school on- or off-reservation. The language addressing proper authorization of transportation funding was initially discussed in the context of all schools. The committee could not reach consensus on who was the appropriate entity to authorize transportation funding. The work group then suggested only referencing transportation authorization in the section on ORBS. The same concerns arose and further discussion of transportation was thought to be redundant. The committee resolved that a succinct statement addressing transportation funding in the section applicable to all schools was sufficient.

*Section 37.131.* This section clarifies that any ISEP eligible student may elect to attend an ORBS. The group intended that all ORBS will have separate, non-overlapping geographic attendance boundaries that will cover the entire United States. Students may attend the ORBS designated for the student's primary residence with or without Tribal permission.

#### **IV. Part 39—The Indian School Equalization Program**

Under the No Child Left Behind Act, Congress required the Committee to establish, through negotiated rulemaking, rules regarding a formula for the "minimum annual amount of funds necessary to sustain each Bureau-funded school" and a formula to distribute funding to BIA schools. 20 U.S.C. 2007. As with the other rules the

Committee developed, the Committee established a Funding Workgroup to develop draft rules for review by the full Committee.

The Bureau currently funds its schools through published procedures known as the Indian School Equalization Program (ISEP) and a mechanism defined in the ISEP known as the Indian School Equalization Formula (ISEF). The current equalization formula assigns weighted units to each student enrolled in grade levels K–12 and when applicable to homeliving programs. Each weight has a different value, and the weight of 1.15 is the base weight for all students. In addition to the base weight, increased values are assigned to certain grade levels to compensate for additional cost. Moreover, supplemental programs providing bilingual education, gifted and talented education, and intense residential guidance are funded by increased weighted values. The total weights for each school are determined by multiplying the student enrollment for each program area by the weights. This total of weighted student units for each school is then multiplied by the base unit value to determine the funding amount for each school. The base unit value is determined by dividing the total of all weighted student units generated by each school into the total amount appropriated for distribution.

The Committee reviewed the current BIA funding mechanism and distribution practices. The Committee understands that the current funding formula at 25 CFR part 39 was developed to provide equity in funding across the BIA school system. The Committee identified areas where the current formula does not provide equity and uniformity in the BIA school system. For example, all funding is currently based on a “count week” in September. This one-week period does not provide a complete school year count of all students served by a school or residential program. Therefore, any population increase or decrease after the September count week is not accounted for under the current system. Some Committee members suggested that the concept of a one-week count week encourages abuse for the following reasons: (1) There is no incentive to retain students after the count week is over, (2) there are many opportunities for schools to inflate student enrollment by busing children in or sponsoring events to attract students for that week, and (3) there are incentives to inflate the number of students identified for supplemental services, such as bilingual and gifted and talented, because these supplemental programs provide for

increased funding. The Committee attempted to minimize the opportunities for abuse in the proposed rule.

One of the Committee’s primary concerns was accountability, which is a critical element of the Act. The Committee tried to build into these proposed rules accountability for both BIA-operated and tribally operated schools, as well as accountability for those BIA officials overseeing the Indian education program. Because accountability is critical to implementing ISEP and ISEF, the Committee developed provisions in the new rules to hold both BIA and all Bureau-funded schools accountable to standards promoting equality and fairness.

For example, in , the Committee proposed a section to provide for increased accountability through reviews of both the school’s certified count and the education line officer’s count verification. The Committee recommended that the Director annually conduct random audits, and that an outside auditor also conduct annual, random audits to ensure the accuracy of ISEP requirements and the ISEF process.

The Committee believes that all schools funded by BIA must accept the responsibility to be accountable in all aspects of their operations. Each tribal organization, school board, and administrator in the system must accept the challenge to make ISEP work in the best interests of all students served by the Bureau-funded school system. The proposed rules require each school to maintain individual files and certify the accuracy of their contents relating to necessary documentation of student eligibility to receive base and supplemental services. In addition, the education line officer is held accountable to verify that students meet the necessary standards for base and supplemental services through the verification process. Each verification will be reviewed by either the Director or an outside auditing firm.

The intent of the rules needs to be considered and all parties involved should be committed to making ISEP work, rather than trying to find ways to give their school an advantage over the other schools in the Bureau-funded school system. It is a matter of personal and professional integrity and fairness for those organizations and individuals charged with administering the rules to find ways to make ISEP and ISEF work properly.

The Committee also feels that accountability must be present at all levels of BIA and the Office of Indian Education Programs (OIEP). BIA must fulfill its obligation to the students

served by the Bureau-funded school system so that each child is given equal opportunity to be successfully educated. Schools should not be penalized for BIA’s failure to administer the law and rules fairly. These proposed rules were drafted to comply with the section 1120 of the NCLB that states:

It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children \* \* \* ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality and provide for the basic elementary and secondary educational needs of Indian children, including meeting the unique educational and cultural needs of those children.

#### *Section 1127 Funding Formula*

Under NCLB Congress required the Secretary, through this Committee, to undertake three specific tasks: (1) To establish a formula for determining the minimum annual amount of funds necessary to sustain each Bureau-funded school; (2) to consider the cost of providing academic services which are at least equivalent to those provided by public schools in the State in which the school is located; and (3) the development of a pro rata formula to distribute funding under the ISEF.

*Minimum Amount of Funding to Sustain Each Bureau-Funded School.* The Committee discussed various options for determining the minimum amount of funding needed to sustain each bureau-funded school. Most options required BIA to have data regarding the actual costs associated with Bureau-funded schools. Consequently, the Committee is proposing a formula based on the dollar value of a student unit nationally as reported by the National Center for Education Statistics (NCES). By looking at the NCES and comparing Bureau-funded schools with Department of Defense schools and District of Columbia public schools, the Committee is proposing a formula that would be based on an accurate cost estimate of operating Bureau-funded academic schools. A similar formula would also more accurately determine the cost of housing a residential student. Moreover, the Committee recognizes that on average, the actual cost for a residential student is two times or more than that of an academic student. However, this formula cannot be fully implemented until the Bureau can collect the data necessary to develop an accurate summary of the amount of funding needed to provide the minimum amount of funding necessary to sustain each Bureau-funded school.

Upon receipt of adequate education cost data, the Committee would hope that the Department could present this data to Congress so that it could review whether it provides sufficient funding to all Bureau-funded schools and residential programs.

The formula establishing the minimum amount of funding to sustain each Bureau-funded school is located in subpart H of the proposed rule. The Department seeks comments on whether the material explaining the derivation of the formula should be included as an appendix, rather than in the body of the rule.

*The Cost of Providing Equivalent Academic Services.* One of the responsibilities imposed upon BIA by the NCLB is to determine the level of funding necessary to finance Bureau-funded schools and residential programs at a level at least equal to that provided by the public schools in the states in which the schools are located. One recent report from the General Accounting Office indicates that the data available is not adequate to allow for a comprehensive and accurate comparison between similarly situated state public schools and Bureau-funded schools. Due to time constraints the Committee did not develop a proposal for a data reporting system that would capture specific data for a comparison between state and BIA-funded schools. However, the Committee did develop a formula to develop the minimum amount of funding to sustain each Bureau-funded school which looks at other similarly situated school and residential programs.

*Pro Rata Formula.* The Committee was also required to develop a formula to distribute funding appropriated by Congress. To develop a distribution formula, the Committee reviewed the existing distribution formula and developed a recommended formula that would better meet the needs of Bureau-funded schools and provide a more equitable distribution of ISEP funding. The Committee took its responsibility very seriously and made a conscientious effort to consider all issues relevant to the rules being developed. The following issues were matters that the Committee discussed at great lengths as they developed the ISEF in order to distribute appropriated funds:

*Student Count.* In Subpart C, the Committee is proposing new rules for undertaking a count of the student population served by BIA school system. These rules provide for the use of an average daily membership for academic purposes and the use of a three-week count period for residential programs.

The Committee decided against the continuation of a count week for academic programs. The Committee determined that the concept of using one week in the entire school year to determine student attendance in academic programs did not provide an accurate reflection of the program's population for the entire school year. A concern that the Committee considered when deciding not to continue an academic count week was the issue of Spring enrollment. Because the current "count week" is the last week in September, school funding is not reflective of a school's enrollment and attendance for an entire academic year. Academic and residential programs may experience sharp increases or decreases in enrollment during the spring semesters, and a one-week count period does not take these fluctuations into account. The Committee also considered using a count period with varying lengths of time for academic funding, however this was also rejected.

The Committee did decide to retain a count period for residential programs. The Committee recommends that the count period for residential programs be the first full week in October. Moreover, the Committee recommends that a student must also be in attendance in a residence program the week preceding and the week following the October count week. Thus, the residential period is a three week period.

The Committee also decided to fund the residential program on the number of nights of service provided. The current funding mechanism funds all residential programs seven-night programs. There seem to be an inequity as some residential programs only offer three or four nights of service, while others operate for seven full nights of service. Therefore, the Committee recommends that a residential program that offers five nights or more of service shall receive full residential funding, the equivalent of 7/7 weighted student unit. Any residential program offering less than five nights of service shall be apportioned a prorated share of funding at 4/7 weighted student unit.

In addition, the Committee recommends that at least 50 percent of the residency levels established during the count period be maintained and residency attendance also be reported to OIEP monthly. If a residential program does not maintain at least 50 percent of its count period enrollment, then the residential program will lose one-tenth of its current year funding allocation. The justification for this recommendation was to encourage residential programs to retain students throughout the entire school year.

*Average Daily Attendance (ADA) versus Average Daily Membership (ADM).* The Committee recommends the use of Average Daily Membership (ADM) to count students for purposes of ISEP academic funding. Before deciding to base the student count on ADM, the Committee considered the merits of both Average Daily Attendance (ADA) and ADM. The Committee adopted ADM for purposes of a student count because it was decided that ADM was a more reasonable and fair mechanism for counting student enrollment and attendance. Unlike ADA, ADM takes into consideration a grace period when students are sick or absent from school. The Committee feels that ADM is more accurate and equitable than a "count week" because it provides a comprehensive look at student enrollment and attendance throughout the entire academic year. In addition, the Committee believes that ADM would help prevent some of the abuses that are inherent in the current funding mechanism and also encourage greater accountability in the academic program. Because ADM is based on the entire school year, there is now a financial incentive for student retention and maintaining student attendance throughout the school year, which the Committee believes will result in higher graduation rates.

*Three-Year Rolling Average.* The proposed rules in § 39.205 provide for funding to be based on a 3-year rolling average. A 3-year rolling average is the mechanism used to determine the amount of money allocated for a school year based on the average of the three previous years' allocations. The Committee felt that the rolling 3-year average would provide a more stable funding base. Thus, enabling a school to better plan and budget for the upcoming school year.

For example, if a school experiences a drastic enrollment decrease beginning in the 2006 school year, the 3-year rolling average would allow the school a 2-year window to adjust its staff and other related costs. The Committee believes that schools and the OIEP should provide timely information related to ADM, in order to promote accuracy of the 3-year rolling average.

*Payment Dates.* The Committee is recommending that BIA distribute 80 percent of a school's funding for the upcoming school year by July 1. This 80 percent would be based on the 3-year rolling average of ADM (base and supplemental programs). The Committee also recommends that BIA distribute the remaining twenty percent of funding by December 1. This 20 percent would reflect any adjustments

made by the verification, audit or appeals processes.

In reviewing the Committee's proposed rule, the Federal team has serious concerns regarding the provisions that states that, "No school will receive less than 80 percent of the amount received the previous year." The concern is that the purpose of the 3-year rolling average is to protect a school against any sharp increases or decreases in student enrollment. Therefore, this mandated 80 percent seems duplicative. The Federal team is also concerned that if a school with decreasing enrollment were automatically given 80 percent of their funding in July, the school would then be responsible to refund BIA for any overpayment in funding.

**Contingency Fund.** BIA has existing rules regarding the use of the contingency fund. The current rules at 25 CFR 39.70–39.78 authorize the awarding of contingency funds to replace items in the event of their destruction by earthquake, fire, flood storm, or other "Acts of God." The Committee reviewed these rules and is proposing revisions.

The Committee determined that the Director's Contingency Fund should only be used to provide for unforeseen, unpredictable, and emergency circumstances. In order to promote transparency in the allocation of contingency funds, the Committee required that the Director annually notify all Bureau-funded schools and appropriate tribal governing bodies of contingency fund allocations.

**Ten percent enrollment increases.** The Committee also discussed whether to include an adjustment for schools whose student population increased by more than 10 percent over the previous 3-year average. However, due to time constraints, the workgroup did not present this issue to the Committee. The Committee would like to seek comments as to the necessity of a provision providing adjustment funding for schools that experience a 10 percent increase in student population from the previous school year's ISEP count. Once again, the purpose of the 3-year rolling average would be to protect against these types of significant enrollment increases. The Committee also discussed that this provision would favor small schools, as a 10 percent increase would be more readily available to a school with a small population.

**Special cost factors.** NCLB required the Committee to consider the following special cost factors:

"The isolation of the school; the need for special staffing, transportation, or education

programs; food and housing costs, maintenance and repair costs associated with the physical condition of the educational facilities; special transportation and other costs of isolated and small schools; the costs of home-living (dormitory) arrangements, where determined necessary by a tribal governing body or designated school board; costs associated with greater lengths of service by education personnel; the costs of therapeutic programs for students requiring such programs; and special costs for gifted and talented students."

As a rule, the Committee considered "special cost" factors to be those factors that only affected a discrete number of schools and were not prevalent in the Bureau-funded school system. The Committee identified the following special cost factors: Language development, isolation factors, gifted and talented, school board training, and small school adjustment. Other special cost factors were considered, but did not receive an additional weighted student unit.

The Committee evaluated the impact that special cost factors have on the ISEF, as special cost factors re-allocate the available funding and provide more funding for these "special costs" at the expense of a more general distribution. The Committee was also concerned about how special cost factors impact residential programs, dorm programs, and schools that do not place an emphasis on these types of programs. By allocating more funding to "special programs," the Committee was choosing to make less money available in the general pool. The Committee is seeking comments on the priority of these choices.

**Language Development.** In § 39.130, the Committee recommends a special cost factor of .13 for language programs. The Committee believes that the need to restore and maintain Native Languages is important. Historically, the government made a concerted effort to eliminate the Native Languages in an attempt to force the assimilation of Indian people. Now there is a desire to maintain and restore those Native Languages and the culture tied to them. Research has indicated that students who are proficient in their Native Language will also achieve better academically. The Committee believes a Native Language Development Program is an important pathway to appropriate cultural knowledge and expression.

The Committee also recognizes BIA's obligation to provide English language development services to students who are limited English proficient. Therefore, any student who is identified as limited English proficient is required to receive limited English proficiency services.

**Isolation factors.** Isolation factors were discussed at length and the Committee did not have sufficient data to rate the isolation factor of each school in the bureau-funded school system. Historically, most Bureau-funded schools are isolated by the placement of Indians on reservation lands. In general, the Committee felt that special weights for isolation factors were better addressed as a transportation issue.

However, the Committee did determine that there are some exceptional circumstances that did warrant additional funding due to the severe isolation and remoteness of a particular school. The Committee agreed that Havasupai Elementary School, which is located in the Grand Canyon, had isolation factors beyond those experienced by most schools. Havasupai Elementary School has food and other important items delivered by mule and/or helicopter. The Committee seeks comments as to whether Black Mesa Community School is also a school that has an extreme isolation factor that is unique and is not generally experienced by a majority of the Bureau-funded schools.

The Committee seeks comments on the following chart and the definition of "established community." This chart was not adopted by the Committee and did not receive consensus from the Committee. The Committee could not reach agreement on whether there is sufficient documentation to clearly identify that certain isolation factors were not experienced by a majority of Bureau-funded schools. The Committee encourages tribes and schools to submit public comment on the following chart so those comments may be given consideration by the Committee before final recommendations for rules are made. The purpose of these comment will be to determine whether other less extreme isolation factors should be given an additional weight under the ISEF.

A school which demonstrates that it meets one or more of the following criteria will be awarded. An isolation cost factor will equal the value of the total number of WSU identified for the applicable criteria, provided, however, that no school will be awarded an isolation factor of more than 12.5 WSU.

1. The school is located at least 60 road miles (one way) from the nearest established community. 1.5 WSU
2. The school is dependent upon animal or light aircraft for transportation of persons, services, and supplies for the operation of the school. 12.5 WSU



3. The school's primary access route is an unpaved road of 10 miles or more.
4. The school's primary access route is dependent upon a bridge or road that is routinely subject to unavailability during periods of severe weather or floods.

For the purposes of this section, the term "established community" means a population center (Metropolitan Statistical Area or an incorporated city or town) having a year-round population of 1,500 or more, provided that it has minimal essential medical facilities (at least one physician and one dentist) available to all students and employees of the school on a non-emergency basis, 24 hour law enforcement services, a post office, retail grocery store and retail motor fuel station.

*Gifted and Talented.* The Community discussed Gifted and Talented considerations at length. Some members of the Committee are concerned that schools that claim a disproportionate number of students for gifted and talented services ultimately reduce the amount of money available to all students in the ISEF base. The reduction in this base could adversely affect residential programs (which are not eligible for the gifted and talented weighted unit) and other schools who either do not have a gifted and talented program or who have very few students who meet the gifted and talented requirements. The Committee would like to seek specific comments on the potential impact on base funding of residential programs if the number of students identified as gifted and talented increase significantly.

The Committee considered, but did not adopt the establishment of a ceiling on the number of students each school could claim for a gifted and talented weighted unit. This ceiling or cap was considered in order to ensure that ISEP funding was evenly distributed throughout the Bureau-funded school system. Some members of the Committee, and members of the public who commented, did not support a cap on gifted and talented. One of the concerns regarding the imposition of a cap is that a cap not only limits the percentage of students who can be counted as gifted and talented, but may also establish a minimum threshold to which every school may feel obligated to meet. Ultimately, the Committee decided not to impose a cap on Gifted and Talented. However, the Committee did place emphasis of the importance of a process for identification of gifted and

talented students as well as documentation that gifted and talented services were provided to identified students.

The proposed rules at § 39.106 provide for the eligibility standards and oversight of gifted and talented funding. These rules require that a student can be identified as gifted and talented in five specific categories: intellectual ability, creative/divergent thinking, academic aptitude, leadership and visual and performing arts. However, a school cannot identify more than 15 percent of its student population as gifted and talented in either the leadership or visual and performing arts categories. The proposed rules outline how students are to be identified, nominated, and assessed as gifted and talented. In addition, the rules provide that a student who is identified as gifted and talented must receive services not ordinarily provided by the school which meet the goals and objectives specified in the student's education plan.

*School Board Expenses and Training.* The current rules at § 39.90 govern how funding is set aside for school board training, eligible training activities, and the approval process for training expenditures. NCLB requires a minimum of 40 hours of school board training for new school board members. School board training issues will vary from year to year and with each school. There will be some schools where there is no need for training since all board members are returning and have already been trained. In other cases, there will be a need for training as required by law. Thus, the Committee included a provision at § 39.600 to address this issue.

The Committee also recommends an amount equal to a total of a 1.2 weight to assist Bureau-operated schools in paying for school board training. Unlike contract or grant schools, Bureau-operated schools are unable to pay for school board training through Administrative Cost Grants. Instead, Bureau-operated schools must pay for school board training from ISEP funding.

*Small School and Small High School Adjustment.* The Committee determined that a factor for a Small School Adjustments was important because these schools do not have economies of scale to provide adequate educational opportunities for their students. The proposed rules at § 39.140 provide for this adjustment. By offering an adjustment (additional weighted units) for schools characterized by smaller populations, these schools should have increased opportunity to offer more or better academic services to their

students. This is especially true for small high schools that are required to offer departmentalized programs.

*Residential Programs.* Current BIA rules at § 36.71 provide for a cost factor for a program entitled "Intensive Residential Guidance (IRG)." This factor is available after the establishment of specific activity programs, individual student diagnostic procedures, and the development of individual student treatment plans and measurements of student progress. The Committee recommended that the current additional weight for the IRG program be eliminated and be added to the residential base. The result of removing IRG to the base is an overall increase in the residential base of about .35.

The Committee heard many comments that the IRG program was cumbersome and did not guarantee that supplemental services were provided to students with extra ordinary needs. However, the Committee did decide that when the Committee undertakes negotiated rulemaking for home living standards that certain standards be included to aid students with special needs, such as, mental health, substance abuse and other needs. The Committee discussed that there is a high probability that the actual cost for a residential student is two times that of an academic student, however, time restraints did not allow for further Committee discussion. The therapeutic dorms program was also discussed and the Committee decided not to include this program in the ISEF because this program is not funded under ISEP.

*Off-Reservation Boarding Schools.* The Committee determined that the Off-Reservation Boarding Schools (ORBS) population represents a unique population of students. Specifically, the Committee was concerned about those ORBS schools that receive a large number of students as a result of a tribal court mandate or extreme disciplinary problems. The Committee is seeking comments as to whether ORBS schools should receive an additional weighted unit to fund special costs that are not equally shared throughout the system.

*Accreditation.* The Committee recognized that accreditation may produce some special cost factors, but decided that an additional weighted unit was not necessary for those schools seeking accreditation.

*Distance and Other Alternative Learning.* The Committee discussed the impacts of Distance Education, Vocational Education, Pre-school early childhood-education, and the education of non-ISEP eligible students. The Committee decided that these issues should be covered by the base program



or other related programs. For example, pre-school early childhood-education might be funded by a program such as Head Start. The Committee also seeks public comment to determine if ISEP or another funding mechanism might be necessary to fund the education of non-ISEP eligible students who attend Bureau-funded schools.

*Costs Associated with Greater Lengths of Service.* The Committee discussed the costs associated with greater lengths of service by educational personnel. It was recognized that there is a difference between bureau-operated schools required to use the DOD salary schedules and grant/contract schools which use their own salary scale. The Committee decided not to include this factor in the formula since many tribes made the decision to become grant or contract schools in order to have more flexibility and discretion.

*Facility Maintenance Costs.* The Committee discussed maintenance and repair costs related to Bureau-funded facilities. However, the Committee decided that these costs were funded separately from the ISEP and not relevant to ISEF.

*Special Education.* The Committee discussed whether students identified as in need of special education services should be allocated an additional weighted unit. Some members of the Committee believed that having an additional weighted unit for special education would be desirable. After considering the issue in depth, the Committee decided to keep special education funding in accordance with the current rules which mandate that each school set aside 15 percent of their basic instruction allotment to meet the needs of students with disabilities. If the 15 percent is inadequate to fund services necessary for eligible students with disabilities, schools may still apply for Part B funding. The Committee did agree that the OIEP's administration of Part B special education funding needs to be improved. Many expressed concerns that access to Part B funding was cumbersome and difficult. Therefore, the Committee recommends that OIEP provide training and technical assistance to better serve the Bureau-funded schools in applying for Part B funding.

*Transition/Phase-In Provisions.* At § 39.220, the Committee recommended a phase-in provision to implement the proposed rules. For the first year after the effective date of publication of a final rule, OIEP will calculate ADM based on the prior 3 years' count period to create an average membership for funding purposes. For the second year and third years, the school will use a

combination of ADM count(s) and applicable ISEP count(s) under the existing rules. Within three years of implementation of the final rules, OIEP will calculate funding on a 3-year rolling average of each school's ADM.

*Transportation.* Although the Committee would like to establish a formula that reflects the actual transportation costs of Bureau-funded schools, the Committee determined that there was insufficient information to develop this actual cost formula at this time. To address this issue, the Committee is proposing new rules for data collection and is proposing an advance notice of proposed rulemaking so that the public can comment on the formula the committee would consider once the data is available. In the meantime, the Committee is proposing that the current OIEP transportation policy be the proposed transportation rule.

In addition to the current transportation policy, the proposed rules would require Bureau-funded academic and residential programs to report their actual transportation expenditures. This information is critical to develop an actual cost transportation formula. One reason the Committee wanted to develop an actual cost formula was to better reflect a school's transportation costs to avoid situations where these costs take away from the instructional funding of the schools.

#### Conclusion

The Committee recognizes that adoption of new formula for distribution will impact each school differently. It is possible that some boarding schools may be heavily impacted by the new formula. The Committee feels strongly that the ISEF should distribute funds in a fair and equitable manner that gives all students equal opportunities to receive a quality education. The Committee believes that certain administrative changes are necessary at the local school and Bureau of Indian Affairs level to provide more educational opportunity to the students served by the Bureau-funded school system.

The Committee cannot emphasize strongly enough the importance of careful consideration of these proposed rules by Bureau-funded schools, tribes with members who attend Bureau-funded schools, and parents and students served by Bureau-funded schools. The Committee strongly encourages anyone who has an interest in these proposed rules to submit public comments that the Committee may consider when finalizing the rules.

#### V. Part 42—Student Rights

Section 1136 of Title IX of the Act required the Secretary to prescribe rules to ensure the constitutional and civil rights of Indian students attending Bureau-funded schools, including rights to privacy, freedom of religion and expression, and due process in connection with disciplinary actions, suspension, and expulsion.

*Section 42.1.* This section provides objectives and guidance for school boards when determining how to apply student rights and due process. It lists only the minimal considerations a school should make to fulfill the due process and student rights obligation owed to students. The following objectives may also be considered: Providing students with a safe learning environment, the opportunity to observe Native customs and practices (consistent with health, safety, and welfare), and an education provided by educators trained in Native pedagogies. The absence of these objectives from the regulation was due to an understanding that in some circumstances consideration of the objective could not be made or would be inappropriate. Wherever possible to the extent practicable school boards should aspire to give consideration to the aforementioned objectives omitted from the regulation.

*Section 42.2.* This section prescribes the minimum rights to which all students at Bureau-funded schools are entitled. Where possible or applicable, a school may provide more rights than required by this rule. Nothing in this section limits existing student rights provided in the Constitution, school board policies, or elsewhere. This section should be read in conjunction with the stated purpose for the rule and the preamble explaining that purpose.

*Section 42.3.* This section prescribes how schools are to apply the due process obligations. It was the group's desire that the rule be interpreted so that a school board would apply Alternative Dispute Resolution (ADR) first whenever possible. It was realized that some situations would arise where use of ADR processes would not be permitted under school board policies (*i.e.*, offenses that merit immediate suspension under school board policy or law). It was understood that in some situations ADR would yield a "consequence" other than traditional forms of formal punitive actions (*i.e.*, detention, suspension, expulsion).

It was the committee's desire that the school board work with the student to ensure reintegration of the student into the school community after using ADR

processes. The group understood reintegration to mean returning the student to regular student status after the student allegedly or actually committed a violation. Where ADR and subsequent reintegration of a student are not possible, the school could then apply traditional formal disciplinary procedures.

The committee wants schools to be permitted to craft their own processes for dealing with violations of school policies. It was also recognized that some of the processes schools used to address student violations were not formal disciplinary actions. Often schools wish to apply ADR processes first or instead of more formal proceedings.

In circumstances where ADR cannot be used, a school may immediately apply formal disciplinary proceedings. The goal of any process used to address violations of school policies should be returning the student to active student status as quickly as possible.

**Section 42.4.** In this section the group attempted to provide guidance on what was meant by ADR processes. The objective of this section was to present examples of alternatives to traditional forms of formal punitive actions typically applied to violations of school policies. Specifically, tribal forms of dispute resolution could be used in place of formal disciplinary processes. It was realized that ADR processes would not always result in traditional forms of formal punitive actions (*i.e.*, detention, suspension, expulsion). Outcomes of ADR processes were not to be discredited merely due to a resolution that applied alternative “consequences.”

**Section 42.5.** In this section the group provided guidance on when it was appropriate to apply ADR techniques in place of more formal disciplinary proceedings. Ultimately, the school board has the discretion to determine what process to apply and when. This section provides points schools should consider in making their determinations.

(a) A school may decide whether use of ADR is appropriate under the circumstances. Where possible, ADR should be used before formal disciplinary proceedings.

(b) Where articulated policy or law clearly defines immediate consequences, a school may not discretionarily apply ADR processes.

(c) Although the committee prefers that school boards apply ADR processes first, use of ADR procedures in every circumstance is not required.

**Section 42.6.** This section prescribes the rights to which all students are

entitled in disciplinary proceedings. School boards should strive to provide students as much information and time as is necessary to defend themselves against allegations of disciplinary violations. School boards may not limit the amount of due process provided to a student in disciplinary actions. The group felt it essential that the accused student be provided the maximum due process available. Due process demands that all students be provided a fair and impartial hearing for all alleged violations of school policies. In certain situations immediate punishment may be applied, but due process must not be diminished merely because punishment has already begun.

(a) Schools must give students written notice of charges within a reasonable time. Reasonable time is notice provided promptly after the charges have been made.

(1) The copy of the regulation that the student is charged with violating must be the same language provided in the most recent copy of student policies and guidelines issued to students by the school.

(2) The school must inform the student of sufficient facts that constitute the alleged violation so the student may defend the allegation.

(3) Any information the school obtains leading to or arising from any charge must be made available to the accused student.

(4) A student must be informed if the school intends to consider any portion of the student's record in disciplinary decisions.

(b) Generally, the school must provide a student a full due process hearing before the student is punished.

(1) There exist certain offenses for which school policy or law requires immediate punishment. In these circumstances, this rule is not intended to prevent those school policies or laws from applying. Rather, the punishment may be effective immediately in a temporary manner pending full hearing.

(2) In rare cases of emergency situations not addressed by school policy or law, immediate removal of the student may be necessary for the protection of the accused student, student body, or school faculty. In such rare instances the school should not be prevented from removing the student posing the emergency risk.

(3) A student may always elect to waive all or a part of the due process hearing rights to which the student is entitled.

(c) It was recognized that emergency situations will arise that merit immediate action by the school board.

(1) Any emergency removal of the student from the active student body will be deemed temporary until provision of a hearing affording a student all due process rights.

(2) All actions taken by a school against a student accused of violating school policy must be documented in writing for the student's record immediately after the action is taken.

(3) A school must provide a student a hearing proving the student full due process rights within 10 days of any disciplinary action. The time may be delayed only upon motion of the student and upon showing of good cause.

**Section 42.7.** This section outlines the minimum due process procedures a school must provide to a student accused of school policy violations. Nothing in this section should be read as precluding a school board from providing additional protections to those enumerated in the proposed rule. If possible, the rules should be interpreted in a manner favoring the accused student.

(a) All students have the right to have a parent or guardian present during hearings for disciplinary violations. If the student is the age of majority, the student may waive the right to have a parent present. “Parent or guardian” should be read broadly to include any adult, other than boarding school personnel, who is the equivalent to a parental authority over the student, or any adult who is head of the household where the accused student primarily resides.

(b) Students have the right to be represented by an adult in addition to their parent at disciplinary proceedings. It was not intended that a student should be entitled to receive funding from the school board or the Federal government to pay for this representation. “Counsel” as used in the rule is not limited to legal counsel. Generally the person selected as “counsel” must act as a representative of the student in the disciplinary proceeding and should generally be familiar with the disciplinary process of the school board.

(c) Accused students have the right to produce and have produced witnesses and confront and examine all witnesses.

(d) A student must be provided all information concerning hearings addressing violations of school policies. While this rule does not specifically require additional school record development, the student is entitled to any records or documents that the school board makes in conjunction with the disciplinary proceeding. The right to certain records does not require

disclosure of documents otherwise privileged under attorney client privilege.

(e) A student must be given the opportunity to appeal any decision concerning violations of school policy. The group hearing the appeal must not be the group that issued the original decision.

(f) A school may not require that the student testify against himself for the purpose of finding him guilty. If, however, the student elects to so testify, then the student's statements may be used to affirm allegations of school policy violations.

(g) When a student is not found guilty of alleged violations of school policy, the student's record must not reflect the allegation. Prior allegations of school policies for which a student is not found guilty should not be used against the student in future proceedings.

**Section 42.8.** This section provides objectives for consideration of victims' rights. Where possible and appropriate, the rights of the victim should be afforded consideration in hearings addressing violations of school policies. While consideration of victims' rights is an aspiration and creates no enforceable right for the victim, it was desired that schools make every effort possible to afford victims rights in disciplinary proceedings.

**Section 42.9.** A school must develop a handbook and make that handbook available to students annually. Changes in school policy do not become effective for the purpose of disciplining a student under the changed policy until the student body is notified of the change in writing.

(a) The handbook must clearly explain all school policies to place all students on notice of expected conduct and actions which constitute violations of school policy.

(b) All staff must be informed of school policies to ensure that violations are properly reported and proper conduct does not subject students to unnecessary charges.

(c) Students and parents, guardians, or other persons providing primary care for students shall be given copies of the student handbook for their reference. In the case of students attending boarding schools, it is not sufficient to provide only dorm staff with the handbook; parents or other caregivers must also be provided copies.

(d) To the extent possible, students, school staff, and parents or guardians should confirm in writing receipt of the student handbook. Such practices will ensure both that schools strive to keep students, staff and others informed of school policies as well as assist the

school in establishing that the student was aware of the policy allegedly violated.

## **VI. Part 44—Grants Under the Tribally Controlled Schools Act**

In section 1127 of the Act, Congress authorized the Secretary to promulgate only rules that: (1) Are necessary to ensure compliance with the Act and (2) Comply with section 5211 of the Tribally Controlled Schools Act of 1988. The Act amended the Tribally Controlled Schools Act of 1988 by striking sections 5202 through 5212 and inserting new sections. New section 5210 specifically provides that:

The Secretary is authorized to issue rules relating to the discharge of duties specifically assigned to the Secretary in this part. For all other matters relating to the details of planning, developing, implementing, and evaluating grants under this part, the Secretary shall not issue rules.

In developing proposed rules, the Committee reviewed each section of the Tribally Controlled Schools Act to determine whether the section pertained to the discharge of the Secretary's duties. If it did, then the Committee considered whether the statutory provision was clear without the need for rules. If so, then the Committee chose not to draft rules.

At the outset, the Committee was especially mindful of Congress' Declaration of Policy found in section 5202 of The Act. The Committee used the declaration, including the recognition of the importance of self-determination, the commitment to Indian education, and the national goal and education needs.

Specifically, the Committee considered the declaration at section 5202(a), where Congress:

Recognizes that the Indian Self-Determination and Education Assistance Act was the product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial step positive step toward tribal and community control and that the United States has an obligation to assure maximum participation in the direction of education services so as to render the persons administering such services and the services themselves more responsive to the needs and the desires of Indian communities.

The Committee also specifically considered that Congress made the following commitment in section 5202(b) of The Act:

Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children through the establishment of a meaningful Indian

self-determination policy for education that will deter further perpetuation of Federal bureaucratic domination of programs.

The Committee also used Congress' declaration of a national goal of the United States in section 5202(c):

Congress declares that a national goal of the United States is to provide the resources, processes, and structure that will enable tribes and local communities to obtain the quantity and quality of educational services and opportunities that will permit Indian children (1) to compete and excel in the areas of their choices; and (2) to achieve the measure of self-determination essential to their social and economic well-being.

The Committee considered that Congress also affirmed the educational needs of Indian students in section 5202(d) of The Act when it stated:

Congress affirms (1) true self-determination in any society of people is dependent upon an education process that will ensure the development of qualified people to fulfill meaningful leadership roles; and (2) that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities; and (3) that those needs may be best met through a grant process.

Fully considering the directives of Congress, the Committee turned to each section of the Tribally Controlled Schools Act, to determine which sections needed rules.

In section 101, the Committee reaffirmed that the statute and rules principally applied to the grantee and that guidelines, manuals, and policy directives of the Bureau only applied if agreed to by the grantee. Section 102, reaffirmed that the rules do not affect existing tribal rights. Section 103 provides the eligibility requirements found in section 5203 and 5205 of the The Act.

Section 104 provides for the three methods by which a grant can be terminated. These methods are found in section 5203(f) B retrocession; 5206(c) B revocation of eligibility; and 5208(12) reassumption. Section 105 implements section 5203(f), section 106 implements section 5206(c), and section 107 implements section 5208(12).

Section 108 implements section 5207, which requires that payments be made to the grantee in two annual payments. However, the Committee is recommending that annual payments be made to all Bureau-funded schools. This section will be amended in the final rule to reflect the final rule for payments. This section also reiterates the statutory requirement that the Prompt Payment Act applies to grant payments. Section 109 implements section 5207(a)(2) regarding excess funding.

In section 5208 of the The Act, Congress specifically incorporated into the Tribally Controlled Schools Act certain sections of the Indian Self-Determination and Education Assistance Act (ISDEAA), as amended. Section 110 incorporates those sections of the 25 CFR part 900 that implement the incorporate sections of the ISDEAA. In addition, the Committee considered whether the “common-rule,” 43 CFR part 12, applied to grantees except in the construction context. The Committee examined 25 U.S.C. 2503(b)(4)(B), section 5204 of The Act, and believed that the 43 CFR part 12 does not apply to grantees. However, some members of the Committee raised concerns that without the common rule, there were no standards for financial, property, or procurement management. To address these concerns, the Committee incorporated subpart E of part 900, “Standards for Tribal or Tribal Organization Management Systems.”

Finally, section 111 reiterates that the Federal Torts Claims Act applies to grant schools.

Overall, the Committee felt that the Tribally Controlled Schools Act of 1988, as amended by the The Act, needed very few rules. The Committee was true to Congress’ directive that the rules only pertain to the discharge of the Secretary’s duties. Moreover, the Committee believed that if the statute was clear, no implementing rules were necessary.

#### VII. Part 47—Uniform Direct Funding and Support

Section 1130 of the Act specifically requires the Secretary to establish by regulation a system for the direct funding and support of all Bureau-funded schools. This system must allot funds in accordance with section 1127 of the Act. A subgroup of the committee reviewed the current rules in 25 CFR 39.50 and determined that the rules did not need any substantive changes. The subgroup put the current regulation in plain language and presented it to the

committee as a whole. The committee as a whole accepted the plain language version of the uniform direct funding rules with little discussion.

#### VIII. Procedural Matters

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

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

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

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

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

(4) This rule raises novel legal or policy issues. The rule proposes entirely new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights and adapts the existing rules to comply with current law and policy.

##### *Regulatory Flexibility Act*

The Department of the Interior certifies that this document will not have a significant economic effect on a

substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Funding for Indian education programs has averaged about \$350 million in grants annually over the last ten years. The “No Child Left Behind” legislation, which these proposed rules are designed to implement, will provide no additional funding, but merely reallocates current funding. Since grants redistribute wealth, they have no impact on aggregate employment and prices unless the allocation of the grant money produces incentives that result in an employment, income, or price effect in excess of \$100 million annually. Although the purpose of this rule is to change the formula for distributing grant money, BIA does not have sufficient information to evaluate the extent to which the proposed regulation may change the incentives associated with new proposed formula. However, based on the new proposed formula, school districts may face incentives to report or count students differently than under the existing formula. Regardless of the extent to which incentives may shift, the Secretary believes that the changes would not result in changes in employment, income, or prices in the economy.

##### *Costs and Benefits*

The proposed formula for distributing the grant money was determined in negotiation with the grant recipients to ensure that maximum benefits are obtained at the local level. The approximate distribution of grants by instructional programs under the current distribution formula and under the proposed new formula is shown in Table 1. Although the distribution of grants under the new formula is not precisely known, the expected distribution is also shown in Table 1. Table 2 shows the effect on grants allocated by State under the current and proposed formula.

TABLE 1.—EFFECT ON GRANT ALLOCATION BY PROGRAM  
[Percent]

Program	Approximate current allocation	Proposed formula allocation
Instructional Programs:		
Basic .....	68.2	59.0
Exceptional Child .....	2.5	10.4
Bilingual .....	6.2	6.8
Gifted & Talented .....	5.6	5.5
Total Instructional .....	82.6	81.6
Residential Programs Basic .....	11.6	18.4

TABLE 1.—EFFECT ON GRANT ALLOCATION BY PROGRAM—Continued  
[Percent]

Program	Approximate current allocation	Proposed formula allocation
Intensive Residential Guidance .....	2.9	0.0
Exceptional Child .....	.1	0.0
Total Residential .....	17.6	18.4
Total .....	100.0	100.0

TABLE 2.—EFFECT ON GRANT ALLOCATION BY STATE  
[Percent]

State	Approximate current allocation	Proposed formula allocation
Arizona .....	27.4	27.8
California .....	2.6	2.6
Florida .....	.4	.4
Iowa .....	.3	.2
Idaho .....	.2	.4
Kansas .....	.2	.2
Louisiana .....	.1	.1
Maine .....	.5	.5
Michigan .....	.5	.5
Minnesota .....	1.5	1.5
Mississippi .....	3.6	3.4
Montana .....	.8	.8
North Carolina .....	2.2	2.1
North Dakota .....	8.0	7.8
New Mexico .....	24.2	24.3
Nevada .....	.2	.3
Oklahoma .....	3.8	3.8
Oregon .....	1.6	1.6
South Dakota .....	16.7	16.5
Utah .....	.9	.9
Washington .....	2.4	2.5
Wisconsin .....	1.5	1.5
Wyoming .....	.4	.4
Total .....	100.0	100.0

These provisions will allow school districts to use Federal funds in a manner more consistent with their own reform strategies and priorities. While most of the benefits of the new law are conveyed by the statute, the regulations proposed through this notice could also result in cost savings, by allowing flexibility in adopting assessment systems composed entirely of locally developed and administered tests. Data limitations make it difficult to estimate the magnitude and timing of any potential cost savings. However, given the new flexibilities associated with the proposed regulation, the Secretary has concluded that these regulations are likely to have positive net benefits.

#### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business

Regulatory Enforcement Fairness Act. This rule:

(1) Does not have an annual effect on the economy of \$100 million or more on budgets.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. The rule proposes new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights and adapts the existing rules to comply with current law and policy. The rule does not pertain to funding and is not expected to have an effect on budgets. The rule is not expected to have a perceptible effect on costs or prices.

(3) Does not have significant adverse effects on competition, employment,

investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The rule proposes new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights and adapts the existing rules to comply with current law and policy. The rule does not pertain to funding and is not expected to have an effect on budgets.

#### *Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule proposes new procedures related to determining adequate yearly progress, school boundaries, funding, and other issues. It also updates existing procedures addressing student rights

and adapts the existing rules to comply with current law and policy. The procedures for dissemination of student rights through student handbooks are consistent with current practices. The procedures for implementing student rights through hearings and alternative dispute resolution processes are consistent with current practices. The rule is not expected to mandate additional costs on tribal governments.

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

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

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

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Nothing in this rule has substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not implicate State government. Similar to federalist concepts, this rule leaves to local school board discretion those issues of student civil rights and due process that can be left for local school boards to address. A Federalism Assessment is not required.

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

In accordance with Executive Order 12988, the Office of the Solicitor has

determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

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

In accordance with Executive Order 13175, we have identified potential effects on federally recognized Indian tribes that will result from this rule. This rule will require Tribally operated schools to observe student rights and procedures spelled out in the rule. Accordingly:

(1) We have consulted with the affected tribe(s) on a government-to-government basis. The consultations have been open and candid to allow the affected tribe(s) to fully evaluate the potential effect of the rule on trust resources.

(2) We will fully consider tribal views in the final rule.

(3) We have consulted with the appropriate bureaus and offices of the Department about the political effects of this rule on Indian tribes. The Office of Indian Education Programs and the Office of the Assistant Secretary—Indian Affairs have been consulted.

#### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Department is requesting comments on the information collection incorporated in this proposed rule. Comments on this information must be received by March 26, 2004, via facsimile or e-mail transmittal to: Desk Officer for the Department of the Interior, Office of Information and Regulatory Affairs, 202/395-6566 (facsimile) or [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov).

Comments are invited on: (1) Whether the collection of information is

necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden including the validity of the methodology and assumption used; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. The information collection will be used to enable BIA to better administer the No Child Left Behind program subject to this rulemaking. In all instances, the Department has strived to lessen the burden on the public and ask for only information that is absolutely essential to the administration of the programs affected and in keeping with the Department's fiduciary responsibility to federally recognized tribes.

Under 25 CFR part 39, OMB clearance has already been given under OMB Control Number 1076-0122 for the information required of Indian schools to document student attendance and classification for participation in certain special programs. In addition, OMB has approved certain transportation information in reporting off-reservation school mileage estimates, also in 25 CFR part 39, under Control Number 1076-0134.

A synopsis of the new information collection burdens for parts 30, 37, 39, 42, 44 and 47 is provided below. Burden is defined as the total time, effort, or financial resources expended (including any filing fees) by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

#### ESTIMATED BURDEN HOURS

CFR section	Number Respondents	Responses per respondent	Burden per response (in hours)	Total annual burden/cost
30.104(a)(1), Submit Notification .....	6	1	1	6 hours/\$72.00
30.104(b), Submit Waiver .....	7	1	11	77 hours/\$924.00
30.106, Submit proposal for alternative AYP .....	20	1	1	20 hours/\$240.00
30.107, Form Requirements .....	20	1	480	9,600 hours/\$115,200.00
30.110, Submit Request for technical assistance .....	20	1	2	40 hours/\$480.00
30.118, Submit Evidence .....	85	1	40	3,400 hours/\$40,800.00
Totals .....	.....	.....	.....	13,143/\$157,716.00

[**Note:** For purposes of this part, we recognize 184 bureau- and tribally-operated schools and peripheral dormitories. From this number we have extrapolated the number of likely respondents per information collection requirement. The cost of reporting

and recordkeeping by the public is estimated to be approximately \$12/hour. We have used this figure as a medium figure that would indicate the cost of having a form (or form requirements) completed, the cost of taking an hour's time off work, the cost of using

one's vehicle, time spent on the activity, and other miscellaneous costs that may be associated with obtaining the information needed to fulfill this part's information collection requirements.]

**Summary****Section 30.104(a)(1) What Is the Secretary's Definition of Adequate Yearly Progress?**

Where the tribal school is in more than one State, because of reservation geographic boundaries, the tribal governing body or school board may choose the State definition it desires for "Adequate Yearly Progress." This is realized through a written communication to the Secretary. It is estimated that there are only 6 schools within 2 tribes that would have this option to choose between or among State definitions for AYP. It is estimated that it would take the tribal governing body or school board 1 hour to complete this notification through a letter to the Secretary.

Burden hours = number of schools with this option (6) × 1 hour to send letter to the Secretary = 6 total annual burden hours at a cost of \$72.00 to the public.

**Section 30.104(b) What is the Secretary's Definition of Adequate Yearly Progress?**

The tribal governing body or school board may seek a waiver that may include developing their own definition of AYP, or adopting or modifying an existing definition of AYP that has been accepted by the U.S. Department of Education. The average number of schools that would ask for this waiver is estimated to be not more than 7 schools. To submit this waiver request for an alternative definition of AYP, the school would take approximately 11 hours to complete.

Burden hours = 7 schools × 11 burden hours = 77 total annual burden

hours at a cost of \$924.00 to the public.

**Section 30.106 How Does a Tribal Governing Body or School Board Propose an Alternative Definition of AYP?**

The tribal governing body or the school board may decide that the Secretary's definition of AYP is otherwise inappropriate. It may then propose an alternative definition of AYP by submitting a proposal to the Secretary. The physical act of submitting the proposal would only entail a hour's time. It is estimated that only 20 schools, on average, would propose an alternative definition of AYP.

Burden hours = 20 schools × 1 burden hour = 20 total annual burden hours at a cost of \$240.00 to the public.

**Section 30.107 What Must a Tribal Governing Body or School Board Include in Its Alternative Definition of AYP?**

This section illustrates the form requirements that a tribal governing body or school board must fulfill in completing its proposal for an alternative definition of AYP. It is estimated that it would take an average of 20 schools making such a proposal approximately 480 hours or 3 months to complete the requirements of this section.

Burden hours = 20 schools × 480 burden hours = 9,600 total annual hours at a cost of \$115,200 to the public.

**Section 30.110 What Is the Process for Requesting Technical Assistance To Develop an Alternative Definition of AYP?**

The tribal governing body or the school board must submit a written

request to the Director of OIEP if it desires to have technical assistance in developing an alternative definition of AYP. It is estimated that an average of 20 schools would be making this request, the same average of schools requesting an alternative definition of AYP, since this assistance is available. In submitting this written request, it is estimated that, at a minimum, a meeting of the tribal governing body or the school board would have to take place to discuss the request and then qualify the parameters of this assistance in a letter then sent to the Director of OIEP. It would take up to 2 hours to complete this administrative task.

Burden hours = 20 schools × 2 burden hours = 40 total annual burden hours at a cost of \$480 to the public.

**Section 30.118 Can a Bureau-Funded School Present Evidence Before It Is Identified for School Improvement, Corrective Action, or Restructuring?**

The tribal governing body or school board may present evidence that it should not be identified for school improvement, corrective action, or restructuring. There are 184 bureau-funded schools and peripheral dormitories. Only 170 have academic programs subject to school improvement, corrective action, or restructuring. Out of the 170 bureau-operated schools, it is estimated that approximately half (85) would seek to present such evidence. To compile the evidence necessary to make its case, it is further estimated that it would take approximately 40 hours (a good work week) to fulfill this requirement.

Burden hours = 85 schools × 40 hours = 3,400 total annual burden hours for a cost of \$40,800 to the public.

**ESTIMATED BURDEN HOURS**

CFR section	# Respondents	Responses per respondent	Burden per response (in hours)	Total annual burden/cost
37.122(b), Propose Change in geographic boundaries .....	2	1	1	2 hours/\$24.00
37.123(c), Submit tribal approval to change geographic boundaries.	2	1	1	2 hours/\$24.00
Totals .....	.....	.....	.....	4/\$48.00

[Note: For purposes of this part, we recognize 184 bureau- and tribally-operated schools and peripheral dormitories. From this number we have extrapolated the number of likely respondents per information collection requirement. The cost of reporting and recordkeeping by the public is estimated to be approximately \$12/hour. We have used this figure as a medium figure that would indicate the cost of having a form (or form

requirements) completed, the cost of taking an hour's time off work, the cost of using one's vehicle, time spent on the activity, and other miscellaneous costs that may be associated with obtaining the information needed to fulfill this part's information collection requirements.]

**Summary****Section 37.122(b) Once Geographic Attendance Boundaries Are Established, How Can They Be Changed?**

Tribal governing bodies and school boards may change their attendance boundaries now. This rulemaking does not otherwise impact on this ability. We



have estimated, for purposes of information collection authority, that there can be approximately two such requests per year. Submitting a letter to the Secretary for this consideration would entail only 1 hour's time to effectively transmit such a letter.

Burden hours = 2 schools × 1 burden hours = 2 total annual burden hours at a cost of \$24.00 to the public.

*Section 37.123 How Does a Tribe Develop Proposed Geographic Attendance Boundaries or Boundary Changes?*

A tribal governing body establishes its own process for developing proposed geographic attendance boundary or boundary changes. Once this has been accomplished, it must submit a document which represents that body's approval to the Secretary for consideration of such change. No tribe

has ever attempted to change its attendance boundary and, consequently, no tribe has developed these in-house processes. However, for purposes of information collection authority, we have estimated that approximately two tribes could make such a request each year. This administrative activity would not entail more than 1 hour's time.

Burden hours = 2 tribes × 1 burden hour = 2 total annual burden hours at a cost of \$24.00 to the public.

**ESTIMATED BURDEN HOURS**

CFR section	Number respondents	Responses per respondent	Burden per Response (in hours)	Total annual burden/cost
39.410, Submit Certification of conflict of interests review ..	10	1	1.5	15 hours/\$180.00
39.502, Submit request for contingency funds to ELO .....	30	1	1	30 hours/\$360.00
Totals .....	.....	.....	.....	45/\$540.00

[**Note:** For purposes of this part, we recognize 184 bureau- and tribally-operated schools and peripheral dormitories. From this number we have extrapolated the number of likely respondents per information collection requirement. The cost of reporting and recordkeeping by the public is estimated to be approximately \$12/hour. We have used this figure as a medium figure that would indicate the cost of having a form (or form requirements) completed, the cost of taking an hour's time off work, the cost of using one's vehicle, plus time spent on the activity, and other miscellaneous costs that may be associated with obtaining the information needed to fulfill this part's information collection requirements.]

**Summary**

*Section 39.410 What Qualifications Must an Audit Firm Meet To Be Considered for Auditing ISEP Administration?*

It is estimated that only 10 firms would be required to submit a conflict of interest certification during any given school year for purposes of general audit. It is further estimated that this administrative task would take approximately 1.5 hours to complete.

Burden hours = 10 certified public accountant firms × 1.5 hours = 15 hours at a cost of \$180.00 to the public.

*Section 39.502 How Does a School Apply for Contingency Funds?*

A school must submit a request to the ELO for contingency funds. From past experience, it is estimated that approximately 30 schools would make such a request. Since there is nothing more involved than submitting a written request to the ELO, it is further estimated that it would take only 1 hour to complete this administrative task.

Burden hours = 30 schools × 1 burden hour = 30 total annual burden hours at a cost of \$360 to the public.

**ESTIMATED BURDEN HOURS**

CFR section	Number of respondents	Responses per respondent	Burden per response (in hours)	Total annual burden/cost
42.6, Form Requirement. Provide written notice of charges.	120	3	.5	180 hours/\$2,160.00.
42.7, Provide copy of hearing of record .....	120	3	3	1,080 hours/\$12,960.00.
42.9, Provide student handbook .....	120	1	.25	30 hours/\$360.00.
Totals .....	.....	.....	.....	1,290/\$15,480.00.

[**Note:** For purposes of this part, we recognize 184 bureau- and tribally-operated schools and peripheral dormitories. From this number we have extrapolated the number of likely respondents per information collection requirement. The cost of reporting and recordkeeping by the public is estimated to be approximately \$12/hour. We have used this figure as a medium figure that would indicate the cost of having a form (or form requirements) completed, the cost of taking an hour's time off work, the cost of using one's vehicle, plus time spent on the activity, and other miscellaneous costs that may be associated with obtaining the information

needed to fulfill this part's information collection requirements.]

**Summary**

*Section 42.6 What Does Due Process in a Formal Disciplinary Proceeding Include?*

The student charged with any infraction of the school code which would lead to a disciplinary proceeding must receive a formal statement of such charges. This a burden accruing to tribally-operated schools. Since every

school may have one infraction (some have no reported disciplinary events and some may have several events), we have used the number of tribally-operated Indian schools (120) as the number of respondents. Providing the student with charges is an administrative task that should not take longer than one-half hour to successfully complete.

Burden hours = 120 schools × 3 responses × 1/2 burden hour = 180 total annual burden hours for a cost

to the government and/or tribal governing body or school board of \$2,160.

**Section 42.7 What Are a Student's Due Process Rights in a Formal Disciplinary Proceeding?**

The student is entitled to a copy of the hearing of record. For transcription, photo-copying, and delivery, it is estimated that this administrative task could take as long as 3 hours to successfully complete.

Burden hours = 120 schools × 3 responses × 3 burden hours = 1,080 total annual burden hours for a cost to the government and/or tribal governing body or school board of \$12,960.

**Section 42.9 How Must the School Communicate Individual Student Rights to Students, Parents or Guardians, and Staff?**

The school must provide a handbook to the affected entities setting out the

school's code of conduct. All of the existing bureau- and tribal-operated schools have such handbooks, so this information distribution concerns making the handbook available to all concerned, a relatively simple task of ¼ hour to make copies available at a site-specific location.

Burden hours = 120 schools × .25 burden hours = 30 total annual burden hours for a cost to the government and/or tribal governing body or school board of \$360.

**ESTIMATED BURDEN HOURS**

CFR section	Number of respondents	Responses per respondent	Burden per response (in hours)	Total annual burden/cost
44.105, Provide written notice of retrocession .....	1	1	1	1 hour/\$12.00

[**Note:** For purposes of this part, we recognize 184 bureau- and tribally-operated schools and peripheral dormitories. From this number we have extrapolated the number of likely respondents per information collection requirement. The cost of reporting and recordkeeping by the public is estimated to be approximately \$12/hour. We have used this figure as a medium figure that would indicate the cost of having a form (or form requirements) completed, the cost of taking an hour's time off work, the cost of using one's vehicle, plus time spent on the activity,

and other miscellaneous costs that may be associated with obtaining the information needed to fulfill this part's information collection requirements.]

**Summary**

**Section 44.105 How Does a Tribal Governing Body Retrocede a Program to the Secretary?**

The tribal governing body must provide written notice to BIA that it wishes to retrocede a program. This

happens rarely, so we have used one respondent tribe per year as an example for information collection authority. A simple written notice, in letter or memorandum form, would only take approximately 1 hour to transmit to BIA.

Burden hours = 1 governing body × 1 burden hour = 1 total annual burden or a cost of \$12.00 to the public.

**ESTIMATED BURDEN HOURS**

CFR Section	Number of respondents	Responses per respondent	Burden per response (in hours)	Total annual burden/cost
47.5, Submit quarterly report to school board .....	120	4	3	1,440 hours/\$17,280
47.7, Notice of appeal .....	120	1	1	120 hours/\$1,440
47.9, Form Requirements, Financial Plan .....	120	1	2	240 hours/\$2,880
47.10, Notice of Action on Financial Plan .....	120	1	1	120 hours/\$1,440
<b>Totals .....</b>				<b>1920/\$23,040</b>

[**Note:** For purposes of this part, we recognize 120 bureau- and tribal-operated Indian schools. From this number we have extrapolated the number of likely respondents per information collection requirement. The cost of reporting and recordkeeping by the public is estimated to be approximately \$12/hour. We have used this figure as a medium figure that would indicate the cost of having a form (or form requirements) completed, the cost of taking an hour's time off work, the cost of using one's vehicle, plus time spent on the activity, and other miscellaneous costs that may be associated with obtaining the information needed to fulfill this part's information collection requirements. For purposes of this part only, we have used the number of tribally operated schools (120) as the number of respondents.]

**Summary**

**Section 47.5 What Is the School Supervisor Responsible For?**

The school supervisor must report at least quarterly (4 responses per year) to the local school board on the amounts spent, obligated, and currently remaining in funds budgeted for each program in the local financial plan. In addition, he must maintain expenditure records in accordance with financial planning system procedures. It is estimated that this would take approximately 3 hours to complete successfully.

Burden hours = 120 schools × 1 supervisor × 4 responses × 3 burden hours = 1,440 total annual burden

hours or a cost to the public of \$17,280.00.

**Section 47.7 What Are the Expenditures Limitations for Bureau-Operated Schools?**

If a Bureau-operated school and OIEP region or Agency support services staff disagree over expenditures, the Bureau-operated school must appeal to the Director for a decision. This appeal would take the form of a memorandum and would take approximately 1 hour to complete successfully.

Burden hours = 120 schools × 1 burden hour = 120 total annual burden or a cost of \$1,440.00 to the public.

### Section 47.9 What Are the Minimum Requirements for the Local Educational Financial Plan?

This is a form requirement for meeting the minimum standards of a educational financial plan. All schools would have to comply with this standard and it is estimated that it would take approximately 2 hours to complete this planning document.

Burden hours = 120 schools × 2 burden hours = 240 total annual burden hours at a cost of \$2,880.00 to the public.

### Section 47.10 How Is the Local Educational Financial Plan Developed?

The supervisor of each school must supervise the disposition of the tentative allotment and express acceptance or otherwise to the ELO in a timely fashion. This administrative task would take approximately 1 hour to convey such disposition.

Burden hours = 120 schools × 2 burden hours = 240 total annual burden hours or a cost of \$1,440.00 to the public.

### National Environmental Policy Act

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

### Clarity of This Regulation

Executive Order 12866 requires each agency to write rules that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following:

- (1) Are the requirements in the rule clearly stated?
- (2) Does the rule contain technical language or jargon that interferes with its clarity?
- (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, *etc.*) aid or reduce its clarity?
- (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "\$" and a numbered heading; for example: § 42.2 What rights do individual students have?)
- (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule?

(6) What else could we do to make the rule easier to understand? Send a copy of any comments that concern how we could make this rule easier to

understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

### Public Comment Solicitation

Although this rule is published by the Bureau of Indian Affairs, the Bureau of Land Management is processing comments under agreement with BIA. If you wish to comment on this proposed rule, you may submit your comments by any one of several methods.

(1) You may mail comments to Director (630), Bureau of Land Management, Eastern States Office, 7450 Boston Boulevard, Springfield, Virginia 22153, Attention: RIN 1076-AE49.

(2) You may submit comments electronically by direct Internet response to either [www.blm.gov/nhp/news/regulatory/index.html](http://www.blm.gov/nhp/news/regulatory/index.html), or <http://www.blm.gov>.

(3) You may hand-deliver comments to 1620 L Street, NW., Room 401, Washington, DC 20036.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record. We will honor the request to the extent allowable by law. There may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. You should submit comments on the information collections in the proposed rule to: Interior Desk Officer (1076-AE49), Office of Information and Regulatory Affairs, 202/395-6566 (facsimile); e-mail: [oira\\_docket@omb.eop.gov](mailto:oira_docket@omb.eop.gov). You may submit comments until April 26, 2004, but should submit them by March 26, 2004, in order to be assured of consideration, because OMB may approve the information collections after 30 days.

### List of Subjects

25 CFR Parts 30, 37, 39, 44, and 47

Indians—Education, Schools, Elementary and Secondary education

programs, grant programs—Indians, Government programs—education.

### 25 CFR Part 42

Indians—Education, Schools, Students, Elementary and Secondary education programs.

Dated: February 4, 2004.

**David W. Anderson,**

*Assistant Secretary—Indian Affairs.*

For the reasons given in the preamble, the Bureau of Indian Affairs proposes to amend parts 30, 37, 39, 42, 44, 47 of title 25 of the Code of Federal Regulations as follows:

1. New part 30 is added to read as follows:

### PART 30—ADEQUATE YEARLY PROGRESS

Sec.

30.100 What is the purpose of this part?

30.101 What definitions apply to terms in this part?

### Subpart A—Defining Adequate Yearly Progress

30.102 Does the law require the Secretary of Interior to develop a definition of AYP for bureau-funded schools?

30.103 Did the Committee consider a separate Bureau definition of AYP?

30.104 What is the Secretary's definition of Adequate Yearly Progress?

### Alternative Definition of AYP

30.105 Can a tribal governing body or school board use another definition of AYP?

30.106 How does a tribal governing body or school board propose an alternative definition of AYP?

30.107 What must a tribal governing body or school board include in its alternative definition of AYP?

30.108 May an alternative definition of AYP use parts of a State's definition?

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30.109 Will the Secretary provide assistance in developing an alternative AYP definition?

30.110 What is the process for requesting technical assistance to develop an alternative definition of AYP?

30.111 When should the tribal governing body or school board request technical assistance?

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30.112 How long does the Secretary have to review an alternative definition?

30.113 What is the process the Secretary uses to review and approve an alternative definition of AYP?

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30.114 Which students must be assessed?

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### Subpart C—Failure To Make Adequate Yearly Progress

- 30.117 What happens if a bureau-funded school fails to make AYP?
- 30.118 Can a bureau-funded school present evidence before it is identified for school improvement, corrective action or restructuring?
- 30.119 Who is responsible for implementing required remedial actions at a bureau-funded school identified for school improvement, corrective action or restructuring?
- 30.120 Are schools exempt from school choice and supplemental services when identified for school improvement, corrective action, and restructuring?
- 30.121 What funds are available to assist schools identified for school improvement, corrective action, or restructuring?
- 30.122 Must the Bureau assist a school identified for school improvement, corrective action, or restructuring?
- 30.123 What is the Bureau's role in assisting bureau-funded schools to make AYP?
- 30.124 Will the Department of Education provide funds for schools that fail to meet AYP?
- 30.125 What happens if a State refuses to allow a school access to the State assessment?

### Subpart D—Responsibilities and Accountability

- 30.126 What are the Bureau's reporting responsibilities?
- 30.127 How is the Bureau accountable to the Department of Education for education funds and performance?
- 30.150 Information collection.

**Authority:** Pub. L. 107–11.

#### § 30.100 What is the purpose of this part?

This part establishes for schools receiving Bureau funding a definition of “Adequate Yearly Progress” (AYP). Nothing in this part:

- (a) Diminishes the Secretary's trust responsibility for Indian education or any statutory rights in law;
- (b) Affects in any way the sovereign rights of tribes; or
- (c) Terminates or changes the trust responsibility of the United States to Indian tribes or individual Indians.

#### § 30.101 What definitions apply to terms in this part?

*OIEP* means the Office of Indian Education Programs in the Bureau of Indian Affairs.

*School* means a school funded by the Bureau of Indian Affairs.

*Secretary* means the Secretary of the Interior or a designated representative.

### Subpart A—Defining Adequate Yearly Progress

#### § 30.102 Does the law require the Secretary of the Interior to develop a definition of AYP for bureau-funded schools?

Yes, through negotiated rulemaking. In developing the Secretary's definition of adequate yearly progress (AYP), the No Child Left Behind Negotiated Rulemaking Committee (Committee) considered a variety of options. In choosing the definition in § 30.103, the Committee in no way intended to diminish the Secretary's trust responsibility for Indian education or any statutory rights in law. Nothing in this part:

- (a) Affects in any way the sovereign rights of tribes; or
- (b) Terminates or changes the trust responsibility of the United States to Indian tribes or individual Indians.

#### § 30.103 Did the Committee consider a separate Bureau definition of AYP?

Yes, the Committee considered having the Bureau of Indian Affairs develop a separate Bureau definition of AYP. For a variety of reasons, the Committee reached consensus on the definition in § 30.104. This is in no way intended to diminish the United States' trust responsibility for Indian education nor is it intended to give states authority over Bureau-Funded schools.

#### § 30.104 What is the Secretary's definition of Adequate Yearly Progress?

The Secretary defines Adequate Yearly Progress as follows. The definition meets the requirements in section 1111(b) of the Act.

(a) Until an alternative definition of AYP is proposed by the tribal governing body or school board and approved by the Secretary, the definition of AYP is that of the State where the school is located.

(1) If the geographic boundaries of the school include more than one State, the tribal governing body or school board may choose the State definition it desires. Such decision shall be communicated to the Secretary in writing.

(2) This section does not mean that the school is under the jurisdiction of the State for any purpose, rather a reference to the State is solely for the purpose of using the State's assessment, curriculum, academic standards, and definition of AYP.

(3) The use of the State's definition of AYP does not diminish or alter the Federal Government's responsibility for Indian education.

(b) School boards or tribal governing bodies may seek a waiver that may

include developing their own definition of AYP, or adopting or modifying an existing definition of AYP that has been accepted by the Department of Education. The Secretary is committed to providing technical assistance to a school, or a group of schools, to develop an alternative definition of AYP.

### Alternative Definition of AYP

#### § 30.105 Can a tribal governing body or school board use another definition of AYP?

Yes. A tribal governing body or school board may waive all or part of the Secretary's definition of AYP and propose an alternative definition under § 30.106.

#### § 30.106 How does a tribal governing body or school board propose an alternative definition of AYP?

If a tribal governing body or school board decides that the definition of AYP in § 30.104 is inappropriate, it may decide to waive all or part of the definition. Within 60 days of the decision to waive, the tribal governing body or school board must submit to the Secretary a proposal for an alternative definition of AYP. The proposal must be consistent with section 1111(b) of the Act.

#### § 30.107 What must a tribal governing body or school board include in its alternative definition of AYP?

(a) The alternative definition of AYP must comply with the requirements of section 1111(b) of the Act, which include the following:

(1) Demonstrate that the school has adopted challenging academic standards;

(2) Demonstrate that the school has an effective accountability system that ensures that the school or schools will make adequate yearly progress.

(b) The alternative definition of AYP must:

(1) Apply the same high standards of academic achievement to all students;

(2) Be statistically valid and reliable;

(3) Result in continuous and substantial academic improvement for all students;

(4) Measure the progress of all students based on a high-quality assessment system that includes, at a minimum, academic assessments in mathematics, reading or language arts and science and that meets the requirements of paragraph (c) of this section;

(5) Establish a starting point;

(6) Create timelines for adequate yearly progress;

(7) Establish measurable objectives;

(8) Include intermediate goals for annual measurable progress; and

(9) Ensure annual improvement for the school.

(c) The measurement required by paragraph (b)(4) of this section must meet both of the following criteria.

(1) The measurement must include separate measurable annual objectives for continuous and substantial improvement for (unless disaggregation of data cannot yield statistically reliable information):

(i) The achievement of all students; and

(ii) The achievement of economically disadvantaged students; students from major racial or ethnic groups, students with disabilities, and students with limited English proficiency.

(2) The measurement must include graduation rates and at least one other academic indicator for schools that do not have a 12th grade (but may include more than one other academic indicator).

**§ 30.108 May an alternative definition of AYP use parts of a State's definition?**

Yes, a tribal governing body or school board may take part of the State's definition and propose to waive the remainder. The proposed alternative definition of AYP must, however, include both the parts of the State's AYP adopted and those parts the tribal governing body or school board is proposing to change.

**Technical Assistance**

**§ 30.109 Will the Secretary provide assistance in developing an alternative AYP definition?**

Yes, the Secretary through the Bureau, shall provide technical assistance either directly or through contract to the tribal governing body or the school board in developing an alternative AYP definition. A tribal governing body or school board needing assistance must submit a request to the Director of OIEP under § 30.110. In providing assistance, the Secretary may consult with the Secretary of Education and may use funds supplied by the Secretary of Education in accordance with section 6111 of the Act.

**§ 30.110 What is the process for requesting technical assistance to develop an alternative definition of AYP?**

(a) The tribal governing body or school board requesting technical assistance to develop an alternative definition of AYP must submit a written request to the Director of OIEP, specifying the form of assistance it requires.

(b) The Director of OIEP must acknowledge receipt of the request for technical assistance within 10 days of receiving the request.

(c) No later than 30 days after receiving the original request, the Director of OIEP will identify a point of contact. This contact will immediately begin working with the tribal governing body or school board to jointly develop the specifics of the technical assistance, including identifying the form, substance, and timeline for the assistance.

**§ 30.111 When should the tribal governing body or school board request technical assistance?**

In order to maximize the time the tribal governing body or school board has to develop an alternative definition of AYP and to provide full opportunity for technical assistance, it is recommended that the tribal governing body or school board request technical assistance before formally notifying the Secretary of its intention to waive the Secretary's definition of AYP.

**Approval of Alternative Definition**

**§ 30.112 How long does the Secretary have to review an alternative definition?**

After receiving a completed proposed alternative definition of AYP, the Secretary has 90 days to review and approve or disapprove the definition.

**§ 30.113 How does the Secretary review and approve an alternative definition of AYP?**

(a) The tribal governing body or school board submits a proposed alternative definition of AYP to the Director, OIEP within 60 days of its decision to waive the Secretary's definition.

(b) Within 30 days of receiving a proposed alternative definition of AYP, OIEP notifies the tribal governing body or the school board whether the proposed alternative definition is complete.

(c) If the proposed alternative definition is incomplete, OIEP provides the tribal governing body or school board with technical assistance to complete the proposed alternative definition of AYP, including identifying what additional items are necessary.

(d) If the proposed alternative definition of AYP is determined to be complete, the Department of Interior may notify the Department of Education that it has received a proposed alternative definition of AYP.

(e) The Secretary has 90 days from the date OIEP receives a completed proposed alternative definition of AYP to determine whether the alternative definition meets the requirements of section 1111(b) of the Act.

(f) The Secretary reviews the proposed alternative definition of AYP

to determine whether it is consistent with the requirements of section 1111(b) of the Act. This review must take into account the unique circumstances and needs of the schools and students.

(g) The Secretary shall approve the alternative definition of AYP if it is consistent with the requirements of section 1111(b) of the Act, taking into consideration the unique circumstances and needs of schools and students.

(h) If the Secretary approves the alternative definition of AYP:

(1) The Department shall promptly notify the tribal governing body or school board; and

(2) The alternate definition of AYP will become effective at the start of the following school year.

(i) The Department will disapprove the alternative definition of AYP if it is not consistent with the requirements of section 1111(b) of the Act. If the Department disapproves the definition, it shall, within 90 days of receiving the completed proposed alternative definition, notify the tribal governing body or school board of the following:

(1) That the definition is disapproved; and

(2) The reasons why the proposed alternative definition does not meet the requirements of section 1111(b) of the Act.

(j) If the Department denies a proposed definition under paragraph (i) of this section, it shall provide technical assistance to overcome the basis for the denial.

**Subpart B—Assessing Adequate Yearly Progress**

**§ 30.114 Which students must be assessed?**

All students in grades three through eight and one grade in high school who are enrolled in a bureau-funded school must be assessed.

**§ 30.115 Which students' performance data must be included for purposes of AYP?**

The performance data of all students in grades three through eight and one grade in grades ten through twelve who are enrolled in a bureau-funded school for a full academic year must be included for purposes of AYP. "Full academic year" must be defined by the Secretary or by an approved alternative definition of AYP.

**§ 30.116 If a school fails to achieve its academic performance objectives, what other methods may it use to determine whether it made AYP?**

If a school fails to achieve its academic performance objectives, there are two other methods it may use to determine whether it made AYP

(a) *Method A*—“*Safe Harbor*.” Under “safe harbor,” the following requirements must be met:

(1) In each group that does not achieve the school’s academic performance objectives, the percentage of students who were below the “proficient” level of academic achievement decreased by 10 percent from the proceeding school year; and

(2) The students in that group made progress on one or more of the academic indicators; and

(3) The 95 percent assessment participation rate requirement is met.  
(b) *Method B—Uniform Averaging Procedure*. A school may use uniform averaging. Under this procedure, the school may average data from the school year with data from one or two school

years immediately preceding that school year and determine if the resulting average makes AYP.

### **Subpart C—Failure To Make Adequate Yearly Progress**

#### **§ 30.117 What happens if a bureau-funded school fails to make AYP?**

Consecutive yrs of failing to make AYP in same academic subject	Status	Action required by entity operating school
1st year of failing AYP .....	No status change .....	Analyze AYP Data and consider consultation with outside experts.
2nd consecutive year of failing AYP .....	School improvement .....	For the next academic year, develop a plan or revise an existing plan for school improvement in consultation with parents, school staff and outside experts.
3rd consecutive year of failing AYP .....	School Improvement, year two	Continue revising or modifying the plan for school improvement in consultation with parents, school staff and outside experts.
4th consecutive year of failing AYP .....	Corrective Action, year one ....	Implement at least one of the six corrective actions steps found in section 1116(b)(7)(c)(iv) of the Act.
5th consecutive year of failing AYP .....	Planning to Restructure .....	Prepare a restructuring plan and make arrangements to implement the plan.
6th consecutive year of failing AYP .....	Restructuring .....	Implement the restructuring plan no later than the beginning of the school year following the year in which it developed the plan.
7th consecutive year (and beyond) of failing AYP.	Restructuring .....	Continue restructuring until AYP is met for two consecutive years.

#### **§ 30.118 Can a bureau-funded school present evidence before it is identified for school improvement, corrective action, or restructuring?**

Yes. The Bureau must give such a school the opportunity to review the data and present evidence as set out in section 1116(b)(2) of the Act.

#### **§ 30.119 Who is responsible for implementing required remedial actions at a bureau-funded school identified for school improvement, corrective action or restructuring?**

(a) For a Bureau-operated school, implementation of remedial actions is the responsibility of the Bureau of Indian Affairs.

(b) For a tribally-operated contract school or grant school, implementation of remedial actions is the responsibility of the school board of the school.

#### **§ 30.120 Are Bureau-funded schools exempt from school choice and supplemental services when identified for school improvement, corrective action, and restructuring?**

Yes, bureau-funded schools are exempt from public school choice and supplemental services when identified for school improvement, corrective action, and restructuring

#### **§ 30.121 What funds are available to assist schools identified for school improvement, corrective action, or restructuring?**

From fiscal year 2004 to fiscal year 2007, the bureau will reserve 4 percent

of its Title I allocation to assist Bureau-funded schools identified for school improvement, corrective action, and restructuring.

(a) The bureau will allocate at least 95 percent of funds under this section to bureau-funded schools identified for school improvement, corrective action, and restructuring to carry out those schools’ responsibility under section 1116(b) of the Act. With the approval of the school board the bureau may directly provide for the remedial activities or arrange for their provision through other entities such as school support teams or educational service agencies.

(b) In allocating funds under this section, the Bureau will give priority to schools that:

(1) Are the lowest-achieving schools;  
(2) Demonstrate the greatest need for funds; and

(3) Demonstrate the strongest commitment to ensuring that the funds enable the lowest-achieving schools to meet progress goals in the school improvement plans.

(c) Funds reserved under this section must not decrease total funding for all schools below the level for the preceding fiscal year.

(d) The Bureau will publish in the **Federal Register** a list of schools receiving funds under this section.

#### **§ 30.122 Must the Bureau assist a school it identified for school improvement, corrective action, or restructuring?**

Yes, if a bureau-funded school is identified for school improvement, corrective action, or restructuring, the Bureau must provide technical or other assistance described in sections 1116(b)(4) and 1116(g)(3) of the No Child Left Behind Act.

#### **§ 30.123 What is the Bureau’s role in assisting bureau-funded schools to make AYP?**

The Bureau must provide support to all bureau-funded schools to assist them in achieving AYP. This includes technical assistance and other forms of support.

#### **§ 30.124 Will the Department of Education provide funds for schools that fail to meet AYP?**

To the extent that Congress appropriates other funds to assist schools not meeting AYP, the Bureau will apply to the Department of Education for these funds.

#### **§ 30.125 What happens if a State refuses to allow a school access to the State assessment?**

(a) The Department will work directly with State officials to assist schools in obtaining access to the State’s assessment. This can include direct communication with the Governor of the State. A bureau-funded school may,

if necessary, pay a State for access to its assessment tools and scoring services.

(b) If a State does not provide access to the State's assessment, the bureau-funded school must submit a waiver for an alternative definition of AYP.

#### **Subpart D—Responsibilities and Accountability**

##### **§ 30.126 What are the Bureau's reporting responsibilities?**

The Bureau has the following reporting responsibilities to the Department of Education, appropriate committees of Congress, and the public.

(a) In order to provide information about annual progress, the Bureau must obtain from all bureau-funded schools the results of assessments administered for all tested students, special education students, students with limited English proficiency, and disseminate such results in an annual report.

(b) The Bureau must identify each school that did not meet AYP in accordance with the school's AYP definition.

(c) Within its annual report to Congress, the Secretary shall include all of the reporting requirements of section 1116 (g)(5) of the Act.

##### **§ 30.127 How is the Bureau accountable to the Department of Education for education funds and performance?**

The Bureau is accountable for the funds it receives from the Department of Education under Title I, Part A of the Act and its performance through an agreement with the Department of Education developed in consultation with Indian tribes.

##### **§ 30.150 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA in §§ 30.104(a)(1), 30.104(b), 30.106, 30.107, 30.110, and 30.118. These collections have been approved by OMB under control number [to be determined].

2. New part 37 is added to read as follows:

#### **PART 37—GEOGRAPHIC BOUNDARIES**

Sec.

37.100 What is the purpose of this part?

37.101 What do the terms used in this part mean?

37.102 How is this part organized?

37.103 Information collection.

##### **Subpart A—All Schools**

37.110 Who determines geographic attendance areas?

37.111 What role does a tribe have in issues relating to school boundaries?

37.112 Must each school have a geographic attendance boundary?

##### **Subpart B—Day Schools, On-Reservation Boarding Schools, and Peripheral Dorms**

37.120 How does this part affect current geographic attendance boundaries?

37.121 Who establishes geographic attendance boundaries under this part?

37.122 Once geographic attendance boundaries are established, how can they be changed?

37.123 How does a tribe develop proposed geographic attendance boundaries or boundary changes?

37.124 How are boundaries established for a new school or dorm?

37.125 Can an eligible student living off a reservation attend a school or dorm?

##### **Subpart C—Off-Reservation Boarding Schools**

37.130 Who establishes boundaries for Off-Reservation Boarding Schools?

37.131 Who may attend an ORBS?

Authority: Pub. L. 107–110.

##### **§ 37.100 What is the purpose of this part?**

(a) This part:

(1) Establishes procedures for confirming, establishing, or revising attendance areas for each Bureau-funded school;

(2) Encourages consultation with and coordination between and among all agencies (school boards, tribes, and others) involved with a student's education; and

(3) Defines how tribes may develop policies regarding setting or revising geographic attendance boundaries, attendance, and transportation funding for their area of jurisdiction.

(b) The goals of the procedures in this part are to:

(1) Provide stability for schools;

(2) Assist schools to project and to track current and future student enrollment figures for planning their budget, transportation, and facilities construction needs;

(3) Adjust for geographic changes in enrollment, changes in school capacities, and improvement of day school opportunities; and

(4) Avoid overcrowding or stress on limited resources.

##### **§ 37.101 What do the terms used in this part mean?**

*Geographic attendance area* means a physical land area that is served by a Bureau-funded school.

*Geographic attendance boundary* means a line of demarcation that clearly delineates and describes the limits of the physical land area that is served by a Bureau-funded school.

*Secretary* means the Secretary of the Interior or a designated representative.

##### **§ 37.102 How is this part organized?**

This part is divided into three subparts. Subpart A applies to all bureau-funded schools. Subpart B applies only to day schools, on-reservation boarding schools, and peripheral dorms—in other words, to all bureau-funded schools except off-reservation boarding schools. Subpart C applies only to off-reservation boarding schools (ORBS).

##### **§ 37.103 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA in §§ 37.122(b), and 37.123(c). These collections have been approved by OMB under control number [to be determined].

##### **Subpart A—All Schools**

##### **§ 37.110 Who determines geographic attendance areas?**

The Tribal governing body or the Secretary determines geographic attendance areas.

##### **§ 37.111 What role does a tribe have in issues relating to school boundaries?**

A tribal governing body may:

(a) Establish and revise geographical attendance boundaries for all but ORB schools,

(b) Authorize a school to provide transportation for students who are members of the tribe attending schools outside the geographic attendance area in which they live.

##### **§ 37.112 Must each school have a geographic attendance boundary?**

Yes. The Secretary must ensure that each school has a geographic area boundary.



## **Subpart B—Day Schools, On-Reservation Boarding Schools, and Peripheral Dorms**

### **§ 37.120 How does this part affect current geographic attendance boundaries?**

The currently established geographic attendance boundaries of day schools, on-reservation boarding schools, and peripheral dorms remain in place unless the tribal governing body revises them.

### **§ 37.121 Who establishes geographic attendance boundaries under this part?**

(a) If there is only one day school, on-reservation boarding school, or peripheral dorm within a reservation's boundaries, the Secretary will establish the reservation boundary as the geographic attendance boundary;

(b) When there is more than one day school, on-reservation boarding school, or peripheral dorm within a reservation boundary, the Tribe may choose to establish boundaries for each;

(c) If a Tribe does not establish boundaries under paragraph (b) of this section, the Secretary will do so.

### **§ 37.122 Once geographic attendance boundaries are established, how can they be changed?**

(a) The Secretary can change the geographic attendance boundaries of a day school, on-reservation boarding school, or peripheral dorm only after:

(1) Notifying the Tribe at least 6 months in advance; and

(2) Giving the Tribe an opportunity to suggest different geographical attendance boundaries.

(b) A tribe may ask the Secretary to change geographical attendance boundaries by writing a letter to the Director of the Office of Indian Education Programs, explaining the tribe's suggested changes. The Secretary must consult with the affected tribes before deciding whether to accept or reject a suggested geographic attendance boundary change.

(1) If the Secretary accepts the Tribe's suggested change, the Secretary must publish the change in the **Federal Register**.

(2) If the Secretary rejects the Tribe's suggestion, the Secretary will explain in writing to the Tribe why the suggestion either:

(i) Does not meet the needs of Indian students to be served; or

(ii) Does not provide adequate stability to all affected programs.

### **§ 37.123 How does a tribe develop proposed geographic attendance boundaries or boundary changes?**

(a) The Tribal governing body establishes a process for developing proposed boundaries or boundary

changes. This process may include consultation and coordination with all entities involved in student education.

(b) The Tribal governing body may delegate the development of proposed boundaries to the relevant school boards. The boundaries set by the school boards must be approved by the Tribal governing body.

(c) The Tribal governing body must send the proposed boundaries and a copy of its approval to the Secretary.

### **§ 37.124 How are boundaries established for a new school or dorm?**

Geographic attendance boundaries for a new day school, on-reservation boarding school, or peripheral dorm must be established by either:

(a) The tribe; or

(b) If the tribe chooses not to establish boundaries, the Secretary.

### **§ 37.125 Can an eligible student living off a reservation attend a school or dorm?**

Yes. An eligible student living off a reservation can attend a day school, on-reservation boarding school, or peripheral dorm.

## **Subpart C—Off-Reservation Boarding Schools**

### **§ 37.130 Who establishes boundaries for Off-Reservation Boarding Schools?**

The Secretary or the Secretary's designee, in consultation with the affected Tribes, establishes the boundaries for off-reservation boarding schools (ORBS).

### **§ 37.131 Who may attend an ORBS?**

Any student is eligible to attend an ORBS.

3. Part 39 is revised to read as follows:

## **PART 39—THE INDIAN SCHOOL EQUALIZATION PROGRAM**

### **Subpart A—General**

Sec.

39.1 What is the purpose of this part?

39.2 What are the definitions of terms used in this part?

39.3 Information collection.

### **Subpart B—Indian School Equalization Formula**

39.100 What is the Indian School Equalization Formula?

39.101 Does ISEF assess the actual cost of school operations?

### **Base and Supplemental Funding**

39.102 What is included in base funding?

39.103 What are the factors used to determine base funding?

39.104 How must a school's base funding provide for students with special needs?

39.105 Are additional funds available for special education?

39.106 Who is eligible for special education funding?

39.107 Are schools allotted supplemental funds for special costs?

### **Gifted and Talented Programs**

39.110 Can ISEF funds be distributed for the use of gifted and talented students?

39.111 What does the term gifted and talented mean?

39.112 What is the limit on the number of students who are gifted and talented?

39.113 What are the special accountability requirements for the gifted and talented program?

39.114 How does a school receive funding for gifted and talented students?

39.115 How are eligible students identified and nominated?

39.116 How does a school determine who receives gifted and talented services?

39.117 How does a school provide gifted and talented services for a student?

39.118 How does a student receive talented and gifted services in subsequent years?

39.119 When must a student leave a gifted and talented program?

39.120 How are gifted and talented services provided?

39.121 What is the WSU for gifted and talented students?

### **Language Development Programs**

39.130 Can ISEF funds be used for Language Development Programs?

39.131 What is a Language Development Program?

39.132 Can a school integrate Language Development Programs into its regular instructional program?

39.133 Who decides how Language Development funds can be used?

39.134 How does a school identify a Limited English Proficient student?

39.135 What services must be provided to an LEP student?

39.136 What is the WSU for Language Development programs?

39.137 May schools operate a language development program without a specific appropriation from Congress?

### **Small School Adjustment**

39.140 How does a school qualify for a Small School Adjustment?

39.141 What is the amount of the Small School Adjustment?

39.143 What is a small high school?

39.144 What is the small high school adjustment?

39.155 Can a school receive both a small school adjustment and a small high school adjustment?

39.156 Is there an adjustment for small residential programs?

### **Geographic Isolation Adjustment**

39.160 Does ISEF provide supplemental funding for extraordinary costs related to a school's geographic isolation?

### **Subpart C—Administrative Procedures, Student Counts and Verifications**

39.200 What is the purpose of the Indian School Equalization Formula?

39.201 Does ISEF reflect the actual cost of school operations?

39.202 What are the definitions of terms used in this subpart?

- 39.203 How does OIEP calculate ADM?
- 39.204 How does OIEP calculate ISEF?
- 39.205 How does OIEP calculate the value of one WSU?
- 39.206 How does OIEP determine a school's funding for the upcoming school year?
- 39.207 How are ISEP funds distributed?
- 39.208 When may a school count a student for membership purposes?
- 39.209 When must a school drop a student from its membership?
- 39.210 What other categories of students can a school count for membership purposes?
- 39.211 Can a student be counted as enrolled in more than one school?
- 39.212 Will the Bureau fund children being home schooled?
- 39.213 What are the minimum number of instructional hours required in order to be considered a full-time educational program?
- 39.214 Can a school receive funding for any part-time students?

#### **Residential Programs**

- 39.215 How does ISEF fund residential programs?
- 39.216 How are students counted for the purpose of funding residential services?
- 39.217 Are there different formulas for different levels of residential services?
- 39.218 What happens if a residential program does not maintain residency levels required by this part?
- 39.219 What reports must residential programs submit to comply with this rule?

#### **Phase-In Period**

- 39.220 How will the provisions of this subpart be phased in?

#### **Subpart D—Accountability**

- 39.400 What is the purpose of this subpart?
- 39.401 What definitions apply to terms used in this subpart?
- 39.402 What are the accountability measures under ISEP?
- 39.403 What certification is required?
- 39.404 What is the certification and verification process?
- 39.405 How will verifications be conducted?
- 39.406 What documentation must the school maintain for additional services it provides?
- 39.407 How long must a school maintain records?
- 39.408 What are the responsibilities of administrative officials?
- 39.409 How does the OIEP Director ensure accountability?
- 39.410 What qualifications must an audit firm meet to be considered for auditing ISEP administration?
- 39.411 How will the auditor report its findings?
- 39.412 What sanctions apply for failure to comply with this part?
- 39.413 Can a school appeal the verification of the count?

#### **Subpart E—Contingency Fund**

- 39.500 What emergency and contingency funds are available?

- 39.501 What is an emergency or unforeseen contingency?
- 39.502 How does a school apply for contingency funds?
- 39.503 How can a school use contingency funds?
- 39.504 May Contingency Funds be carried over to a subsequent fiscal year?
- 39.505 What are the reporting requirements for the use of the contingency fund?

#### **Subpart F—School Board Training**

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**Authority:** 25 U.S.C. 13; 25 U.S.C. 2008; Pub. L. 107–110.

#### **§ 39.1 What is the purpose of this part?**

This part provides for the uniform direct funding of BIA-operated and tribally operated day schools, boarding schools, and dormitories. This part applies to all schools, dormitories, and administrative units that are funded through the Indian School Equalization Program of the Bureau of Indian Affairs.

#### **§ 39.2 What are the definitions of terms used in this part?**

*Agency* means an organizational unit of the Bureau which provides direct services to the governing body or bodies and members of one or more specified Indian Tribes. The term includes Bureau Area Offices only with respect to off-reservation boarding schools administered directly by such Offices.

*Agency school board* means a body, the members of which are appointed by the school boards of the schools located within such agency, and the number of such members shall be determined by the Director in consultation with the affected tribes, except that, in Agencies serving a single school, the school board of such school shall fulfill these duties.

*Assistant Secretary* means the Assistant Secretary of Indian Affairs, Department of the Interior, or his or her designee.

*Average Daily Membership (ADM)* means the aggregated ISEP-eligible membership of a school for a school year, divided by the number of school days in the school's submitted calendar.

*Base or base unit* means both the weight or ratio of 1.0 and the dollar value annually established for that weight or ratio which represents students in grades 4 through 8 in a typical instructional program.

*Basic program* means the instructional program provided all students at any age level exclusive of any supplemental programs which are not provided to all students in day or boarding schools.

*Basic transportation miles* means the daily average of all bus miles logged for round trip home-to-school transportation of day students.

*Director* means the Director of the Office of Indian Education Programs in the Bureau of Indian Affairs or a designee.

*Education Line Officer* means the Bureau official in charge of Bureau education programs and functions in an Agency who reports to the Director.

*Eligible Indian student means a student who:*

(1) Is a member of, or is at least one-fourth degree Indian blood descendant of a member of, a tribe that is eligible for the special programs and services provided by the United States through the Bureau of Indian Affairs to Indians because of their status as Indians;

(2) Resides on or near a reservation or meets the criteria for attendance at a Bureau off-reservation home-living school; and

(3) Is enrolled in a Bureau-funded school.

*Home schooled* means a student who is not enrolled in a school and is receiving educational services at home at the parent's or guardian's initiative.

*Homebound* means a student who is educated outside the classroom.

*Individual supplemental services* means non-base academic services provided to eligible students. Individual supplemental services that are funded by additional WSUs are gifted and talented or language development services.

*ISEP* means the Indian School Equalization Program.

*ISEP student count week* means the last full week in September during which schools count their student enrollment for ISEP purposes.

*Limited English Proficient (LEP)* means a child from a language background other than English who needs language assistance in their own language or in English in the schools. This child has sufficient difficulty speaking, writing, or understanding English to deny him/her the opportunity to learn successfully in English-only classrooms and meets one or more of the following conditions:

(1) The child was born outside of the United States or the child's native language is not English;

(2) The child comes from an environment where a language other than English is not dominant; or

(3) The child is an American Indian or Alaska native and comes from an environment where a language other than English has had a significant impact on the child's level of English language proficiency.

*Local School Board* means a body chosen in accordance with the laws of the tribe to be served or, in the absence of such laws, elected by the parents of the Indian children attending the school. For a school serving a substantial number of students from different tribes:

(1) The members of the local school board shall be appointed by the tribal governing bodies affected; and

(2) The Secretary shall determine number of members in consultation with the affected tribes.

*OIEP* means the Office of Indian Education Programs in the Bureau of Indian Affairs.

*Resident* means a student who is residing at a boarding school or dormitory during the weeks when student membership counts are conducted and is either:

(1) A member of the instructional program in the same boarding school in which the student is counted as a resident; or

(2) Enrolled in and a current member of a public school in the community in which the student resides.

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

(1) Enrolled in and are current members of a public school in the community in which they reside; or

(2) Members of the instructional program in the same boarding school in which they are counted as residents and:

(i) Are officially enrolled in the residential program of a Bureau-operated or -funded school; and

(ii) Are actually receiving supplemental services provided to all students who are provided room and board in a boarding school or a dormitory.

*School* means a school funded by the Bureau of Indian Affairs. The term "school" does not include public, charter, or private schools.

*School day* means a day as defined by the submitted school calendar, as long as annual instructional hours are as they are reflected in § 39.213, excluding passing time, lunch, recess, and breaks.

*School bus* means a passenger vehicle, operated by an operator in the employ of, or under contract to, a Bureau operated or funded school, who is qualified to operate such a vehicle under State or Federal regulations governing the transportation of students; which vehicle is used to transport day students to and/or from home and the school.

*School-wide supplemental funds* means non-base academic funding for

schools with unique characteristics. The school-wide supplemental funds are funded by additional WSUs and are as follows:

- (1) Geographic isolation;
- (2) Small school adjustment;
- (3) Small high school adjustment;
- (5) School board training for Bureau-operated schools.

*Special education* means specially designed instruction or speech-language therapy to meet the unique needs of a child with a disability. Therapies covered by this definition include:

- (1) Instruction in the home, classroom, institution, hospital, and other settings;
- (2) Instruction in physical education and speech therapy;
- (3) Transition services;
- (4) Travel training;
- (5) Assistive technology services; and
- (6) Vocational education.

*Supervisor* means the individual in the position of ultimate authority at a Bureau-funded school.

*Tribally operated contract school* means an elementary school, secondary school, or dormitory that receives financial assistance for its operation under a contract, grant, or agreement with the Bureau under section 102, 103(a), or 208 of the Indian Self-Determination and Education Assistance Act, or under the Tribally Controlled Schools Act of 1988.

*Three-year average means:*

(1) For academic programs, the average daily membership of the 3 years before the year of operation; and

(2) For the residential programs, the count period membership of the 3 years before the year of operations.

*Transported student* means the average number of students transported to school on a daily basis.

*Unimproved roads* means unengineered earth roads that do not have adequate gravel or other aggregate surface materials applied and do not have drainage ditches or shoulders.

*Weighted Student Unit means:*

(1) The measure of student membership adjusted by the weights or ratios used as factors in the Indian School Equalization Formula; and

(2) The factor used to adjust the weighted student count at any school as the result of other adjustments made under this part.

### § 39.3 Information collection.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501

*et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA. These collections have been approved by OMB under control number [to be determined].

## Subpart B—Indian School Equalization Formula

### § 39.100 What is the Indian School Equalization Formula?

The Indian School Equalization Formula (ISEF) was established to allocate Indian School Equalization Program (ISEP) funds. OIEP applies ISEF to determine funding allocation for Bureau-funded schools as described in §§ 39.204 through 39.206.

### § 39.101 Does ISEF assess the actual cost of school operations?

No. ISEF does not attempt to assess the actual cost of school operations either at the local level or in the aggregate at the national level. ISEF provides a method of distribution of funds appropriated by Congress for all schools.

## Base and Supplemental Funding

### § 39.102 What is included in base funding?

(a) Academic base funding includes all available funding for educational services to students enrolled in a Bureau-funded school.

(b) Residential base funding includes all available funding for residential services to students enrolled in a Bureau-funded school or an eligible public school who live in a Bureau-funded residential setting.

### § 39.103 What are the factors used to determine base funding?

To determine base funding, schools use must the factors shown in the

following table. The school must apply the appropriate factor (called the base academic weight) to each student for funding purposes.

Grade level	Base funding factor for day student	Base funding factor for residential student
Kindergarten	1.15	NA
Grades 1–3 ...	1.38	1.75
Grades 4–6 ...	1.15	1.6
Grades 7–8 ...	1.38	1.6
Grades 9–12	1.5	1.6

### § 39.104 How must a school's base funding provide for students with special needs?

(a) Each school must provide for students with special needs by:

(1) Reserving 15 percent of academic base funding to support special education programs; and

(2) Providing resources through residential base funding to meet the special needs of students under the National Criteria for Home-Living Situations.

(b) A school may spend ISEP funds on school-wide programs to benefit all students (including those without disabilities) only if all of the following conditions are met:

(1) The school sets aside 15 percent of the basic instructional allotment to meet the needs of students with disabilities;

(2) The school can document that it has met all needs of students with disabilities and addressed all components of the Individuals with Disabilities Education Act (IDEA); and

(3) There are unspent funds after the conditions in paragraphs (b)(1) and (b)(2) of this section are met.

### § 39.105 Are additional funds available for special education?

(a) Schools may supplement base funding for special education with funds available under Part B of the Individuals with Disabilities Education Act (IDEA). To obtain Part B funds, the school must submit an application to OIEP. IDEA funds are available only if the school demonstrates that funds reserved under § 39.103(a) are inadequate to pay for services needed by all eligible ISEP students with disabilities.

(b) The Bureau will facilitate the delivery of IDEA Part B funding by:

(1) Providing technical assistance to schools in completing the application for the funds; and

(2) Providing training to Bureau to improve the delivery of Part B funds.

### § 39.106 Who is eligible for special education funding?

To receive ISEP special education funding, a student must be under 22 years old and must not have received a high school diploma or its equivalent on the first day of eligible attendance. The following minimum age requirements also apply:

(a) To be counted as a kindergarten student, a child must be at least 5 years old by December 31; and

(b) To be counted as a first grade student; a child must be at least 6 years old by December 31.

### § 39.107 Are schools allotted supplemental funds for special costs?

Yes, schools are allotted supplemental funds for special costs. ISEF provides additional funds to schools through add-on weights (called special cost factors) that add value to the base weighted student unit. ISEF adds special cost factors as shown in the following table.

Cost factor	Weight	For more information see
Gifted and talented students .....	2.0	§§ 39.110 through 39.121.
Students with language development needs .....	0.13	§§ 39.130 through 39.137.
Small school size .....	( <sup>1</sup> )	§§ 39.140 through 39.156.
Geographic isolation of the school .....	12.5	§ 39.160.

<sup>1</sup>Varies.

## Gifted and Talented Programs

### § 39.110 Can ISEF funds be distributed for the use of gifted and talented students?

Yes, ISEF funds can be distributed for the provision of services for gifted and talented students.

### § 39.111 What does the term gifted and talented mean?

The term gifted and talented means students, children, or youth who:

(a) Give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields; and

(b) Need services or activities not ordinarily provided by the school in order to fully develop those capabilities.

### § 39.112 What is the limit on the number of students who are gifted and talented?

There is no limit on the number of students that a school can classify as gifted and talented.

### § 39.113 What are the special accountability requirements for the gifted and talented program?

If a school identifies more than 13 percent of its student population as

gifted and talented the Bureau will immediately audit the school's gifted and talented program to ensure that all identified students:

- (a) Meet the gifted and talented requirement in the regulations; and
- (b) Are receiving gifted and talented services.

**§ 39.114 How does a school receive funding for gifted and talented students?**

To be funded as gifted and talented under this part, a student must be identified as talented and gifted in at least one of the following areas.

(a) *Intellectual Ability* means scoring in the top 5 percent on a statistically valid and reliable measurement tool of intellectual ability.

(b) *Creativity/Divergent Thinking* means scoring in the top 5 percent of performance on a statistically valid and reliable measurement tool of creativity/divergent thinking.

(c) *Academic Aptitude/Achievement* means scoring in the top 15 percent of academic performance in a total subject area score on a statistically valid and reliable measurement tool of academic achievement/aptitude, or a standardized assessment, such as an NRT or CRT.

(d) *Leadership* means the student is recognized as possessing the ability to lead, guide, or influence the actions of others as measured by objective standards that a reasonable person of the community would believe demonstrates that the student possess leadership skills. These standards include evidence from surveys, supportive documentation portfolios, elected or appointed positions in school, community, clubs and organization, awards documenting leadership capabilities. No school can identify more than 15 percent of its student population as gifted and talented through the leadership category.

(e) *Visual and Performing Arts* means outstanding ability to excel in any imaginative art form; including, but not limited to, drawing, printing, sculpture, jewelry making, music, dance, speech, debate, or drama determined by as documented from surveys, supportive documentation portfolios, awards from judged or juried competitions. No school can identify more than 15 percent of its student population as gifted and talented through the visual and performing arts category.

**§ 39.115 How are eligible students identified and nominated?**

(a) Screening can be completed annually to identify potentially eligible students. Students meeting the criteria in § 39.114 for gifted and talented

services can be nominated by any of the following:

- (1) A teacher or other school staff;
- (2) Another student;
- (3) A community member;
- (4) A parent or legal guardian; or
- (5) A student can nominate himself or herself.

(b) Students can be nominated based on information regarding the student's abilities from any of the following sources:

- (1) Collections of work;
- (2) Audio/visual tapes;
- (3) School grades;
- (4) Judgment of work by qualified individuals knowledgeable about the child's performances (e.g., artists, musicians, poets, historians, etc.);
- (5) Interviews, or observations; or
- (6) Information from other sources.

(c) The school must have written parental consent to collect documentation of gifts and talents under paragraph (b) of this section.

**§ 39.116 How does a school determine who receives gifted and talented services?**

(a) To determine who receives gifted and talented funding, the school must use qualified professionals to perform a multi-disciplinary assessment. The assessment may include the examination of work samples or performance appropriate to the area under consideration. The school must have the parent or guardian's written permission to conduct individual assessments or evaluations.

Assessments under this section must meet the following standards:

- (1) The assessment must use assessment instruments specified in § 39.114 for each of the five criteria for which the student is nominated;
- (2) If the assessment uses a multi-criteria evaluation, that evaluation must be an unbiased evaluation based on student needs and abilities;
- (3) Indicators for visual and performing arts and leadership may be determined based on national, regional, or local criteria; and
- (4) The assessment may use student portfolios.

(b) A multi-disciplinary team will review the assessment results to determine eligibility for gifted and talented services. The purpose of the team is to determine eligibility and placement to receive gifted and talented services.

(1) Team members may include nominator, classroom teacher, qualified professional who conducted the assessment, local experts as needed, and other appropriate personnel such as the principal and or a counselor.

(2) A minimum of three team members is required to determine eligibility.

(3) The team will design a specific education plan to provide gifted and talented services related in the areas identified.

**§ 39.117 How does a school provide gifted and talented services for a student?**

Gifted and talented services are provided through or under the supervision of highly qualified professional teachers. To provide gifted and talented services for a student, a school must take the steps in this section.

(a) The multi-disciplinary team formed under § 39.116 (b) will sign a statement of agreement for placement of services based on documentation reviewed.

(b) The student's parent or guardian must give written permission for the student to participate.

(c) The school must develop a specific education plan that contains:

- (1) The date of placement;
- (2) The date services will begin;
- (3) The criterion from § 39.114 for which the student is receiving services and the student's performance level;
- (4) Measurable goals and objectives; and
- (5) A list of staff responsible for each service that the school is providing.

**§ 39.118 How does a student receive gifted and talented services in subsequent years?**

For each student receiving gifted and talented services, the school must conduct a yearly evaluation of progress, file timely progress reports, and update the specific education plan.

(a) If a school identifies a student as gifted and talented based on § 39.114 (a), (b), or (c), then the student does not need to reapply for the gifted and talented program. However, the student must be retested at in the least every 3 years through the 10th grade to verify eligibility.

(b) If a school identifies a student as gifted and talented based on § 39.114 (e) or (f), the student must be reevaluated annually for the gifted and talented program.

**§ 39.119 When must a student leave a gifted and talented program?**

A student must leave the gifted and talented program when either:

- (a) The student has received all of the available services that can meet the student's needs;
- (b) The student no longer meets the criteria that have qualified him or her for the program; or
- (c) The parent or guardian removes the student from the program.

**§ 39.120 How are gifted and talented services provided?**

In providing services under this section, the school must:

(a) Provide a variety of programming services to meet the needs of the students;

(b) Provide the type and duration of services identified in the Individual Education Plan established for each student; and

(c) Maintain individual student files to provide documentation of process and services; and

(d) Maintain confidentiality of student records under the Family Educational Rights and Privacy Act (FERPA).

**§ 39.121 What is the WSU for gifted and talented students?**

The WSU for a gifted and talented student is the base academic weight (see § 39.103) subtracted from 2.0. The following table shows the gifted and talented weights obtained using this procedure.

Grade level	Gifted and talented WSU
Kindergarten .....	0.85
Grades 1 to 3 .....	0.62
Grades 4 to 6 .....	0.85
Grades 7 to 8 .....	0.62
Grades 9 to 12 .....	0.50

**Language Development Programs****§ 39.130 Can ISEF funds be used for Language Development Programs?**

Yes, schools can use ISEF funds to implement Language Development programs that demonstrate the positive effects of native language programs on students' academic success and English proficiency. Funds can be distributed to a total aggregate instructional weight of 0.13 for each eligible student.

**§ 39.131 What is a Language Development Program?**

A Language Development program is one that serves students who either:

(a) Are not proficient in spoken or written English;

(b) Are not proficient in any language;

(c) Are learning their native language for the purpose of maintenance or language restoration and enhancement;

(d) Are being instructed in their native language; or

(e) Are learning non-language subjects in their native language.

**§ 39.132 Can a school integrate Language Development Programs into its regular instructional program?**

A school may offer Language Development programs to students as part of its regular academic program. Language Development does not have to be offered as a stand-alone program.

**§ 39.133 Who decides how Language Development funds can be used?**

Tribal governing bodies or local school boards decide how their funds for Language Development programs will be used in the instructional program to meet the needs of their students.

**§ 39.134 How does a school identify a Limited English Proficient student?**

A student is identified as Limited English Proficient (LEP) by using a nationally recognized scientifically research-based test.

**§ 39.135 What services must be provided to an LEP student?**

A school must provide services that assist each LEP student to:

(a) Become proficient in English, and to the extent possible proficient in their native language; and

(b) Meet the same challenging academic content and student academic achievement standards that all students are expected to meet under section 1111(b)(1) of the Act.

**§ 39.136 What is the WSU for Language Development programs?**

Language Development programs are funded at 0.13 WSUs per student.

**§ 39.137 May schools operate a language development program without a specific appropriation from Congress?**

Yes, a school may operate a language development program without a specific appropriation from Congress, but any funds used for such a program must come from existing ISEP funds. When Congress specifically appropriates funds for the *Indian or native languages*, the factor to support the language development program will be no more

than 0.25 WSU. [25 U.S.C. 2007 (c)(i)(e)].

**Small School Adjustment****§ 39.140 How does a school qualify for a Small School Adjustment?**

A school will receive a small school adjustment if either:

(a) Its average daily membership (ADM) is less than 100 students; or

(b) It serves lower grades and has a diploma-awarding high school component with an average instructional daily membership of less than 100 students.

**§ 39.141 What is the amount of the Small School Adjustment?**

(a) A school with a 3-year ADM of 50 or fewer students will receive an adjustment equivalent to an additional 12.5 base WSU; or

(b) A school with a 3-year ADM of 51 to 99 students will use the following formula to determine the number of WSU for its adjustment. With X being the ADM, the formula is as follows: WSU adjustment = ((100-X)/200)\*X

**§ 39.143 What is a small high school?**

For purposes of this part, a small high school:

(a) Is accredited under 25 U.S.C. 2001(b);

(b) Is staffed with highly qualified teachers;

(c) Operates any combination of grades 9 through 12;

(d) Offers high school diplomas; and

(e) Has an ADM of fewer than 100 students.

**§ 39.144 What is the small high school adjustment?**

(a) The small high school adjustment is a WSU adjustment given to a small high school that meets both of the following criteria:

(1) It has a 3-year average daily membership (ADM) of less than 100 students; and

(2) It operates as part of a school that during the 2003–04 school year also included lower grades.

(b) The following table shows the WSU adjustment given to small high schools. In the table, "X" stands for the ADM.

School receives a small school adjustment under § 39.141	ADM of high school component	Amount of small high school adjustment
Yes .....	50 or fewer students .....	6.25 base WSU
Yes .....	51 to 99 .....	Determined using the following formula: WSU = ((100-X)/200)*X/2
No .....	50 or fewer students .....	12.5 base WSU
No .....	51 to 99 students .....	Determined using the following formula: ((100-X)/200)*X

**§ 39.155 Can a school receive both a small school adjustment and a small high school adjustment?**

A school that meets the criteria in § 39.140 can receive both a small school

adjustment and a small high school adjustment. The following table shows the total amount of adjustments for

eligible schools by average daily membership (ADM) category.

ADM—entire school	ADM—high school component	Small school adjustment	Small high school adjustment	Total adjustment
0–50	NA	12.5	NA	12.5
0–50	0–50	12.5	6.25	18.75
51–99	0–50	*12.5–0.5	6.25	18.75–6.75
51–99	51–99	*12.5–0.5	**6.25–0.25	18.75–0.7
99	0–50	0	12.5	12.5
99	51–98	0	**12.5–0.5	12.5–0.5

\* The amount of the adjustment is within this range. The exact figure depends upon the results obtained using the formula in § 39.141.

\*\* The amount of the adjustment is within this range. The exact figure depends upon the results obtained using the formula in § 39.144.

**§ 39.156 Is there an adjustment for small residential programs?**

In order to compensate for the additional costs of operating a small residential program, OIEP will add to the total WSUs of each qualifying school as shown in the following table:

Type of residential program	Number of WSUs added
Residential student count of 50 or fewer ISEP-eligible students.	12.5
Residential student count of between 51 and 99 ISEP-eligible students.	Determined by the formula $((100 - X)/200)X$ , where X equals the residential student count.

**Geographic Isolation Adjustment****§ 39.160 Does ISEF provide supplemental funding for extraordinary costs related to a school's geographic isolation?**

Yes. Havasupai Elementary School, for as long as it remains in its present location, will be awarded an additional cost factor of 12.5 WSU.

**Subpart C—Administrative Procedures, Student Counts, and Verifications****§ 39.200 What is the purpose of the Indian School Equalization Formula?**

OIEP uses the Indian School Equalization Formula (ISEF) to distribute Indian School Equalization Program (ISEP) appropriations equitably to Bureau-funded schools.

**§ 39.201 Does ISEF reflect the actual cost of school operations?**

ISEF does not attempt to assess the actual cost of school operations either at the local school level or in the aggregate nationally. ISEF is a relative distribution of available funds at the local school level by comparison with all other Bureau-funded schools.

**§ 39.202 What are the definitions of terms used in this subpart?**

*Homebound* means a student who is educated outside the classroom.

*Home schooled* means a student who is not enrolled in a school and is receiving educational services at home at the parent's or guardian's initiative.

*School day* means a day as defined by the submitted school calendar, as long as annual instructional hours are as they are reflected in § 39.213, excluding passing time, lunch, recess, and breaks.

*Three-year average means:*

- (1) For academic programs, the average daily membership of the 3 years before the year of operation; and
- (2) For the residential programs, the count period membership of the 3 years before the year of operations.

**§ 39.203 How does OIEP calculate ADM?**

OIEP calculates ADM by:

- (a) Adding the total enrollment figures from periodic reports received from each Bureau-funded school; and
- (b) Dividing the total enrollment for each school by the number of days in the school's reporting period.

**§ 39.204 How does OIEP calculate ISEF?**

To calculate ISEF for a school, OIEP will add the weights from paragraphs (a), (b), and (c) of this section to come up with a total of weighted student units (WSUs).

- (a) The 3-year average of ADM multiplied by the weighted student unit that is applicable to eligible students;
- (b) Any supplemental units generated by the students; and
- (c) Any supplemental weights generated by the schools.

**§ 39.205 How does OIEP calculate the value of one WSU?**

To calculate the appropriated dollar value of one WSU, OIEP divides the systemwide average number of WSUs for the previous 3 years into the current year's appropriation.

**§ 39.206 How does OIEP determine a school's funding for the upcoming school year?**

To determine a school's funding for the upcoming school year, OIEP uses the following six-step process:

(a) *Step one.* Multiply the appropriate base academic weight from § 39.121 by the number of students in each grade level category.

(b) *Step two.* Multiply the number of students eligible for supplemental program funding under § 39.107 by the WSU for the program.

(c) *Step three.* Calculate all school enrollment weights and residential weights to which the school is entitled.

(d) *Step four.* Add together the sums obtained in steps one through three to obtain each school's total WSU

(e) *Step five.* Add together the total WSUs for all Bureau-funded schools.

(f) *Step six.* Calculate the value of a WSU by dividing this year's funds by the average total WSUs (calculated under step five) for the previous 3 years.

(g) *Step seven.* Multiply each school's WSU total by the base value of one WSU to determine funding for that school.

**§ 39.207 How are ISEP funds distributed?**

(a) On July 1, schools will receive funding based on 80 percent of the WSU value as determined by dividing available funds by the total average WSU for the previous three years.

(b) On December 1, the balance will be distributed to all schools after verification of the school count and any adjustments made through the appeals process for the third year.

**§ 39.208 When may a school count a student for membership purposes?**

If a student is enrolled, is in attendance during any of the first 10 days of school, and receives at least 5 days' instruction, the student is deemed to be enrolled all 10 days. The first 10 days of school, for purposes of this section, are determined by the calendar that the school submits to OIEP.



(a) For ISEP purposes, a school can add a student to the membership when he or she has been enrolled and has received a full day of instruction from the school.

(b) Except as provided in § 39.210, to be counted for ADM, a student dropped under § 39.209 must:

- (1) Be re-enrolled; and
- (2) Receive a full day of instruction from the school.

**§ 39.209 When must a school drop a student from its membership?**

If a student is absent for 10 consecutive school days, the school must drop that student from the

membership for ISEP purposes of that school on the 11th day.

**§ 39.210 What other categories of students can a school count for membership purposes?**

A school can count other categories of students for membership purposes as shown in the following table.

Type of student	Circumstances under which student can be included in the school's membership
(a) Homebound .....	(1) The student is temporarily confined to the home for some or all of the school day for medical, family emergency, or other reasons required by law or regulation; (2) The student is being provided by the school with at least 5 documented contact hours each week of academic services by certified educational personnel; and (3) Appropriate documentation is on file at the school.
(b) Located in an institutional setting outside of the school.	The school is either: (1) Paying for the student to receive educational services from the facility; or (2) Providing educational services by certified school staff for at least 5 documented contact hours each week.
(c) Taking college courses during the school day.	(1) The student is concurrently enrolled in, and receiving credits for both the school's courses and college courses; and (2) The student is in physical attendance at the school at least 3 documented contact hours per day.
(d) Taking distance learning courses.	The student is both: (1) Receiving high school credit for grades; and (2) In physical attendance at the school at least 3 documented contact hours per day.
(e) Taking internet courses .....	The student is both: (1) Receiving high school credit for grades; and (2) Is taking the courses at the school site under a teacher's supervision.

**§ 39.211 Can a student be counted as enrolled in more than one school?**

Yes, if a student attends more than one school during an academic year, each school may count the student as enrolled once the student meets the criteria in § 39.208.

**§ 39.212 Will the Bureau fund children being home schooled?**

No, the Bureau will not fund any child that is being home schooled.

**§ 39.213 What are the minimum number of instructional hours required in order to be considered a full-time educational program?**

A full time program provides the following number of instructional/student hours to the corresponding grade level:

Grade	Hours
K .....	720
1-3 .....	810
4-8 .....	900
9-12 .....	970

**§ 39.214 Can a school receive funding for any part-time students?**

(a) A school can receive funding for the following part-time students:

- (1) Kindergarten students enrolled in a 2-hour program; and
- (2) Grade 7-12 students enrolled in at least half but less than a full instructional day.

(b) The school must count students classified as part-time at 50 percent of their basic instructional WSU value.

**Residential Programs**

**§ 39.215 How does ISEF fund residential programs?**

Residential programs are funded on a WSU basis using a formula that takes into account the number of nights of service per week. Funding for residential programs is based on the average of the 3 previous years' WSUs.

**§ 39.216 How are students counted for the purpose of funding residential services?**

For a student to be considered in residence for purposes of this subpart, the school must be able to document that the student:

- (a) Was in residence at least one night during the first full week of October;
- (b) Was in residence at least one night during the week preceding the first week in October;
- (c) Was in residence at least one night during the week following the first week in October; and
- (d) Was present for both the after school count and the midnight count at least one night during each week specified in this section.

**§ 39.217 Are there different formulas for different levels of residential services?**

(a) Residential services are funded as shown in the following table:

If a residential program operates * * *	Each student is funded at the level of * * *
(1) 4 nights per week or less.	Total WSU $\times$ 4/7
(2) 5, 6 or 7 nights per week.	Total WSU $\times$ 7/7

(b) In order to qualify for residential services funding under paragraph (a)(2) of this section, a school must document that at least 10 percent of residents are present on 3 of the 4 weekends during the count period.

(c) At least 50 percent of the residency levels established during the count period must be maintained every month for the remainder of the school year.

(d) A school may obtain waivers from the requirements of this section if there are health or safety justifications.

**§ 39.218 What happens if a residential program does not maintain residency levels required by this part?**

Each school must maintain its declared nights of service per week as certified in its submitted school calendar. For each month that a school does not maintain 25 percent of the residency shown in its submitted calendar, the school will lose one-tenth of its current year allocation.

**§ 39.219 What reports must residential programs submit to comply with this rule?**

Residential programs must report their monthly counts to the Director on the last school day of the month. To be

counted, a student must have been in residence at least 10 nights during each full school month.

#### Phase-In Period

##### § 39.220 How will the provisions of this subpart be phased in?

In calculating ADM for purposes of this subpart, a school must phase in the

provisions of this subpart as shown in the following table.

Time period	How OIEP must calculate ADM
(a) First year after the effective date of this part.	Use the prior 3 years' count period to create an average membership for funding purposes.
(b) Second year after the effective date of this part.	(1) The academic program will use the previous year's ADM and the 2 prior years' count periods; (2) The residential program will use the previous year's count period and the 2 prior years' count weeks.
(c) Each succeeding year after the effective date of this part.	Add one year of ADM or count period and drop one year of prior count weeks until both systems or operating on a 3-year rolling average using the previous 3 years' count period or ADM, respectively.

#### Subpart D—Accountability

##### § 39.400 What is the purpose of this subpart?

The purpose of this subpart is to ensure that this subpart establishes systematic verification and random independent outside auditing procedures to hold administrative the school, school board, or tribal officials having responsibility for student count and student transportation expenditure reporting are held accountable for the accurate and reliable performance of these duties. The subpart establishes systematic verification and random independent outside auditing procedures to accomplish this goal.

##### § 39.401 What definitions apply to terms used in this subpart?

*Administrative officials* means any persons responsible for managing and operating a school, including the school supervisor, the chief school administrator, tribal officials, Education Line Officers, and the Director, OIEP.

*Director* means the Director of the Office of Indian Education Programs of the Bureau of Indian Affairs.

*Education Line Officer* means the Bureau official in charge of Bureau education programs and functions in an Agency who reports to the Director.

##### § 39.402 What are the accountability measures under ISEP?

There are strict accountability measures under ISEP for misapplying or evading the processes in this part for classifying, counting, and serving students and for accurately reporting student transportation expenditures. These measure will ensure the equitable distribution of funds among schools. The accountability measures in the subpart apply to officials who are responsible under this part for:

- (a) Classifying and counting students for funding under ISEP;
- (b) Overseeing, certifying, and verifying the student count process; and

- (c) Overseeing, certifying, and verifying transportation expenditure accounting and reporting.

##### § 39.403 What certification is required?

(a) Each school must maintain an individual file on each student receiving basic educational and supplemental services. The file must contain written documentation of the following:

- (1) Each student's eligibility and attendance records;
- (2) A complete listing of all supplemental services provided, including all necessary documentation required by statute and regulations (*e.g.*, a current and complete Individual Education Plan for each student receiving supplemental services); and
- (3) Documentation of expenditures and program delivery for student transportation to and from school provided by commercial carriers.

(b) The School must maintain the following files in a central location:

- (1) The school's ADM and supplemental program counts and residential count;
- (2) Transportation related documentation, such as school bus mileage, bus routes;
- (3) A list of students transported to and from school;
- (4) An electronic student count program or database;
- (5) Class record books;
- (6) Supplemental program class record books;

(7) For residential programs, residential student attendance documentation;

(8) Evidence of teacher certification; and

(9) The school's accreditation certificate.

(c) The Director must maintain a record of required certifications for ELOs, specialists, and school superintendents in a central location.

##### § 39.404 What is the certification and verification process?

- (a) Each school must:

- (1) Certify that the files required by § 39.403 are complete and accurate; and
- (2) Compile a student roster that includes a complete list of all students by grade, days of attendance, and supplemental services.

(b) The chief school administrator and the president of the school board are responsible for certifying the school's ADM and residential count is true and accurate to the best of their knowledge or belief and is supported by appropriate documentation.

(c) OIEP's education line officer (ELO) will annually review the following to verify that the information is true and accurate and is supported by program documentation:

- (1) The eligibility of every student;
- (2) The school's ADM and supplemental program counts and residential count;
- (3) Evidence of accreditation;
- (4) Documentation for all provided basic and supplemental services, including all necessary documentation required by statute and regulations (*e.g.*, a current and complete Individual Education Plan for each student receiving supplemental services); and
- (5) Documentation of required by subpart G for student transportation to and from school provided by commercial carriers.

##### § 39.405 How will verifications be conducted?

The eligibility of every student shall be verified. The ELO will take a random sampling of five days with a minimum of one day per grading period to verify the information in § 39.404(c) The ELO will verify the count for the count period and verify residency during the remainder of the year.

##### § 39.406 What documentation must the school maintain for additional services it provides?

Every school must maintain a file on each student receiving additional services. (Additional services include for homebound services, institutional

services, distance courses, internet courses or college services.) The school must certify, and its records must show, that:

(a) Each homebound or institutionalized student is receiving 5 contact hours each week by certified educational personnel;

(b) Each student taking college, distance or internet courses is in physical attendance at the school for at least 3 certified contact hours per day.

**§ 39.407 How long must a school maintain records?**

The responsible administrative official for each school must maintain records relating to ISEP, supplemental services, and transportation-related expenditures. The official must maintain these records in appropriate retrievable storage for at least the four years prior to the current school year, unless Federal records retention schedules require a longer period.

**§ 39.408 What are the responsibilities of administrative officials?**

Administrative officials have the following responsibilities:

(a) Applying the appropriate standards in this part for classifying and counting ISEP eligible Indian students at the school for formula funding purposes;

(b) Accounting for and reporting student transportation expenditures;

(c) Providing training and supervision to ensure that appropriate standards are adhered to in counting students and accounting for student transportation expenditures;

(d) Submitting all reports and data on a timely basis; and

(e) Taking appropriate disciplinary action for failure to comply with requirements of this part.

**§ 39.409 How does the OIEP Director ensure accountability?**

(a) The Director of OIEP must ensure accountability in student counts and student transportation by doing all of the following:

(1) Conducting annual independent and random field audits of the processes and reports of at least one school per OIEP line office to ascertain the accuracy of Bureau line officers' reviews;

(2) Hearing and making decisions on appeals from school officials;

(3) Reviewing reports to ensure that standards and policies are applied consistently, education line officers treat schools fairly and equitably, and the bureau takes appropriate administrative action for failure to follow this part; and

(4) Reporting the results of the findings and determinations under this section to the appropriate tribal governing body.

(b) The purpose of the audit required by paragraph (a)(1) of this section is to ensure that the procedures outlined in these regulations are implemented by responsible administrative officials. To conduct the audit required by paragraph (a)(1) of this section, OIEP will select an independent audit firm that will:

(1) Select a statistically valid audit sample of recent student counts and student transportation reports; and

(2) Analyze these reports to determine adherence to the requirements of this part and accuracy in reporting.

**§ 39.410 What qualifications must an audit firm meet to be considered for auditing ISEP administration?**

To be considered for auditing ISEP administration under this subpart, an independent audit firm must:

(a) Be a licensed Certified Public Accountant Firm that meets all requirements for conducting audits under the federal Single Audit Act;

(b) Not be under investigation or sanction for violation of professional audit standards or ethics;

(c) Certify that it has conducted a conflict of interests check and that no conflict exists; and

(d) Be selected through a competitive bidding process.

**§ 39.411 How will the auditor report its findings?**

(a) The auditor selected under § 39.410 must:

(1) Provide an initial draft report of its findings to the governing board or responsible Federal official for the school(s) involved; and

(2) Solicit, consider, and incorporate a response to the findings, where submitted, in the final audit report.

(b) The auditor must submit a final report to the Assistant Secretary—Indian Affairs and all tribes served by each school involved. The report must include all documented exceptions to the requirements of this part, including those exceptions that:

(1) The auditor regards as negligible;

(2) The auditor regards as significant, or as evidence of incompetence on the part of responsible officials, and that must be resolved in a manner similar to significant audit exceptions in a fiscal audit; or

(3) Involve fraud and abuse.

(c) The auditor must immediately report exceptions involving fraud and abuse directly to the Department of the Interior Inspector General's office.

**§ 39.412 What sanctions apply for failure to comply with this part?**

(a) The employer of a responsible administrative official must take appropriate personnel action if the official:

(1) Submits false or fraudulent ISEP-related counts;

(2) Submits willfully inaccurate counts of student participation in weighted program areas; or

(3) Certifies or verifies submissions described in paragraphs (a)(1) or (a)(2) of this section.

(b) Unless prohibited by law, the employer must report:

(1) Notice of final Federal personnel action to the tribal governing body and tribal school board; and

(2) Notice of final tribal or school board personnel action to the Director of OIEP.

**§ 39.413 Can a school appeal the verification of the count?**

Yes, a school may appeal to the Director any administrative action disallowing any academic, transportation, supplemental program or residential count. In this appeal, the school may provide evidence to indicate the student's eligibility, membership or residency or adequacy of a program for all or a portion of school year. The school must follow the appeals process in 25 CFR part 2.

**Subpart E—Contingency Fund**

**§ 39.500 What emergency and contingency funds are available?**

(a) The Secretary must reserve 1 percent of funds from the allotment formula to meet emergencies and unforeseen contingencies affecting educational programs.

(b) At the end of each fiscal year the Secretary:

(1) Can carry over to the next fiscal year a maximum of 1 percent the current year funds; and

(2) Must distribute all funds in excess of 1 percent equally to all schools.

**§ 39.501 What is an emergency or unforeseen contingency?**

An emergency or unforeseen contingency is an event that meets all of the following criteria:

(a) It could not be planned for;

(b) It is not the result of mismanagement, malfeasance, or willful neglect;

(c) It could not have been covered by an insurance policy in force at the time of the event;

(d) The Assistant Secretary determines that BIA cannot reimburse the emergency from the facilities emergency repair fund; and

(e) It could not have been prevented by prudent action by officials responsible for the educational program.

**§ 39.502 How does a school apply for contingency funds?**

To apply for contingency funds, a school must send a request to the ELO. The ELO must send the request to the Director for consideration within 48 hours of receipt. The Director will consider the severity of the event and will attempt to respond to the request as soon as possible, but in any event within 30 days.

**§ 39.503 How can a school use contingency funds?**

Contingency funds can be used only for education services and programs, including repair of educational facilities.

**§ 39.504 May Contingency Funds be carried over to a subsequent fiscal year?**

Bureau-operated schools may carry over funds to the next fiscal year.

**§ 39.505 What are the reporting requirements for the use of the contingency fund?**

(a) At the end of each fiscal year, BIA/OIEP shall send an annual report to Congress detailing how the Contingency Funds were used during the previous fiscal year.

(b) In conjunction with the distribution of unused contingency funds, by October 1 of each year, the Bureau must send a letter to each school and each tribe operating a school listing the allotments from the Contingency Fund.

**Subpart F—School Board Training Expenses**

**§ 39.600 Are Bureau-operated school board expenses funded by ISEP limited?**

Yes. Bureau-operated schools are limited to \$8,000 or one percent (1%) of ISEP allotted funds (not to exceed \$15,000).

**§ 39.601 Is school board training for Bureau-operated schools considered a school board expense subject to the limitation?**

No. School board training for Bureau-operated schools is not considered a school board expense subject to the limitation.

**§ 39.602 Can Grant and Contract schools spend ISEP funds for school board expenses, including training?**

No. Grant and Contract school board expenses and training are funded with their administrative cost grant funds.

**§ 39.603 Is school board training required for all Bureau-funded schools?**

Yes. Any new member of a local school board or an agency school board must complete 40 hours of training within one year of appointment.

**§ 39.604 Is there a separate weight for school board training at Bureau-operated schools?**

Yes. There is an ISEP weight not to exceed 1.2 WSUs to cover school board training and expenses at Bureau-operated schools.

**Subpart G—Transportation**

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

(a) This part covers how transportation mileage and funds for schools are calculated under the ISEP transportation program. The program funds transportation of students from home to school and return.

(b) To use this part effectively, a school should:

(1) Determine its eligibility for funds using the provisions of §§ 39.702 through 39.708;

(2) Calculate its transportation miles using the provisions of §§ 39.710 and 39.711; and

(3) Submit the required reports as required by §§ 39.721 and 39.722.

**§ 39.701 What definitions apply to terms used in this subpart?**

*ISEP* means the Indian School Equalization Program.

*ISEP student count week* means the last full week in September during which schools count their student enrollment for ISEP purposes.

*Unimproved roads* means unengineered earth roads that do not have adequate gravel or other aggregate surface materials applied and do not have drainage ditches or shoulders.

**Eligibility for Funds**

**§ 39.702 Can a school receive funds to transport residential students using commercial transportation?**

A school transporting students by commercial bus, train, airplane, or other commercial modes of transportation will be funded at the cost of the commercial ticket for:

(a) The trip from home to school in the Fall;

(b) The round-trip return home at Christmas; and

(c) The return trip home at the end of the school year.

**§ 39.703 What ground transportation costs are covered for students traveling by commercial transportation?**

This section applies only if a school transports residential students by

commercial bus, train or airplane from home to school. The school may receive funds for the ground miles that the school has to drive to deliver the students or their luggage from the bus, train, or plane terminal to the school.

**§ 39.704 Are schools eligible for other funds to transport residential students?**

Schools may receive funds for actual chaperone expenses, excluding salaries, during the transportation of students to and from home at the beginning and end of the school year and at Christmas.

**§ 39.705 Are schools eligible for other funds to transport special education students?**

A school that transports a special education student from home to a treatment center and back to home on a daily basis as required by the student's Individual Education Plan may count those miles for day student funding.

**§ 39.706 Are peripheral dormitories eligible for day transportation funds?**

Yes. If the peripheral dormitory is required to transport dormitory students to the public school, the dormitory may count those miles driven transporting students to the public school for day transportation funding.

**§ 39.707 Which student transportation miles are not eligible for ISEP transportation funding?**

(a) The following transportation uses are part of the instructional program and are not eligible for transportation funding:

- (1) Fuel and maintenance runs;
- (2) Transportation home for medical or other emergencies;
- (3) Transportation to treatment or special services programs;
- (4) Transportation to after-school programs; and
- (5) Transportation for day and boarding school students to attend instructional programs less than full-time at locations other than the school reporting the mileage.

(b) Examples of after-school programs covered by paragraph (a)(4) of this section include:

- (1) Athletics;
- (2) Band;
- (3) Detention;
- (4) Tutoring, study hall and special classes; and
- (5) Extra-curricular activities such as arts and crafts.

**§ 39.708 Are non-ISEP eligible children eligible for transportation funding?**

Only ISEP-eligible children enrolled in and attending a school are eligible for ISEP transportation funding. Public, charter, and alternative school students

and children participating in preschool programs such as Head Start and FACE are not eligible for ISEP transportation funding and should not be transported on buses.

### Calculating Transportation Miles

#### § 39.710 How does a school calculate annual bus transportation miles for day students?

To calculate the total annual bus transportation miles for day students, a school must use the appropriate formula from this section. In the formulas, Tu = Miles driven on Tuesday of the ISEP student count week, W = Miles driven on Wednesday of the ISEP student count week, and Th = Miles driven on Thursday of the ISEP student count week.

(a) For ISEP-eligible day students whose route is entirely over improved roads, calculate miles using the following formula:

$$\frac{Tu + W + Th}{3} * 180$$

(b) For ISEP-eligible day students whose route is partly over unimproved roads, calculate miles using the following three steps.

(1) *Step 1.* Apply the following formula to miles driven over improved roads only:

$$\frac{Tu + W + Th}{3} * 180$$

(2) *Step 2.* Apply the following formula to miles driven over unimproved roads only:

$$\frac{Tu + W + Th}{3} * 1.2 * 180$$

(3) *Step 3.* Add together the sums from steps 1 and 2 to obtain the total annual transportation miles.

#### § 39.711 How does a school calculate annual bus transportation miles for residential students?

To calculate the total annual transportation miles for residential students, a school must use the procedures in paragraph (b) of this section.

(a) The school can receive funds for the following trips:

- (1) Transportation to the school at the start of the school year;
- (2) Round trip home at Christmas; and
- (3) Return trip to home at the end of the school year.

(b) To calculate the actual miles driven to transport students from home to school at the start of the school year add together the miles driven for all buses in the fall. If a school transports students over unimproved roads, the school must separate the number of miles driven for each bus into improved miles and unimproved miles. The number of miles driven is the sum of:

(1) The number of miles driven on improved roads; and

(2) The number of miles driven on unimproved roads multiplied by 1.2.

(c) The annual miles driven for each school is the sums of the mileage from paragraph (b)(1) and (b)(2) of this section multiplied by 4.

### Reporting Requirements

#### § 39.720 Why are there different reporting requirements for transportation data?

In order to construct an actual cost data base, residential and day schools must report data required by §§ 39.721 and .722.

#### § 39.721 What transportation information must off-reservation boarding schools report?

(a) Each off-reservation boarding school that provides transportation must report annually the information required by this section. The report must:

- (1) Be submitted to OIEP by August 1 and cover the preceding school year;
- (2) Include a Charter/Commercial and Air Transportation Form signed and certified as complete and accurate by the School Principal and the appropriate ELO; and
- (3) Include the information required by paragraph (b) of this section.

(b) Each annual transportation report must include the information required by the following table.

Type of transport	Information required for annual report
(1) Bus .....	Actual number of miles traveled by all buses or other vehicles to transport students to school at the beginning of the year multiplied by the number of trips that students take during the year, up to a maximum of four.
(2) Aircraft .....	The following information for each student traveling by air: <ol style="list-style-type: none"> <li>(i) A maximum of four one-way fares;</li> <li>(ii) Roundtrip fare paid for transportation home due to an immediate family emergency;</li> <li>(iii) Ground mileage from airport arrival to school; and</li> <li>(iv) If applicable, chaperone travel costs (excluding salary) for school-to-home travel.</li> </ol>

#### § 39.722 What transportation information must day schools or on-reservation boarding schools report?

(a) Each day school or on-reservation boarding school that provides transportation must report annually the information required by this section. The report must:

(1) Be submitted to OIEP by August 1 and cover the preceding school year;

(2) Include a Day Student Transportation Form signed and certified as complete and accurate by the School Principal and the appropriate ELO; and

(3) Include the information required by paragraph (b) of this section.

(b) Each annual transportation report must include the following information:

(1) Fixed vehicle costs, including: the number and type of buses, passenger size, and local GSA rental rate and duration of GSA contract;

(2) Variable vehicle costs;

(3) Mileage traveled to transport students to and from school on school days, to cities of special services, and to extra-curricular activities;

(4) Medical trips;

(5) Maintenance and Service costs; and

(6) Driver costs.

### Miscellaneous Provisions

#### § 39.730 Which standards must student transportation vehicles meet?

All vehicles used by schools to transport students must meet or exceed

all appropriate Federal Motor Vehicle Safety Standards (FMVSS) and State motor vehicle safety standards. The Bureau will not fund transportation mileage and costs incurred transporting students in vehicles that do not meet these standards.

#### § 39.731 Can transportation time be used as instruction time for day school students?

No. Transportation time cannot be used as instruction time for day school students in meeting the minimum required hours for academic funding.

#### § 39.732 How does OIEP allocate transportation funds to schools?

OIEP allocates transportation miles based on the types of transportation

programs that the school provides. To allocate transportation funds OIEP:

(a) Multiplies the one-way commercial costs for all schools by four to identify the total commercial costs for all schools;

(b) Subtracts the commercial cost total from the appropriated transportation funds and allocates the balance of the transportation funds to each school with a per-mile rate;

(c) Divides the balance of funds by the sum of the annual day miles and the annual residential miles to identify a per-mile rate;

(d) For day transportation, multiplies the per-mile rate times the annual day miles for each school; and

(e) For residential transportation, multiplies the per mile rate times the annual transportation miles for each school.

#### **Subpart H—Determining the Amount Necessary To Sustain an Academic or Residential Program**

##### **§ 39.801 What is the formula to determine the amount necessary to sustain a school's academic or residential program?**

(a) The Secretary's formula to determine the minimal annual amount necessary to sustain a bureau-funded school's academic or residential program is as follows:

Student Unit Value × Weighted Student Unit = Annual Minimum Amount

(b) Sections 39.802 through 39.807 explain the derivation of the formula in paragraph (a) of this section.

(c) If the annual minimum amount calculated under this section and § 39.802 through 39.807 is not fully funded, OIEP will use the Indian School

Equalization Formula to distribute funds to schools.

##### **§ 39.802 What is the Student Unit value in the formula?**

The student unit value is the value applied to each student in an academic or residential program. There are two types of student unit values: the student unit instructional value (SUIV) and the student unit residential value (SURV).

(a) The student unit instructional value (SUIV) applies to a day student. It is an annually established ratio of 1.0 that represents a student in grades 4 through 6 of a typical non-residential program.

(b) The student unit residential value (SURV) applies to a residential student. It is an annually established ratio of 1.0 that represents a student in grades 4 through 6 of a typical residential program.

##### **§ 39.803 What is a Weighted Student Unit in the formula?**

A weighted student unit is an adjusted ratio using factors in the Indian School Equalization Formula to establish educational priorities and to provide for the unique needs of specific students, such as:

- (a) Students in grades kindergarten through 3 or 7 through 12;
- (b) Special education students;
- (c) Gifted and talented students;
- (d) Distance education students;
- (e) Vocational and industrial education students;
- (f) Native Language Instruction students;
- (g) Small schools;
- (h) Personnel costs;
- (i) Alternative schooling; and

(j) Early Childhood Education programs.

##### **§ 39.804 How is the SUIV calculated?**

The SUIV is calculated by the following 5-step process:

(a) *Step 1.* Use the adjusted national average current expenditures (ANACE) of public and private schools determined by data from the U.S. Dept. of Education-National Center of Education Statistics (NCES), the Department of Defense Schools, the District of Columbia Schools, and the Association of Boarding Schools for the last two school years for which data is available.

(b) *Step 2.* Subtract the average specific Federal share (title I and IDEA Part B) of the total revenue for bureau-funded elementary and secondary schools for the last school year for which data is available as reported by NCES (15%).

(c) *Step 3.* Subtract the administrative cost grant/agency area technical services revenue as a percentage of the total revenue (current expenditures) of BIA-funded schools for school year 1999–2000.

(d) *Step 4.* Subtract the transportation revenue as a percentage of the total revenue (current revenue) BIA-funded schools for the last school year for which data is available.

(e) *Step 5.* Add Johnson O'Malley funding.

##### **§ 39.805 What was the student unit for Instruction value (SUIV) for the school year 1999–2000?**

The process in § 39.804 looks like this, using figures for the 1999–2000 school year:

\$8,030	ANACE
– 1205	Average specific Federal share of total revenue for bureau-funded schools.
– 993	Cost grant/technical services revenue as a percentage total revenue.
– 658	Transportation revenue as a percentage of the total revenue.
+85	Johnson O'Malley funding.
<hr/>	
\$5,259	SUIV.

##### **§ 39.806 How is the SURV calculated?**

(a) The SURV is the adjusted national average current expenditures for residential schools (ANACER) of public and private residential schools. This average is determined using data from:

(1) The U.S. Department of Education-National Center of Education Statistics (NCES);

(2) The U.S. Department of Defense schools;

(3) Elementary and secondary schools at Gallaudet University; and

(4) The Association of Boarding Schools' residential cost range for the school year.

(b) Following the procedure in paragraph (a) of this section, the SURV for school year 1999–2000 was \$ 11,000.

##### **§ 39.807 How will the Student Unit Value be adjusted annually?**

(a) The Student Unit Value (SUV) will be adjusted annually by dividing the previous year's Student Value into two parts and adjusting each one as shown in this section.

(1) The first part consists of 85 percent of the previous year's SUV. OIEP will adjust this portion using the personnel cost of living increase of the Department of Defense.

(2) The second part consists of 15 percent the previous year's SUV. OIEP will adjust this portion using the Consumer Price Index-Urban of the Department of Labor.

(b) If the student unit value amount is not fully funded, the schools will receive their pro rata share using the Indian School Equalization Formula.

##### **§ 39.808 What definitions apply?**

The definitions in this section apply to the provisions in this subpart.

*Adjusted National Average Current Expenditure [ANACE]* means the actual current expenditures for pupils in fall

enrollment in public elementary and secondary schools for the last school year for which data is available. These expenditures are adjusted to reflect current expenditures of federally financed schools' cost of day and residential programs financed by:

- (1) The Department of Defense;
- (2) The Department of Education; and
- (3) The District of Columbia.

*Current expenditures* means expenses related to classroom instruction, classroom supplies, administration, support services-students and other support services and operations. Current expenditures do not include facility operations and maintenance, buildings and improvements, furniture, equipment, vehicles, student activities and debt retirement.

4. Part 42 is revised to read as follows:

## **PART 42—STUDENT RIGHTS**

Sec.

- 42.1 What general principles apply to this part?
- 42.2 What rights do individual students have?
- 42.3 How should a school address alleged violations of school policies?
- 42.4 What are alternative dispute resolution processes?
- 42.5 When can a school use ADR processes to address an alleged violation?
- 42.6 What does due process in a formal disciplinary proceeding include?
- 42.7 What are a student's due process rights in a formal disciplinary proceeding?
- 42.8 What are victims' rights in due process?
- 42.9 How must the school communicate individual student rights to students, parents or guardians, and staff?
- 42.99 Information collection.

**Authority:** 5 U.S.C. 301, Pub. L. 107–110.

### **§ 42.1 What general principles apply to this part?**

(a) This part applies to every Bureau-funded school. The regulations in this part govern student rights and due process procedures in disciplinary proceedings in all Bureau-funded schools. To comply with this part, each school must:

- (1) Respect the constitutional, statutory, civil and human rights of individual students; and
- (2) Respect the role of Tribal judicial systems where appropriate.

(b) All student rights, due process procedures, and educational practices should, where appropriate or possible, afford students consideration of and rights equal to the student's traditional Native customs and practices.

### **§ 42.2 What rights do individual students have?**

Individual students at Bureau-funded schools have, and must be accorded, at least the following rights:

- (a) The right to an education that may take into consideration Native American or Alaska Native values;
- (b) The right to an education that incorporates applicable Federal and Tribal constitutional and statutory protections for individuals; and
- (c) The right to due process in instances of disciplinary actions for alleged violation of school regulations for which the student may be subjected to penalties.

### **§ 42.3 How should a school address alleged violations of school policies?**

(a) In addressing alleged violations of school policies, each school must consider, to the extent appropriate, the reintegration of the student into the school community.

(b) The school may address a student violation using alternative dispute resolution (ADR) processes or the formal disciplinary process.

(1) When appropriate, the school should first attempt to use the ADR processes described in § 42.5 that may allow resolution of the alleged violation without recourse to punitive action.

(2) Where ADR processes do not resolve matters or cannot be used, the school must address the alleged violation through a formal disciplinary proceeding under § 42.6 consistent with the due process rights described in § 42.6.

### **§ 42.4 What are alternative dispute resolution processes?**

Alternative dispute resolution (ADR) processes are formal or informal processes that may allow resolution of the violation without recourse to punitive action.

(a) ADR processes may:

- (1) Include peer adjudication, mediation, and conciliation; and
- (2) Involve appropriate customs and practices of the Indian Tribes or Alaska Native Villages to the extent that these practices are readily identifiable.

(b) For further information on ADR processes and how to use them, contact the Office of Collaborative Action and Dispute Resolution by:

- (1) Sending an e-mail to: [cadr@ios.doi.gov](mailto:cadr@ios.doi.gov); or
- (2) Writing to: Office of Collaborative Action and Dispute Resolution, Department of the Interior, 1849 C Street, NW., MS 5258, Washington, DC 20240.

### **§ 42.5 When can a school use ADR processes to address an alleged violation?**

(a) The school may address an alleged violation through the ADR processes described in § 42.4, unless one of the conditions in paragraph (b) of this section applies.

(b) The school must not use ADR processes in any of the following circumstances:

- (1) Where the law requires immediate expulsion ("zero tolerance" laws);
  - (2) For a special education disciplinary proceeding where use of ADR would not be compatible with the Individuals with Disabilities Education Act (Pub. L. 105–17); or
  - (3) When all parties do not agree to using alternative dispute resolution processes.
- (c) If ADR processes do not resolve matters or cannot be used, the school must address alleged violations through the formal disciplinary proceeding described in § 42.7.

### **§ 42.6 What does due process in a formal disciplinary proceeding include?**

Due process must include written notice of the charges and a fair and impartial hearing as required by this section.

(a) The school must give the student written notice of charges within a reasonable time before the hearing required by paragraph (b) of this section. Notice of the charges includes:

- (1) A copy of the school policy allegedly violated;
- (2) The facts that allegedly constitute the violation;
- (3) Information about any statements that the school has received relating to the charge and instructions on how to obtain copies of those statements; and
- (4) Information regarding those parts of the student's record that the school will consider in rendering a disciplinary decision.

(b) The school must hold a fair and impartial hearing before imposing disciplinary action, except under the following circumstances:

- (1) If the law requires immediate removal (such as, if the student brought a firearm to school) or if there is some other statutory basis for removal;
- (2) In an emergency situation that seriously and immediately endangers the health or safety of the student or others; or
- (3) If the student (or the student's parent or guardian if the student is less than 18 years old) chooses to waive entitlement to a hearing.

(c) In an emergency situation under paragraph (b)(2) of this section, the school:

- (1) May temporarily remove the student;



(2) Must immediately document for the record the facts giving rise to the emergency; and

(3) Must afford the student a hearing that follows due process, as set forth in this part, within ten days.

**§ 42.7 What are a student's due process rights in a formal disciplinary proceeding?**

A student has the following due process rights in a formal disciplinary proceeding:

(a) The right to have present at the hearing the student's parents or guardians (or their designee);

(b) The right to be represented by counsel (Legal counsel will not be paid for by the Bureau-funded school or the Secretary);

(c) The right to produce, and have produced, witnesses on the student's behalf and to confront and examine all witnesses;

(d) The right to a record of hearings of disciplinary actions, including written findings of fact and conclusions in cases of disciplinary action;

(e) The right to administrative review and appeal under school policy;

(f) The right not to be compelled to testify against himself or herself; and

(g) The right to have an allegation of misconduct and related information expunged from the student's school record if the student is found not guilty of the charges.

**§ 42.8 What are victims' rights in due process?**

In due process, each school must consider victims' rights when appropriate.

(a) The victim's rights may include a right to:

(1) Participate in due process either in writing or in person;

(2) Provide a statement concerning the impact of the incident on the victim; and

(3) Have the outcome explained to the victim and to his or her parents or guardian by a school official, consistent with confidentiality.

(b) For the purposes of this part, the victim is the actual victim, and not his or her parents.

**§ 42.9 How must the school communicate individual student rights to students, parents or guardians, and staff?**

Each school must:

(a) Develop a student handbook that includes local school policies, definitions of suspension, expulsion, zero tolerance, and other appropriate terms, and a copy of the regulations in this part;

(b) Provide all school staff a current and updated copy of student rights and responsibilities before the first day of each school year;

(c) Provide all students and their parents or guardians a current and updated copy of student rights and responsibilities every school year upon enrollment; and

(d) Require students, school staff, and to the extent possible, parents and guardians, to confirm in writing that they have received a copy and understand the student rights and responsibilities.

**§ 42.99 Information Collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA. These collections have been approved by OMB under control number [to be determined].

5. New part 44 is added to read as follows:

**PART 44—GRANTS UNDER THE TRIBALLY CONTROLLED SCHOOLS ACT**

Sec.

44.101 What directives apply to a grantee under this part?

44.102 Does this part affect existing tribal rights?

44.103 Who is eligible for a grant?

44.104 How a grant can be terminated?

44.105 How does a tribe or tribal organization retrocede a program to the Secretary?

44.106 How can the Secretary revoke an eligibility determination?

44.107 How does the Secretary reassume a program?

44.108 How must the Secretary make grant payments?

44.109 What happens if the grant recipient is overpaid?

44.110 What Indian Self-Determination Act provisions apply to grants under the Tribally Controlled Schools Act?

44.111 Does the federal tort claims act apply to grantees?

44.200 Information collection.

**Authority:** Pub. L. 107–110, title 10, part D, the Native American Education Improvement Act, part B, section 1138, Regional Meetings and Negotiated Rulemaking.

**§ 44.101 What directives apply to a grantee under this part?**

In making a grant under this part the Secretary will use only:

(a) The regulations in this part; and

(b) Guidelines, manuals, and policy directives agreed to by the grantee.

**§ 44.102 Does this part affect existing tribal rights?**

This part does not:

(a) Affect in any way the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminate or change the trust responsibility of the United States to any Indian tribe or individual Indian;

(c) Require an Indian tribe to apply for a grant; or

(d) Impede awards by any other Federal agency to any Indian tribe or tribal organization to administer any Indian program under any other law.

**§ 44.103 Who is eligible for a grant?**

The Secretary can make grants to Indian tribes and tribal organizations that operate:

(a) A school under the provisions of Pub. L. 93–638;

(b) A tribally-controlled school (including a charter school, community-generated school or other type of school) approved by tribal governing body; or

(c) A bureau-funded school approved by tribal governing body.

**§ 44.104 How can a grant be terminated?**

A grant can be terminated only by one of the following methods:

(a) Retrocession by the tribe;

(b) Revocation of eligibility by the Secretary; or

(c) Reassumption by BIA.

**§ 44.105 How does a tribal governing body retrocede a program to the Secretary?**

(a) To retrocede a program, the tribal governing body must:

(1) Notify the Bureau in writing, by formal action of the tribal governing body; and

(2) Consult with the Bureau to establish a mutually agreeable effective date. If no date is agreed upon, the retrocession is effective 120 days after the tribal governing body notified the Bureau.

(b) The Bureau must accept any request for retrocession that meets the criteria in paragraph (a) of this section.

(c) After the tribal governing body retrocedes a program:

(1) The tribal governing body decides whether the school becomes Bureau-operated or contracted under the Indian Self-Determination Act; and

(2) If the governing body decides that the school is to be Bureau-operated, the Bureau must provide education-related services in at least the same quantity and quality as those that were previously provided.

**§ 44.106 How can the Secretary revoke an eligibility determination?**

(a) In order to revoke eligibility, the Secretary must:

(1) Provide the tribe or tribal organization with a written notice;

(2) Furnish the tribe or tribal organization with technical assistance to take remedial action; and

(3) Provide an appeal process.

(b) The Secretary cannot revoke an eligibility determination if the tribe or tribal organization is in compliance with 25 U.S.C. 2505(C).

(c) The Secretary can take corrective action if the school fails to be accredited by January 8, 2005.

(d) In order to revoke eligibility for a grant, the Secretary must send the tribe or tribal organization a written notice that:

(1) States the specific deficiencies that are the basis of the revocation or reassumption;

(2) Explains what actions the tribe or tribal organization must take to remedy the deficiencies.

(e) The tribe or tribal organization may appeal a notice of revocation or reassumption by requesting a hearing under 25 CFR part 900, subpart L or P.

(f) After revoking eligibility, the Secretary will either contract the program under 638 or operate the program directly.

#### **§ 44.107 How does the Secretary reassume a program?**

To reassume a program, the Secretary must comply with 25 U.S.C. 450m and 25 CFR part 900, subpart P.

#### **§ 44.108 How must the Secretary make grant payments?**

(a) The Secretary makes two annual grant payments.

(1) The first payment, consisting of 80 per cent of the amount that the grantee was entitled to receive during the previous academic year, must be made no later than July 1 of each year; and

(2) The second payment, consisting of the remainder to which the grantee is entitled for the academic year, must be made no later than December 1 of each year.

(b) For funds that become available for obligation on October 1, the Secretary must make payments no later than December 1.

(c) If the Secretary does not make grant payments by the deadlines stated in this section, the Secretary must pay interest under the Prompt Payment Act. If the Secretary does not pay this interest, the grantee may pursue the remedies provided under the Prompt Payment Act.

#### **§ 44.109 What happens if the grant recipient is overpaid?**

(a) If the Secretary has mistakenly overpaid the grant recipient, then the Secretary will notify the grant recipient

of the overpayment. The grant recipient must return the overpayment within 30 days after it receives the notification.

(b) When the grant recipient returns the money to the Secretary, the Secretary will distribute the money equally to all schools in the system.

#### **§ 44.110 What Indian Self-Determination Act provisions apply to grants under the Tribally Controlled Schools Act?**

(a) The following provisions of part 900 apply to any grant to a school administered under an ISDEAA contract or agreement.

(1) Subpart F; Standards for Tribal or Tribal Organization Management Systems, Section 900.45.

(2) Subpart H; Lease of Tribally-owned Buildings by the Secretary.

(3) Subpart I; Property Donation Procedures.

(4) Subpart N; Post-award Contract Disputes.

(5) Subpart P; Retrocession and Reassumption Procedures.

(b) To resolve any disputes arising from the Secretary's administration of the requirements of this part, the procedures in subpart N of part 900 apply if the dispute involves any of the following:

(1) Any exception or problem cited in an audit;

(2) Any dispute regarding the grant authorized;

(3) Any dispute involving an administrative cost grant;

(4) Any dispute regarding new construction or facility improvement or repair, or

(5) Any dispute regarding our denial or failure to act on a request for facilities funds.

#### **§ 44.111 Does the Federal Tort Claims Act apply to grantees?**

Yes, the Federal Tort Claims Act applies to grantees.

#### **§ 44.200 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)(PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA. These collections have been approved by OMB under control number [to be determined].

6. New Part 47 is added to read as follows:

### **PART 47—UNIFORM DIRECT FUNDING AND SUPPORT**

Sec.

47.1 What is the purpose of this part?

47.2 What definitions apply to terms in this part?

47.3 How does a school find out how much funding it will receive?

47.4 When does OIEP provide funding?

47.5 What is the school supervisor responsible for?

47.6 Who has access to local education financial records?

47.7 What are the expenditure limitations for Bureau-operated schools?

47.8 Who develops the local educational financial plans?

47.9 What are the minimum requirements for the local educational financial plan?

47.10 How is the local educational financial plan developed?

47.11 Can these funds be used as matching funds for other Federal programs?

47.12 How are funds obligated?

47.99 Information collection.

**Authority:** Pub. L. 107–110.

#### **§ 47.1 What is the purpose of this part?**

This part contains the requirements for developing local financial plans that schools need in order to receive direct funding from the Bureau of Indian Affairs.

#### **§ 47.2 What definitions apply to terms in this part?**

*Budget* means that element in the local educational financial plan which shows all costs of the plan by discrete programs and sub-cost categories.

*Consultation* means soliciting and recording the opinions of school boards regarding each element of the local educational financial plan and incorporating these opinions to the greatest degree feasible in the development of the local educational financial plan at each stage.

*Director* means the Director, Office of Indian Education Programs.

*Local educational financial plan* means the plan that:

(1) Programs dollars for educational services for a particular Bureau-operated school; and

(2) Has been ratified in an action of record by the local school board or determined by the superintendent under the appeals process in 25 CFR part 2.

*OIEP* means the Office of Indian Education Programs in the Bureau of Indian Affairs of the Department of the Interior.

*School* means a Bureau-funded school.

#### **§ 47.3 How does a school find out how much funding it will receive?**

The Office of Indian Education Programs (OIEP) will notify each school

in writing of the annual funding amount it will receive as follows:

(a) No later than July 1st OIEP will let the school know the amount that is 80 percent of its funding; and

(b) No later than September 30 OIEP will let the school know the amount of the remaining 20 percent.

#### **§ 47.4 When does OIEP provide funding?**

By July 1st of each year OIEP will make available for obligation all funds for that fiscal year that begins on the following October 1st.

#### **§ 47.5 What is the school supervisor responsible for?**

Each Bureau-operated school's school supervisor has the responsibilities in this section. The school supervisor must do all of the following:

(a) Ensure that the school spend funds in accordance with the local financial plan, as ratified or amended by the school board;

(b) Sign all documents required to obligate or pay funds or to record receipt of goods and services;

(c) Report at least quarterly to the local school board on the amounts spent, obligated, and currently remaining in funds budgeted for each program in the local financial plan;

(d) Recommend changes in budget amounts to carry out the local financial plan, and incorporate these changes in the budget as ratified by the local school board, subject to provisions for appeal and overturn; and

(e) Maintain expenditure records in accordance with financial planning system procedures.

#### **§ 47.6 Who has access to local education financial records?**

The Comptroller General, the Assistant Secretary, the Director, or any of their duly authorized representatives have access for audit and explanation purposes to any of the local school's accounts, documents, papers, and records which are related to the schools' operation.

#### **§ 47.7 What are the expenditure limitations for Bureau-operated schools?**

Each Bureau-operated school must spend all allotted funds in accordance with applicable Federal regulations and local education financial plans. If a Bureau-operated school and OIEP region or Agency support services staff disagree over expenditures, the Bureau-operated school must appeal to the Director for a decision.

#### **§ 47.8 Who develops the local educational financial plans?**

The local Bureau-operated school supervisor develops the local

educational financial plan in active consultation with the local school board, based on the tentative allotment received.

#### **§ 47.9 What are the minimum requirements for the local educational financial plan?**

(a) The local educational financial plan must include:

(1) Separate funds for each group receiving a discrete program of services is to be provided, including each program funded through the Indian School Equalization Program;

(2) A budget showing the costs projected for each program; and

(3) A certification provision meeting the requirements of paragraph (b) of this section.

(b) The certification required by paragraph (a)(3) of this section must provide for either:

(1) Certification by the chairman of the school board that the plan has been ratified in an action of record by the board; or

(2) Except in the case of contract schools, certification by the Agency Superintendent of Education that he or she has approved the plan as shown in an action overturning the school board's rejection or amendment of the plan.

#### **§ 47.10 How is the local educational financial plan developed?**

(a) The following deadlines apply to development of the local financial plan:

(1) Within 15 days after receiving the tentative allotment, the school supervisor must consult with the local school board on the local financial plan.

(2) Within 30 days of receiving the tentative allotment, the school board must review the local financial plan and, by a quorum vote, ratify, reject, or amend, the plan.

(3) Within one week of the school board action under paragraph (a)(2) of this section, the supervisor must either:

(i) Send the plan to the education line officer (ELO), along with the official documentation of the school board action; or

(ii) Appeal the school board's decision to the ELO.

(4) The ELO will review the local financial plan for compliance with laws and regulations and may refer the plan to the Solicitor's Office for legal review. If the ELO notes any problem with the plan, he or she must:

(i) Notify the local board and local supervisor of the problem within two weeks of receiving the plan;

(ii) Make arrangements to assist the local school supervisor and board to correct the problem; and

(iii) Refer the problem to the Director of the Office of Indian Education if it cannot be solved locally.

(b) When consulting with the school board under paragraph (a)(1) of this section, the school supervisor must:

(1) Discuss the present program of the school and any proposed changes he or she wishes to recommend;

(2) Give the school board members every opportunity to express their own ideas and views on the supervisor recommendations; and

(3) After the discussions required by paragraphs (b)(1) and (b)(2) of this section, present a draft plan to the school board with recommendations concerning each of the elements.

(c) If the school board does not act within the deadline in paragraph (a)(2) of this section, the supervisor must send the plan to the ELO for ratification. The school board may later amend the plan by a quorum vote; the supervisor must transmit this amendment in accordance with paragraph (a)(3) of this section.

#### **§ 47.11 Can these funds be used as matching funds for other Federal programs?**

A school may use funds that it receives under this part as matching funds for other Federal programs.

#### **§ 47.12 How are funds obligated?**

(a) Authority to obligate funds in the Bureau operated schools is governed by provisions of the Bureau Manual (42 BIAM).

(b) Authority to obligate funds in tribally operated contract schools is governed by contracting procedures of 25 CFR part 900.

(c) Authority to obligate funds in all Bureau funded and operated schools is based upon the tentative allotment (§§ 47.3 and 47.4) for the period beginning October 1 of any fiscal year. The tentative allotment as restricted by a continuing resolution, if applicable, would govern until computation and notification of initial allotments as described in this subpart, as adjusted by the Director in accordance with §§ 39.501 through 39.503.

#### **§ 47.99 Information collection.**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)(PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This part involves collections of information subject to the PRA in §§ 47.5, 47.7, 47.9, and 47.10. These collections have been

approved by OMB under control  
number [to be determined].

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