DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 30, 37, 39, 42, 44, and 47

RIN 1076–AE49

Implementation of the No Child Left Behind Act of 2001

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This final rule addresses six areas involving Indian education: Defining adequate yearly progress; establishing geographic attendance areas for Bureau of Indian Affairs-funded schools (Bureau-funded schools); establishing a formula for the minimum amount necessary to fund Bureau-funded schools; establishing a system of uniform direct funding and support for Bureau-operated schools; providing guidelines to ensure the Constitutional and civil rights of Indian students; and establishing a method for administering grants to tribally controlled schools. The rule implements the provisions of the No Child Left Behind Act of 2001.

DATES: *Effective Date:* May 31, 2005.

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I. Background

A. What Information Does This Section Address?

This section addresses:

—Requirements of the Act.
—Overview of Negotiated Rulemaking Process.
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B. What Are the Negotiated Rulemaking Requirements of the No Child Left Behind Act of 2001?

Under 25 U.S.C. 2018 , the Secretary of the Interior (Secretary) established the No Child Left Behind Negotiated Rulemaking Committee (Committee) to develop proposed rules to implement several sections of the Act relating to the Bureau-funded school system. (In this preamble and rule we use the term ''the Act'' to refer to the No Child Left Behind Act, Pub. L. 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and amends the Education Amendments of 1978.) The Act required that the Committee be comprised only of representatives of tribes served by Bureau-funded schools and the Federal government. It also 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 requirements of the Act that are the subject of this negotiated rulemaking process are:

(1) *20 U.S.C. 6316(g):* Develop a definition of ''Adequate Yearly Progress'' for the Bureau-funded school system;

(2) *25 U.S.C. 2004:* Attendance boundaries for Bureau-funded schools;

(3) *25 U.S.C. 2007:* A determination of the funds needed to sustain Bureau-funded schools and a formula to allocate the current funds;

(4) *25 U.S.C. 2010:* The direct funding and support of Bureau-funded schools;

(5) *25 U.S.C. 2016:* The rights of students in the Bureau-funded school system; and

(6) *25 U.S.C. 2501, et seq., the Tribally Controlled Schools Act (TCSA) of 1988, as amended by the Act:* Discharge of the Secretary's responsibilities under this Act through which tribes and tribal school boards can operate Bureau-funded schools under the grant mechanism established in the Tribally Controlled Schools Act.

C. What Was the Negotiated Rulemaking Process?

Under the Act, in August and September, 2002, the Secretary conducted regional consultation meetings with tribes on the six areas of the Act to be negotiated. Following consultation and under the Act and the Negotiated Rulemaking Act (subchapter III of chapter 5, title 5, United States Code), in November, 2002, the Secretary published a Notice of Intent To Form a Negotiated Rulemaking Committee (67 FR 75828, December 10, 2002) and requested nominations for tribal representatives for the Committee.

The Secretary reviewed tribal nominations for tribal representatives and announced selection of 19 tribal representatives and 6 Federal representatives from the Department of the Interior (68 FR 23631, May 5, 2003). Tribal membership on the Committee represented, to the maximum extent possible, the proportionate share of students from tribes served by Bureau-funded schools. The Secretary chartered the No Child Left Behind Negotiated Rulemaking Committee under the Federal Advisory Committee Act (5 U.S.C. Appendix) on May 1, 2003.

The Committee held its first meeting in June, 2003. It agreed on protocols to govern the meetings and selected three tribal representatives and two Federal representatives as co-chairs. A third party neutral approved by the Committee served as lead facilitator for all Committee meetings. The Committee met five times, from June 2003, through October 2003, to develop recommendations for six proposed rules. The Committee divided the areas subject to regulation among four work groups: funding and funding distribution; student rights and geographic boundaries; administration of grants; and adequate yearly progress. These work groups prepared written products for review, revision, and approval by the full Committee.

The Committee operated by consensus and recommendations for proposed rules were consensus decisions. All Committee and work group 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. **Federal Register** notices stating the location and dates of the meetings and inviting members of the public to attend were published prior to each meeting. In addition, Committee information including meeting locations and dates and meeting agendas and summaries were provided on the Office of Indian Education Program Web site at: *http://www.oiep.bia.edu.*

The Department published a proposed rule in the **Federal Register** on February 25, 2004 (69 FR 8752), with a 120-day comment period. (The Department subsequently reopened the comment period for an additional 10 days.) In August 2004, following the public comment period, the Committee reconvened to review public comments and make recommendations for final rules to the Secretary.

D. How Were Public Comments Handled?

The Notice of Proposed Rulemaking for parts 30, 37, 39, 42, 44, and 47, published February 25, 2004, provided

for a 120-day public comment period. We also reopened the public comment period for an additional 10 days at the end of the 120-day public comment period. We received 47 comments from individuals, tribal leaders, schools, education associations, school boards, and the U.S. Department of Education. Because the proposed rules were the result of negotiated rulemaking, the Committee reconvened to review public comments at the end of the public comment period.

The Committee was provided the full text of each comment and summaries of each comment for review. The Committee operated by consensus in reviewing comments to determine whether to accept a comment and make suggested changes to a rule, accept a comment and modify suggested changes, or acknowledge a comment and make no changes. Comments were handled as follows.

—Where comments referred to issues that are beyond the scope of this rule, such as inadequate funding or disproportionate allocations, or to issues that were not relevant to this rule, such as tribal recognition or comments on the Paperwork Reduction Act requirements (the comment period ended on PRA items in March, 2004), the Committee acknowledged the comments, but took no action on them.
—Where comments agreed with the proposed rules, the Committee acknowledged the comments.
—Where comments disagreed with the proposed rules, the Committee acknowledged the comments. The disposition of these comments and the reasons that they were accepted or not accepted are treated in the detailed discussions that follow.
—Where the Committee did not have consensus to reopen a particular section to consider comments suggesting changes, the Department reviewed the comments and made changes where it deemed necessary. These changes are noted in the response to comments section for each part.

Following receipt of the Committee's recommendations for the final rules, the Secretary reviewed the public comments and made changes as noted for each part. Changes that are purely grammatical are not discussed. Public comments and responses are noted below under the applicable part.

E. How Were Oversights in the Proposed Rule Corrected?

When the proposed rule was published, there was an oversight in the wording of the amendatory language for part 39. Rather than stating that the entire subpart was proposed for revision, the amendatory language should have stated that only subparts A through H were proposed for revision. Our intention, and that of the negotiated rulemaking Committee, was to leave subparts I through L in place with no revisions. This final rule corrects that oversight.

F. How Were Conforming Amendments to Parts 31 and 36 Handled?

Additional changes are required in order to eliminate conflicts between the amendments in these regulations and existing regulations in other parts of 25 CFR. In a rule published elsewhere in today's **Federal Register** and identified by the RIN 1076–AE54, the Department is deleting provisions in parts 31 and 36 of 25 CFR that conflict with the amendments published in this rule.

II. Public Comments—General

We received the following general comments referring to all parts:

Comment: The proposed rules may go against tribal culture and affect tribal sovereignty and do not ensure fair and equal treatment for tribes.

Response: We noted the comment and did not make any changes to the rules based on these comments. Congress mandated that we promulgate rules relating to certain sections of the Act.

Comment: Other provisions of the Act should be included in this rulemaking.

Response: We noted the comment and did not make any changes based on this comment. The comment is beyond the scope of these rules. The Secretary determined which sections of the Act to include in this negotiated rulemaking.

Comment: The Act provides no additional funding for education. Funding is insufficient. Redistribute funding to improve the concentration where it is needed.

Response: We noted the comment and did not make any changes based on this comment. The comment is beyond the scope of these rules.

III. Comments on Part 30—Adequate Yearly Progress

For purposes of adequate yearly progress (AYP), the Bureau of Indian Affairs is considered the State Educational Agency (SEA) for the Bureau-funded school system.

20 U.S.C. 6311(b) requires each State to submit a plan to the Secretary of Education which demonstrates that the State, through its 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.

The Act requires each SEA to define the AYP that schools and local educational agencies (LEAs) must attain toward the goal of all students reaching the proficient level on reading/language arts and mathematics assessments by school year 2013–2014. Each State's AYP definition must include a starting point and intermediate goals for student improvement in reading/language arts and mathematics; if a school or LEA does not meet the intermediate goals for two consecutive years or more, it is identified as in need of improvement and must implement an improvement plan and take certain other actions under the Act.

The Act 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 of the academic assessments; and
—Includes separate measurable annual goals for continuous and substantial improvement in the academic achievement of all students in the school; economically disadvantaged students; students from major racial and ethnic groups; students with disabilities; and 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 academic indicator applicable to elementary and middle schools. 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.

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—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 consequences of failing to make AYP are described in § 30.117. While the remedial statuses of ''school improvement,'' ''corrective action,'' and ''restructuring'' applicable to public schools are also applicable 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.

Only major, substantive public comments are discussed below. In some instances, we have combined several similar or identical comments and replied to them in one response. Grammatical changes, minor wording revisions, and other purely style-oriented comments are not discussed; however, changes to the final rule reflect such public comment. The Secretary reviewed the final rule and made the changes as noted below.

A. Comments the Committee Considered That Resulted in No Change to the Rule

Comment: There were several comments supporting the proposed definition of adequate yearly progress for Bureau-funded schools. These comments included:

—Agreement with the proposed definition of adequate yearly progress being that of the State in which a Bureau-funded school is located;
—Agreement with allowance for a tribe's submission of its own set of alternatives; and
—Agreement with the language describing the Secretary's trust responsibility, the sovereign rights of Indian Tribes, and the State's lack of jurisdiction over Bureau-funded schools.

Response: These comments were considered, appreciated, and, because they were in agreement with the rule, no action was taken.

Comment: Several commenters suggested that:

—The regulations should require that a school's alternative definition of adequate yearly progress (AYP) ''identify'' what is from the State's definition and what is not; and
—The Department of the Interior should establish a system of rewards and sanctions.

Response: These comments were considered and no action was taken because the Committee had already considered this in drafting the proposed rule.

Comment: Change § 30.119(b), to make it more specific and state that:

—The school board has the sole authority and responsibility for determining the nature and implementation of remedial actions in accordance with the Act; and
—In implementing any remedial actions the Board is not subject to an approval process from the Bureau, but may request and receive technical assistance concerning remedial actions.

Response: The comment was considered and no action was taken. The Committee determined that the suggested change is unnecessary as section 20 U.S.C. 6316(g)(4) is clear.

Comment: There are several references in the rule to various parts of section 1116 of the Act, so section 1116 should be included in the rule.

Response: This comment was considered and no action was taken because the Committee believed that this would not improve the rule.

Comment: Language should be added to § 30.122 to say that providing funding and technical assistance to schools that fail to make AYP is not just a responsibility, but a priority to the Bureau.

Response: This comment was considered and no action was taken.

Comment: Section 30.126 should be modified to match section 1116(g) and to:

—More clearly state that the Bureau collects information from grant and school boards to enable its reporting requirement, but that the Bureau does not make the determination of school improvement, corrective action or restructuring status for Bureau-funded grant and contract schools; and
—Include language implementing section 1116(g) for tribally controlled school boards to identify the factors that led to any determination of remedial actions for the school and for those factors to be reported to the Department of Education.

Response: This comment was considered and no action was taken because the Committee felt the statutory language was clear.

Comment: Rewards and sanctions should be the responsibility of the Bureau.

Response: This comment was considered and no action was taken.

B. Comments the Committee Considered That Resulted in Changes to the Rule

Comment: Delete the reference to ''curriculum'' since adoption of the definition of AYP used by the State in which the school is located would not mean a school needs to use the State curriculum. Instead add the phrase ''academic content and student achievement'' before ''standards.''

Response: This change was made and is reflected in § 30.104(a).

Comment: Delete the reference to ''curriculum'' and add ''solely for the purpose of using the State's academic contents and student performance standards, assessments, and definition of AYP.''

Response: This change was made and is reflected in § 30.104(a)(2).

Comment: Insert the term ''trust'' before responsibility for Indian education.

Response: This change was made and is reflected in § 30.104(a)(3).

Comment: Insert that the proposal must meet the requirement of section 1111(b) of the Act and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and students served.

Response: This change was made in part. The term ''to be consistent with section'' was removed and, ''must meet the requirements of 20 U.S.C. 6311(b), taking into account the unique circumstances and needs of the school or schools and the students served'' was added, as reflected in § 30.106.

Comment: The reference to the ''State's definition'' of AYP is in error. It should be a reference to the Bureau's definition of AYP.

Response: The word ''State's'' was changed to ''Secretary's'' as reflected in § 30.108.

Comment: The language should be changed to say ''By the 2005–2006 school year, a Bureau-funded school must measure the achievement of all students enrolled in grades three through eight, and once for all students enrolled in grades 10–12. Until that time, the Bureau-funded schools must measure the achievement of all students

at least once during grades three through five, six through nine and 10–12.''

Response: Revised § 30.114 states an assessment is required for all students in grades three through eight and at least once for all students in grades ten through twelve.

Comment: The rule must be revised to clarify that a school fails to meet AYP if it is deficient in any of the measurements in § 30.107(b)(6)(i) or (ii) as recommended in an earlier comment.

Response: The change was made and is reflected in § 30.116.

C. Comments the Committee Considered That Resulted in No Consensus With No Change to Rule

Comment: There were several comments suggesting the Department of the Interior, Office of Indian Education Programs should develop its own definition of AYP based on Bureau-wide standards and assessments.

Response: The Committee consensus was to define the Secretary of the Interior's definition of AYP as each State's definition of AYP, since the Department lacks an independent set of standards and assessments necessary to establish a definition of AYP. Although the Committee received very few comments on this decision, some Committee members commented on this issue. When the comments were being reviewed, some of the tribal members of the Committee decided to withhold consensus on keeping the proposed definition of AYP. Since the Committee failed to reach consensus in recommending a final AYP rule, it is left for the Secretary to determine the rule.

The Secretary has decided to keep the definition of AYP as published in the Notice of Proposed Rulemaking published on February 25, 2004 with certain clarifying changes as described in the preceding section. Since the Department did not receive comments that had not already been considered when the Committee made the difficult choice to recommend the definition found in the NPRM, the Secretary decided to adopt the NPRM's definition. Thus, the definition of AYP remains that of the State in which a school is located until the school has received a waiver of that definition from the Secretary of the Interior.

The AYP workgroup of the negotiated rulemaking Committee 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 aggregating Bureau-funded school assessment data to make AYP determinations is not statistically reliable because each school uses a different assessment system and because, collectively, the assessments in use do not meet the requirements of the Act in 20 U.S.C. 6311(b)(3)(C)(ii). Therefore, the Committee needed to develop a uniform assessment system. As the Committee discovered, Bureau 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, academic content and student achievement standards and assessments; or

—Allowing each Bureau-funded school to follow the definition of the State in which it is located.

After Congress passed the Goals 2000 Act (Pub. L. 103–227), 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 curricula, academic content and student achievement 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.

In light of this history, the Committee revised its initial plan and decided to adopt as the Secretary's definition of AYP the definition of the State in which a school is located. However, a tribal governing body or school board may develop an alternative AYP definition and submit it to the Secretary for approval. This decision implements 20 U.S.C. 6316(g) of the Act, which expressly permits a tribe or school board to waive the Bureau's AYP definition and develop its own, subject to the Secretary's approval in consultation with the Secretary of Education.

During our initial negotiations, Tribal representatives on the Committee expressed serious objection to adopting State AYP definitions as the Secretary'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.

D. Comments the Committee Considered That Resulted in No Consensus With Changes to the Rule

The Committee also had no consensus regarding comments made by the Department of Education on the proposed definition of AYP. The Department of Education did not provide these comments during the original public comment period.

Since the Department of Education is a Federal agency, the Department of the Interior believed that it could nevertheless consider Education's comments. However, to ensure fairness to any member of the public who had not yet provided comment, the Department of the Interior formally reopened the public comment period for receipt of comments from Education and any member of the public. During review of the comments, the Federal Committee members believed that some of Education's comments should be accepted and the proposed changes be made to the rule. Some tribal Committee members objected that the Federal Committee members would not negotiate whether to consider Education's comments. Therefore, the Committee could not reach consensus on whether to accept Education's comments. Since there was no Committee recommendation, the Secretary in adopting the final rule has accepted certain Department of Education comments.

Comment: The rule should clarify in §§ 30.104 and 30.105 that any Bureau-funded school that uses the Bureau's definition of AYP must also use the academic, content, and student achievement standards and State assessments of the State in which the school is located. Standards and assessments are a necessary part of an accountability system.

Response: The Committee could not reach consensus to change the proposed rule based on this comment from the Department of Education. Since there was no consensus Committee recommendation, the Secretary accepted the Department of Education's comment and changed the rule to read: ''Yes. A tribal governing body or school board may waive all or part of the Secretary's definition of academic content and student achievement standards and assessments and AYP. However, until the alternative definition is approved under § 30.113 the school must use the Secretary's definition of academic content and student achievement standards, assessments, and AYP.''

Comment: The rule should revise § 30.107 to:

—Use the same language as section 1111(b) of the Act to take into account the unique circumstances and needs of the school or schools and the students served;
—Add a citation to 34 CFR 200.13–20; and
—State that a waiver request will include an explanation of what standards and assessments will be used, as required by section 1111(b).

Response: Since there was no consensus Committee recommendation on whether to accept this comment from the Department of Education, the Secretary accepted the comment and made the following changes:

—Changed the term ''curriculum'' as recommended in several comments;
—Removed science from the areas that require a measurement of progress as recommended in several comments; and
—Added ''academic contents and achievement standards'' as recommended throughout the document.

The Secretary also added the Department of Education's language suggestions to the Department's final rule in § 30.107 to read:

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

(a) An alternative definition of AYP must meet the requirements of 20 U.S.C. 6311(b)(2) and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and the students served.

(b) In accordance with 20 U.S.C. 6311(b) and 34 CFR 200.13–200.20, an 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 and reading or language arts;

(5) Measure progress separately for reading or language arts and for mathematics;

(6) Unless disaggregation of data cannot yield statistically reliable information or reveals personally identifiable information, apply the same annual measurable objectives to each of the following:

(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;

(7) Establish a starting point;

(8) Create a timeline to ensure that all students are proficient by the 2013–2014 school year;

(9) Establish annual measurable objectives;

(10) Establish intermediate goals;

(11) Include at least one other academic indicator which, for any school with a 12th grade, must be graduation rate; and

(12) Ensure that at least 95 percent of the students enrolled in each group under § 30.107(b)(6) are assessed.

(c) If a Bureau-funded school's alternative definition of AYP does not use a State's academic content and student achievement standards and academic assessments, the school must include with its alternative definition the academic standards and assessment it proposes to use. These standards and assessments must meet the requirements in 20 U.S.C. 6311(b) and 34 CFR 200.1–200.9.

(d) 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).

Comment: There is substantial concern about a regulation that requires the Secretary and the Secretary of the Department of Education, regardless of the complexity of a particular waiver request, to approve or disapprove all alternative definitions of AYP within 90 days of receiving a completed alternative definition. The suggestion was made to include an exception for unusual circumstances that may require additional time. A notification provision should also be added to inform a school that seeks a waiver what additional time will be needed.

Response: Section 30.113(d) now states that the Secretaries will, ''review the proposed definition to determine whether it is consistent with the requirements of 20 U.S.C. 6311(b) of the Act.'' It does not specify a time within which the Secretaries will act. While the Secretaries will handle each situation expeditiously, the revised wording of the regulation allows flexibility in processing individual cases and ensures that extra time can be taken where necessary.

Comment: Merely providing the Department of Education with notification of the Department of the Interior's receipt of a completed proposed alternative definition of AYP is insufficient. The last phrase in the Elementary and Secondary Education Act (ESEA) section 1111(g)(1)(B) provides for the Department of Education's Secretary to have the information needed to determine whether a request of an alternative AYP definition should take into account the unique circumstances and needs of school or schools and the students served. This statutory sentence makes no sense if interpreted to mean that the Secretary of Education may only disapprove an alternative definition that the Secretary chooses to make the subject of a consultation with the Department of Education—which is all that § 30.113 would require. The Act surely did not mean to create opportunities for inconsistencies in the Federal government's overall approach to approving alternative AYP definitions. Nor should the Executive Branch do so as a matter of interpretative choice.

The words of the statute in 1116(g) state that the Secretary of the Interior, ''in consultation with the Secretary if the Secretary of the Interior requests the consultation, shall approve such alternative definition unless the Secretary determines that the definition does not meet the requirements of section 1111(b), that takes into account the unique circumstances and needs of such school or schools and the students served.'' While this language is admittedly cumbersome, three fundamental principles compel the approach we strongly request DOI to take:

—The Secretary of the Department of Education expresses statutory responsibility for determining that, as a part of consultation with DOI, alternative definitions do not meet the statutory requirements (in keeping with the Department of Education's overall title I, part A statutory responsibility to administer the title I, part A requirements governing systems of accountability);

—The Executive Branch's need to avoid inconsistencies in application of section 1111(g)(1)(B); and
—Take into account Interior's and Education's differing expertise in assessing whether an alternative AYP definition meets the requirements of ESEA section 1111(b) and applicable regulations, taking into account the unique circumstances and needs of the school or schools and the students served.

Response: The Committee could not reach consensus to change the rule based on this comment. The Notice of Proposed Rulemaking provided that the Secretary of the Interior made the final determination on whether to grant an AYP waiver. The Committee believed that the statute could be read to mean that the Secretary of the Interior has the final decision-making power. During the public comment period, the Federal team members engaged in discussion within the Department of the Interior and with the Department of Education. The Departments tried to find a compromise that would provide for consistency in Federal decision-making and ensure that the Departments work together, using their collective expertise, to make a decision regarding whether an alternate definition of AYP meets the requirements of statute and regulations. The result of the discussion was the Department of Education's comment that the decision on the waiver should be a joint decision by the Secretary of the Interior and the Secretary of Education.

When the Committee convened to review the comments, tribal members expressed concerns that the Federal members engaged in this dialogue with the Department of Education and that the Federal team was prepared to withhold consensus for any other result. Consequently, the Committee could not reach consensus on whether to consider the Department of Education's comments. Thus, the final rule has adopted certain Department of Education comments and revised § 30.113(d) through (h) to read:

(d) The Secretaries review the proposed alternative definition of AYP to determine whether it is consistent with the requirements of 20 U.S.C. 6311(b). This review must take into account the unique circumstances and needs of the schools and students.

(e) The Secretaries shall approve the alternative definition of AYP if it is consistent with the requirements of 20 U.S.C. 6311(b), taking into consideration the unique circumstances and needs of schools and students.

(f) If the Secretaries approve the alternative definition of AYP:

(1) The Secretary 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.

(g) The Secretaries will disapprove the alternative definition of AYP if it is not consistent with the requirements of 20 U.S.C. 6311(b). If the alternative definition is disapproved, the tribal governing body or school board will be notified of the following:

(1) That the definition is disapproved; and

(2) The reasons why the proposed alternative definition does not meet the requirements of 20 U.S.C. 6311(b).

(h) If the Secretaries deny a proposed definition under paragraph (g) of this section, they shall provide technical assistance to overcome the basis for the denial.

Comment: The proposed rule needs to be revised to more closely reflect the ED–DOI agreement in 20 U.S.C. 7824.

Response: The Committee did not reach consensus to change the proposed rule based on this comment from the Department of Education. Since the Committee provided no recommendation on this comment, the Secretary has decided to delete this section of the rule, as it is specifically provided for in the Act.

IV. Comments on Part 37—Geographic Attendance Boundaries

The Act requires designated separate geographic boundaries for all Bureau-funded schools and provides for tribes to have input into the process. This part provides guidance and clarifies what roles tribes have in establishing and revising geographic attendance boundaries for schools. It also clarifies some of the limitations on the Secretary's ability to change school boundaries. It recognizes distinctions for different boundary determinations for day schools, on-reservation boarding schools, and peripheral dorms and for off-reservation boarding schools. The rule provides guidance applicable to both types of schools, where appropriate (subpart A) and provides separate guidance for each type of school, where appropriate (day schools, on-reservation boarding schools, and peripheral dorms—subpart B and off-reservation boarding schools B subpart C). This part is intended to give tribes the opportunity to meaningfully participate in all decisions regarding attendance boundaries and related policies where not statutorily prohibited.

General Comments Requesting No Change

Several commenters approve of provisions of the rule that allow tribal entities to work collaboratively with Bureau-funded schools when geographic boundaries are determined or revised and that provide for assistance from the Department if tribes need assistance. Several commenters agree with the rule provision that tribes have ongoing authority to suggest changes to and participate in the revision of geographic attendance boundaries for schools. Some comments support the flexibility for allowing students to attend schools outside their geographic attendance boundaries. One commenter noted that rights in the rule are rights recognized pursuant to reserved tribal authority stemming from treaties between the United States and tribes. Some commenters to this part in the NPRM preamble disagree with allowing parental choice (which was not included in the final rule). One commenter stated that the Bureau can and must withhold payment from a school when a student who does not live within the school geographic attendance boundary has not received a waiver in accordance with tribal law.

Comment: Funding should not be withheld solely because a student is attending a school outside his or her attendance area.

Response: No change was made because a student is funded at the school they are attending.

Comment: Revise § 37.110 to state that a change of school is the decision of the parents and/or the student.

Response: No change was made because the Act requires the Secretary to promulgate regulations for school boundaries.

Comment: Revise the term ''geographic attendance area'' in § 37.101 to clarify that it may include off-reservation areas, particularly off-reservation boarding schools.

Response: No change was made because the rule states that geographic attendance areas include off-reservation boarding schools.

Comment: If parental choice is included in the rule, geographic boundaries have no meaning.

Response: No change was made because parental choice is not included in the rule.

Comment: Revise § 37.111 to state that tribes have input on authorizing transportation funds for students attending schools outside their geographic attendance boundaries.

Response: The Committee acknowledged this comment, considered it, and made no change.

Comment: Revise § 37.111 to reflect that a Bureau-funded school may enroll eligible Indian students who are not members of the tribe.

Response: We revised § 37.111(b) and added paragraph (c) to clarify that a

Bureau-funded school may enroll eligible Indian students who are not members of the tribe. The section authorizes ISEP-eligible students residing within the tribe's jurisdiction to receive transportation funding to attend schools outside the geographic attendance area in which the student lives. The section also authorizes tribal member students who are ISEP-eligible and not residing within the tribe's jurisdiction to receive transportation funding to attend schools outside the geographic attendance area in accordance with a tribal resolution issued by the tribe in which the student is enrolled.

Comment: Revise § 37.122 to include a deadline for the Secretary to accept or reject a proposed geographic boundary change; a time period for publishing the **Federal Register** notice of an accepted change; and a time frame for informing a tribe why a suggested boundary change is not accepted.

Response: The Committee acknowledged this comment, considered it, and made no change.

Comment: Revise § 37.131 to clarify that all off-reservation boarding schools will have separate, non-overlapping boundaries, or, if parental choice is applied, delete this section as unnecessary.

Response: No change was made because the rule does not need clarification and the section is necessary to the rule.

V. Comments on Part 39—The Indian School Equalization Program

A. General Comments on the Indian School Equalization Program

Comment: Several comments stated that data for actual transportation costs incurred by Bureau-funded schools should:

—Take into account costs of gas and additional wear and tear that vehicles incur in isolated, remote locations; and

—Reflect two school years' worth of transportation information.

The commenters also felt that, after collecting this data:

—The Committee should reconvene to review the data and develop a proposed regulation; and

—The Secretary should then publish a proposed rule for notice and comment before a final recommendation is made.

Response: The Committee acknowledged and considered this comment, however no change was made to the funding formula. The Committee agrees that it needs more information to develop an improved transportation funding formula. It therefore recommended to the Secretary that another negotiated rulemaking Committee convene after the Department and the Bureau-funded schools have gathered additional transportation information in order to develop a more accurate and fair transportation funding regulation.

Comment: In the preamble, the Committee had asked for comments on the determination of an isolation factor. Several commenters acknowledged the effects of severe isolation that results in expenses above and beyond the norm. Some commenters felt that all schools were isolated and should qualify for an isolation adjustment and others suggested that even schools that have paved highways should be considered, as the areas surrounding some Bureau schools are underdeveloped.

Response: The Committee acknowledged and considered these comments; however, there was no change made to the rule, as the comments did not give any specific indicators or suggestions on how to determine isolation factors.

Comment: Also in the preamble, the Committee had asked if the funding formula should be left in the body of the rule or if it should be placed in the appendix. Commenters responded that the formula should be in the body of the rule.

Response: The Committee recommends that the ''minimum amount of funding to sustain each Bureau-funded school formula'' be placed in the body of the rule and not in the appendix.

Comment: The proposed rules may in practice contravene the culture of the Micoosukee Tribe and impinge on Tribal sovereignty. Due to the unique cultural aspects of Indian Tribes, the standards applied to non-Indians cannot be applied to Indians. The result would be to infringe on tribal culture, violate laws designed to protect tribes, and take away the right of tribes to live according to their customs and beliefs. The proposed rules do not ensure fair and equal treatment for tribes.

Response: The comment was acknowledged and considered. No action was taken because the Committee's charge was to develop regulations to implement the Act and, therefore, the Committee had no authority to address this comment.

Comments: Several commenters discussed the need for additional funding. One commenter did not support using general funds to redistribute in the base program categories arguing that the proposed items could pose a huge financial impact on schools. Several commenters suggested more funding is required for general education of students. Another comment was that the Act will provide no additional funding but merely reallocate current funding.

Several commenters shared the concern that current Bureau funding is insufficient in many areas, and that merely revising the distribution method is inadequate. What should have happened was a redistribution to concentrate funding where it is needed combined with additional funding to support the Act's mandates.

Another commenter suggested providing recurring funding to support educational services to pre-K students. One Commenter suggested that special circumstances, such as the therapeutic dormitory pilot project, should be included in the ISEP base. These comments also included a comment that another funding mechanism is needed to fund non-ISEP eligible students for distance and alternative learning and expressed disappointment that the funding formula did not take into account greater lengths of service of employees. Schools incur increased costs with employees who have greater lengths of service. Several commenters also were disappointed that the formula does not provide funding for after school programs.

Response: These comments were acknowledged and considered and no action was taken because the Committee's charge was to develop regulations to implement the Act but it was not authorized to make funding recommendations.

Comment: Several commenters discussed Off-Reservation Boarding Schools (ORBS) and suggested that ORBS should not receive an additional weighted unit in the funding formula. Others felt that ORBS should receive an additional weighted unit in the funding formula because their needs are unique as some of their students have legal and behavioral problems.

Response: The Committee acknowledged and considered this comment; however, no change was made to the funding formula because the commenters did not present any additional arguments that had not already been considered by the Committee in drafting the proposed rules.

Comment: Several commenters recommended that the funding formula be revised to provide a supplemental weight for students with disabilities because the mandatory 15 percent set aside may cause economic hardship on

a school and the part B process is cumbersome.

Response: The Committee did not have consensus to open this issue for discussion. The current regulations and the proposed regulations 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 Federal team decided that additional information is needed to determine if modifications are necessary to the 15 percent set-aside. The Committee recommends that additional information be gathered regarding the number of ISEP eligible students who are identified as disabled and who are receiving special education services, and other related information. If the information collected reveals that the 15 percent set-aside does not accurately reflect the percentage of ISEP eligible students with disabilities in the Bureau-funded school system, then the Committee recommends that a negotiated rulemaking committee negotiate revised special education funding regulations.

Comment: The proposed rules will allow school districts to use Federal funds in a manner more consistent with their own reform strategies and priorities. It is important to note that these rules allow flexibility in adopting assessment systems composed entirely of locally developed and administered tests.

Response: The comment was acknowledged and considered and no action was taken since no change was necessary based on this comment.

B. Section-Specific Comments

Section 39.2 What are the Definitions of Terms Used in This Part?

Comment: There is no need for a definition of ISEP student count week.

Response: The Committee acknowledged and considered this comment and made this change.

Comment: The definition of school bus includes a definition of the operator, including the requirement that the driver be State qualified.

Response: The Committee acknowledged and considered this comment and changed the definition of school bus to include ''. . . operated by an operator in the employ of, or under contract to, a Bureau-funded school, who is qualified to operate such a vehicle under Tribal, State, or Federal regulations governing the transportation of students.''

Comment: Why does the definition of tribally operated contract school include grant schools?

Response: The Committee acknowledged and considered this comment and changed the definition to read ''Tribally operated school means an elementary school, secondary school, or dormitory that receives financial assistance for its operations 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 (25 U.S.C. 450 *et seq.*), or under the Tribally Controlled Schools Act of 1988.''

Comment: Bureau-funded school and Bureau school should be defined.

Response: The Committee acknowledged and considered this comment and added a definition of Bureau-funded school and Bureau school.

Comment: Is the definition of ISEP count week still needed in view of the proposal to convert a 3-year rolling average for identifying the student count? The count period used for residential students is not the last full week in September. As only the transportation mileage count would be taken the last full week of September, the term could be changed to ''transportation mileage count week.''

Response: The Committee acknowledged and considered this comment and took out the definition of ISEP count week, but kept the definition as part of the definition of transportation.

Comment: The following corrections are needed in the definition of ''Limited English Proficient'': ''(1) * * * means a child from a language background other than English who needs language assistance in his/her language or in English in school,'' (2) ''the child comes from an environment [where a language] other than English is dominant.''

Response: The Committee acknowledged and considered this comment and adopted the suggested language changes to the definition of ''Limited English Proficient.''

Comment: The terms ''Bureau-operated or -funded schools'' used here is redundant. The term should be ''Bureau-funded,'' and that term should be defined, as suggested above.

Response: The Committee acknowledged and considered this comment and took out the term ''Bureau-operated'' because it was redundant.

Comment: The opening sentence of the definition for Special Education does not seem broad enough to cover the numbered items listed. Some special education students, especially those who are physically handicapped, require personal aides and other such accommodations that are customarily provided through special education programs and paid for with special education funds. Consider using the definition of ''special education'' in the IDEA regulations at 34 CFR 300.26.

Response: The Committee acknowledged and considered this comment and adopted the definition of ''special education'' in the IDEA regulations at 34 CFR 300.26.

Comment: The definition of ''supervisor'' requires clarity. Perhaps in a Bureau-operated school the individual in the position of ultimate authority is called ''superintendent,'' but that is not the term used in all contract and grant schools. Furthermore, the ''ultimate authority'' in a contract or grant school is the school board. The purpose of this term should be determined and the definition clarified accordingly.

Response: The Committee acknowledged and considered this comment and the term ''supervisor'' was removed as a definition.

Comment: The definition of ''transported student'' does not match the term. A ''transported student'' is not ''the average number of students.'' Either the term should be revised or the definition should be revised.

Response: The Committee acknowledged and considered this comment and removed the definition of ''transported student.''

Comment: The definition of ''three year rolling average'' should expressly state that all supplemental weights should be included in the average. That is, the 3-year average should actually be an average of WSU count.

Response: The Committee acknowledged and considered this comment and changed the definition to add the current year of operation in academic programs and residential programs.

Comments: There were several comments on this section that did not result in a change to the rule. They include comments that:

(1) The definition of ''agency'' should be changed so it reflects what an agency does because it does not always provide services to governing bodies;

(2) The definition of ''agency school board'' is not necessary because they have no duties or responsibilities under ISEP;

(3) The definitions need to clarify whether a school counts non-ISEP students for ADM;

(4) The definition of ''Individual Supplemental Services'' should include SPED since schools are required to spend ISEP funds for SPED services and

since SPED is a non-base academic service;

(5) The ''Limited English Proficiency'' definition is too lengthy and should consist only of paragraph (3) because ISEP only deals with American Indians;

(6) The definition of ''eligible Indian student'' should be revised to establish an upper age limit for eligibility for ISEF funding;

(7) The ''homebound'' definition should require enrollment in a Bureau school, since a homebound student can qualify for ISEF and ADM count if he/she received the minimum level of contact hours; Suggested definition: ''Homebound'' means a student who is enrolled in a Bureau-funded school and is educated outside the classroom''; and

(8) The definition of ''Local School Board'' does not track the definition of that term in the Act and should read: ''Local School Board,'' when used with respect to a Bureau school, means a body chosen in accordance with the laws of the tribe.''

Response: These comments were acknowledged and considered by the Committee, but the Committee determined that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.102 What Is Academic Base Funding?

Comment: The term ''base funding'' should be clarified to distinguish between ''academic base funding'' and ''residential base funding.''

Response: The Committee acknowledged and considered this comment, and made this change throughout the funding section.

Comment: The question should be revised to state, ''What is included in base academic funding?''

Response: The Committee acknowledged and considered this comment, and changed the question to read, ''What is academic base funding?''

Comment: The answer to § 102(a) in the proposed rule is incorrect because it states that base funding includes all available funding for educational services.

Response: The Committee acknowledged and considered this comment, and changed the answer to more accurately reflect that base funding is the average daily membership times the weighted student unit.

Section 39.103 What Are the Factors Used To Determine Base Funding?

Comment: The answer is inaccurate, as it states, ''base funding factors'' when really it is the weighted unit factor for base academic and base residential funding.

Response: The Committee acknowledged and considered this comment, and changed the chart (contained in the answer) to more accurately illustrate what the base academic and base residential funding is for the appropriate grade levels.

Comment: In the question the words ''use'' and ''must'' are transposed.

Response: The Committee acknowledged and considered this comment, and modified the sentence so that these two words are transposed into their correct positions.

Section 39.104 How Must a School's Base Funding Provide for Students With Disabilities?

Comment: Is it necessary for a school to comply with the Individuals with Disabilities Act (IDEA) if the school does not have enough students to qualify for part B funding?

Response: The Committee did not reach consensus to discuss this issue as it is clear that any student identified as disabled must be provided special education services under IDEA.

Comment: This section needs to be revised to select one term to refer to the students being described and use it consistently.

Response: The Committee acknowledged and considered this comment, and modified the rule to read ''students with disabilities'' throughout the document.

Comment: This section contains several inaccuracies and needs revision. Specifically, the term ''academic base funding'' should be used in place of ''ISEP funds.'' What is meant by ''all components'' of IDEA?. Also, paragraph (b) should address only the circumstances under which a school may use some or all of the 15 percent reserved in paragraph (a)(1) for a schoolwide program.

Response: The Committee acknowledged and considered this comment and modified the paragraph to refer to ''academic base funding'' instead of ''ISEP funds.'' The Committee rewrote the paragraph to state that a school may spend all or part of the 15 percent academic base funding reserved under paragraph (a)(1) on school-wide programs to benefit all students (including those without disabilities) only if:

(1) The school can document that it has met all needs of students with disabilities with those funds; and

(2) After having done so, there are unspent funds remaining from the funds.

Section 39.105 Are Additional Funds Available for Special Education?

Comment: In paragraph (a) the term ''base funding'' should be ''base academic funding'' and a reference to the 15 percent reserve should be inserted.

Response: The Committee acknowledged and considered this comment, and changed the paragraph to read, ''a school may supplement the 15 percent base academic funding reserved under § 39.104, for special education with funds available under part B of the Individuals with Disabilities Education Act (IDEA).''

Comment: Revise paragraph (b)(2) to read, ''provide training to staff to improve delivery of part B funds.''

Response: The Committee acknowledged and considered this comment and revised the section to read, ''providing training to Bureau staff to improve the delivery of part B funds.''

Comments: A commenter suggested clarification was needed on who makes the determination that schools have demonstrated that the reserved ISEP funds are inadequate to pay for additional SPED services and what criteria are used.

Response: The comment was acknowledged and considered and no action was taken, as the Committee felt the rule was clear.

Section 39.106 Who Is Eligible for Special Education Funding?

Comments: There were two comments on this section suggesting that clarification was needed as to whether the minimum age requirement only applies to ISEP SPED and if so why. The answer to the question of who is eligible for special education funding is not unique to special education. Rather it establishes age limits applicable to all students in the Bureau-funded system. It should be moved to the definition section.

Response: The comment was acknowledged and considered and no action was taken as this section only refers to who is eligible for Special Education Funding.

Section 39.107 Are Schools Allotted Supplemental Funds for Special Student and/or School Costs?

Comment: The Committee should take a serious look at categorical funding based on the special and unique educational needs of Indian children. The primary consideration seemed to be based on the distribution of available funds instead of the needs of children. The categorical funding must be based

on the actual services provided to student through a weighted student unit.

Response: The Committee did not reach consensus on this item. The Federal team could not consider going back to a categorical system of basing the funding to a student on the type of disability that student may have.

Comment: The answer to this question is inconsistent with the definition of the term ''school-wide supplemental funds.'' In that definition four conditions applicable to a school generate supplemental funds. By contrast, in the § 39.107 chart, a mix of both student conditions and school conditions that generate supplemental funding appear. The weights shown in the chart are not consistent.

Response: The Committee acknowledged and considered this comment and revised the chart.

Comments: Several commenters suggested that the Committee missed several categories of funding. One comment suggested serious consideration be given to allowing all schools to offer early childhood programs instead of using discretionary programming such as the FACE program. The funding of FACE should be moved to ISEP and each school should have a weight of at least .5. Another commenter suggested other programs be considered like vocational and technical education, food, summer programming, and electric technologies.

Other commenters suggested that school personnel costs and the cost of living should be taken into consideration and that all children should be funded equally. No child should be funded less than another child. The WSU for K–12 should be the same 1.5 WSU, especially for K's. The young children need more supervision, small classes, and therefore should not be only 1.15 WSU. This grade needs a teacher and an aide. Especially since the proposed WSU for intense bilingual is planned to be decreased to .13 WSU and all children will be eligible, this decrease will greatly impact our kindergarten program if the intense bilingual is decreased and the kindergarten grade WSU is the same. This should also apply to residential; the WSU should be the same for all grades.

Response: The comments were acknowledged and considered and no action was taken as the Committee does not have authority to provide funding to early childhood education and because the commenters did not present any additional arguments that had not already been considered by the Committee in the draft proposed rules.

Section 39.110 Can ISEF Funds be Distributed for the Use of Gifted and Talented Students?

Comments: There were several comments on the Gifted and Talented program. One commenter suggested that, as the rule is written, gifted and talented programs, apply only to academic programs. The weight for funding is included in ISEP, which is deducted before distribution of funds. Under this scenario, the rule creates a deficit for Residential Programs in boarding schools and major problems for residential dormitories that have absolutely no access to these gifted and talented funds. The gifted and talented program funds should be available to residential programs.

Another commenter suggested that it can be predicted that the gifted and talented program will grow by anywhere from 10–20 percent from current levels and such growth could create an impact in excess of $20 million that will affect only residential programs.

Another commenter suggested that the ''gifted programs have always used the idea of giftedness from the dominant culture, the Native ideas of giftedness have not been readily considered.'' It is important that Bureau schools make the proper assessment of giftedness, but whose definition is being used? Tribal leaders, parents, and the community should be involved in the process of defining gifted. The idea of placing a cap on the number of gifted students is not an option but rather an evaluation of what gifted means to the Native person and how that differs from the mainstream society. It should not be easy to get into the gifted program with the Bureau, but rather the school and community should give a clear demonstration of giftedness and how the school can support and advance the giftedness of the student in whatever ways appropriate.

Response: The Committee could not reach consensus on these comments. These comments were acknowledged and considered by the Committee, but the Committee determined that the comments did not raise new concerns not already considered in the proposed rule. The Committee therefore took no action.

Comment: Overall, the rules and procedures on Gifted and Talented seem cumbersome and administering the program is difficult due to the potential for abusing the count.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.112 What Is the Limit on the Number of Students Who Are Gifted and Talented?

Comment: Although the rule states there is no cap on the number of gifted and talented students a school can have, there is a cap of 15 percent in Leadership and Visual and Performing Arts. Critical Thinking as a specific category has been eliminated. There should not be a cap on Gifted and Talented and the six specific categories should be restored.

Response: The comment was acknowledged and considered and no action was taken. This is because the Committee felt they did not limit the number of students who can be classified as gifted and talented, but limited the number of students that would receive ISEP funding as a gifted and talented student.

Comment: In order to better correspond to the answer provided, this question should be revised to read: ''Is there a limit on the number of students a school can identify for the gifted and talented program?''

Response: The comment was acknowledged and considered and no action was taken.

Comment: The proposed funding formula appears to be very cumbersome, complicated and an unrealistic method upon which schools would be dependent for funds to operate programs. A simpler formula needs to be established that would guarantee some degree of stability regarding operating funds for the entire year.

Response: The comment was acknowledged and considered and no action was taken because the Committee determined that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.113. What are the Special Accountability Requirements for the Gifted and Talented Program?

Comment: No outcome state is provided for what happens if a school does not meet the two requirements in this section.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.114 What Characteristics May Qualify a Student as Gifted and Talented for Purposes of Supplemental Funding?

Comment: This question is awkwardly worded. (The question as published in the proposed rule read, ''How does a school receive funding for gifted and talented students?'') Consider

revising the question to read, ''what characteristics may qualify a student as gifted and talented for purposes of supplemental funding?''

Response: The Committee acknowledged and considered this comment and revised the question as suggested.

Comment: In (e) strike ''determined by.''

Response: The Committee acknowledged and considered this comment and struck the term ''determined by.''

Comments: Several commenters suggested changing the caps on specific gifted and talented funding. One commenter suggested that a cap of 25 percent of the student body for gifted and talented should be used. Another believed that the 15 percent cap on leadership and visual and performing arts will have a significant impact on schools as many Native American students fall into these categories. Restricting the number of Indian students that can be identified as gifted or talented in any given school setting can stifle the talents of countless students. Indian students who qualify for this program should not be left out simply because the quota has been filled. Several commenters suggested they would like the rule reconsidered to require documentation to identify all students who truly qualify for the gifted and talented program.

Response: The comment was acknowledged and considered and no action was taken as the Committee felt they did not limit the number of students who can be classified as gifted and talented, but limited the number of students that would receive ISEP funding as a gifted and talented student.

Comment: Paragraphs (a) and (b) do not identify the measuring tool, and paragraph (c) provides an option of NRT or CRT assessment. One commenter suggested that only norm-referenced tests (NRTs) or IQ tests be used for gifted and talented categories in § 39.114(a)–(c). Schools should develop their own criteria for placement in categories (d) and (e).

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear and the Committee did not want to limit schools' options.

Comment: This section does not specify what it is the student has to score in the top 5 percent of in order to be eligible. Does it mean the top 5 percent of students tested nationwide or just the school or some other group of students? ''Intellectual Ability'' is differentiated from ''academic aptitude/achievement'' even though it would seem that these might identify essentially the same students.

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

Comment: Several commenters suggested that the criteria for gifted and talented students were overly inclusive. One commenter suggested the ''Leadership'' and ''Visual and Performing Arts'' criteria are quite subjective and will probably result in the schools simply identifying 15 percent of their student body for each category. For these students, special services will need to be available that will not be available to other students. This may cause implementation problems for students and schools alike. Another commenter suggested that their agency restrict the school to a maximum of 10 percent of enrollment in gifted and talented.

Other commenters suggested that the weighted student unit (WSU) for the gifted and talented program should be the same for all grades K–12 at .5 or .62 WSU. One commenter suggested that a discrepancy exists because of the low cap placed on measurable giftedness and the high cap on subjective giftedness. Nationwide, gifted talented student identification averages between 10–15 percent. In the recommended rules, giftedness can easily run in excess of 50 percent. Anything categorized above 50 percent should be considered the base program and curriculum should be adjusted accordingly.

Several commenters also suggested imposing a cap on gifted and talented that is no greater than the national average in any given year.

Response: These comments were acknowledged and considered but no action was taken, as the 15 percent enrollment number was the result of several days of negotiations in which these issues were discussed at length.

Comment: The proposed regulation does not indicate what grade levels are eligible for gifted and talented designations. The commenter objects to proving gifted and talented services before third grade.

Response: The Committee acknowledged and considered this comment and no change was made as the grade level was left to the discretion of the schools.

Comment: What is the purpose of screening annually and is only annual screening permitted?

Response: The Committee acknowledged and considered this comment and no change was made as the Committee felt the language was clear.

Section 39.115 How Are Eligible Gifted and Talented Students Identified and Nominated?

Comment: This question should be revised so that the term ''gifted and talented'' appears in the question. (In the proposed rule, the question read: How are eligible students identified and nominated?) Suggested rewording: ''How may students can be nominated for gifted and talented designation?''

Response: The Committee acknowledged and considered this comment and changed the question to include the term ''gifted and talented.''

Comment: The second sentence of paragraph (a) should be edited as follows: ''A student may be nominated for gifted and talented designation using the criteria in § 39.114 by any of the following: * * * (5) The student himself or herself.''

Response: Paragraph (a) was changed to read, ''(a) Screening can be completed annually to identify potentially eligible students. A student may be nominated for gifted and talented designation using the criteria in § 39.114 by any of the following: * * * (5) The student himself or herself.''

Comment: In paragraph (b) the word ''child's'' should be changed to ''student's.''

Response: The Committee acknowledged and considered this comment and changed the term ''child's'' to ''student's.''

Comment: The school is concerned with the proposed removal of the intensive residential guidance program. If the program is eliminated it will be easier to eliminate the services and the funding that are needed to meet these students' needs.

Response: The comment was acknowledged and considered and no action was taken because the Committee intended all students to receive these services.

Section 39.117 How Does a School Provide Gifted and Talented Services for a Student?

Comment: Neither the answer to this question nor any other proposed gifted and talented regulation describes the level of gifted and talented services that must be provided. A provision should be developed that includes the level of services requirements.

Response: The comment was acknowledged and considered and no change was made to the rule because the comment did not present any additional argument that had not already been

considered by the Committee in drafting the proposed rules.

Section 39.118 How Does a Student Receive Gifted and Talented Services in Subsequent Years?

Comment: The two sentences of paragraph (a) are contradictory. If a student does not have to reapply for a gifted and talented designation, why must the student be retested every 3 years? The second sentence should be deleted.

Response: The Committee acknowledged and considered this comment and changed the last sentence of paragraph (a) to read, ''However, the student must be reevaluated at least every 3 years through the 10th grade to verify eligibility for funding.''

Comment: There were several comments suggesting in paragraph (b), the cross-reference to § 39.114 should read ''(d) or (e)'' rather than ''(e) or (f).''

Response: The Committee acknowledged and considered this comment and changed the cross reference to read ''(d) or (e).''

Section 39.119 When Must a Student Leave a Gifted and Talented Program?

Comment: It is recommended that no student be tested out of gifted and talented and therefore this section should be revised to the extent it calls for testing out. If the section remains, how can a school comply with paragraph (b)? Would the student have to be tested and found to no longer qualify? If this remains, it should be limited to students identified under leadership and visual performing arts only. If the purpose of the testing required in paragraph (b) is evaluation and testing of gifted and talented students' progress, this is acceptable.

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language in the proposed rule was clear.

Section 39.130 Can ISEF Funds Be Used for Language Development Programs?

Comment: The rules acknowledge the presence of students who are not proficient in any language, but do not provide any means for identifying them. While there is a test at § 39.134 for testing English ability, there is seemingly no measure for identifying the skill of students in their Native language.

Response: The comment was acknowledged and considered and no action was taken as the purpose of this section is to determine whether a student has limited proficiency in English.

Comment: Several commenters supported this section of the proposed rule. One tribal commenter agrees with the recommended special cost factor of .13 for language programs. Not only has that been a concern for many years, but it has not always been clear if Bureau schools had permission to teach Native languages.

Another commenter suggested that the tribe supports the proposed rule on Language Development programs, particularly the parts that seek to ensure the goal of infusing Native language and culture in to school curricula. However, the tribe does not agree with using ISEP funds to support Language Development programs for Native students who are predominantly ELL learners or are limited English language proficient as ISEP funds should be used generally for all school programs. Instead, funding for Language Development and ELL students should be provided for separately and the WSU be appropriated at 0.25 based on this new definition. The tribe expects Bureau to seek specific appropriations from Congress to support Native Language development curricula.

Response: The comment was acknowledged and considered and no action was taken as these regulations have no affect on the amount of current or future appropriations.

Section 39.131 What Is a Language Development Program?

Comment: Paragraphs (d) and (e) of this section seem to describe the same student. If there was a different intent, one or both of the paragraphs should be revised.

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

Comment: The School Board is afraid that the English proficiency assessment will remove students from their Native Language program. If the intent is to have all Native American students taught their Native Language, more funding will be required to sustain the effort as the funding will be subtracted from the general pool.

Response: The comment was acknowledged and considered and no action was taken as these regulations have no effect on the amount of current or future appropriations.

Section 39.132 Can a School Integrate Language Development Programs Into Its Regular Instructional Program?

Comment: We strongly support the concept of the integration of Native language programs into the regular curriculum.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.134 How Does a School Identify a Limited English Proficient Student?

Comment: Since the proposed rules for AYP include using the definition from the State Accountability Workbook in which the tribally funded school is located, it would be appropriate to provide an option for using the LEP assessment instrument approved for use within the State in which the tribally funded school operates.

Response: The comment was acknowledged and considered and no action was taken because the Committee felt this option was already available to tribes.

Section 39.135 What Services Must Be Provided to an LEP Student?

Comment: The language indicating that services are to assist LEP students become proficient in English and to the extent possible their Native language seems too vague and ambiguous.

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

Comment: We support the .13 weight for the Language Development Programs, so as not to adversely impact a school's ISEF allotment that would occur if the current .2 weight for intense bilingual were retained.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.137 May Schools Operate a Language Development Program Without a Specific Appropriation From Congress?

Comment: The citation regarding Native Language curriculum is incorrect. It should read 25 U.S.C. 2007(C)(1)(E).

Response: The Committee acknowledged and considered this comment and the citation was changed to read 25 U.S.C. 2007(C)(1)(E).

Comments: Several commenters made suggestions on future appropriations. One commenter suggested if Congress does not provide additional ISEP funding for Native Language curriculum, Native Language programs for restoration and enhancement should be funded solely out of the new appropriation, and the ''Language Development Program'' described in these regulations should be altered accordingly. That is, the ''Language

Development Program'' should be restored to the focus of teaching English to students not proficient in that language and the weight for these students should be restored to the current level of .2.

Another commenter suggested this section places a limit on the amount of future Congressional appropriations that can be appropriated for Native language programs. The statute on which this section is based also seems indecipherable. It is not clear that this rule captures the meaning of the statutory provision, whatever it may be.

Response: The comment was acknowledged and considered and no action was taken as these regulations have no effect on current or future appropriations.

Section 39.141 What Is the Amount of the Small School Adjustment?

Comment: The definition of small schools in the Proposed Rule needs to be expanded slightly to include mores schools not accomplishing economies of scale, and funding should take into account costs of accreditation.

Response: The comment was acknowledged and considered and no action was taken because the comment did not present any additional argument that had not already been considered by the Committee in drafting the proposed rules.

Comment: The school board agrees with the small school and small high school adjustment but more funding is required so it does not take away from the general pool.

Response: The comment was acknowledged and considered and no action was taken as these regulations have no effect on the amount of current or future appropriations.

Comment: Several commenters agreed with the Committee's recommendation to offer an adjustment for schools with smaller school populations.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.144 What Is the Small High School Adjustment?

Comment: The table that accompanies this section should be edited for clarity. We recommend that the first column heading be phrased in the form of a question because the answers that follow are either ''yes'' or ''no.'' We suggest, ''Does the school receive a small school adjustment under § 39.141?''.

Response: The Committee acknowledged and considered this comment and changed the table to read, ''School receives a small school adjustment under § 39.141.''

Section 39.145 Can a School Receive Both a Small School Adjustment and a Small High School Adjustment?

Comment: The first sentence of the answer should read, ''A school that meets both of the criteria in § 39.140 can receive both a small school adjustment and a small high school adjustment.''

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language was clear.

Comment: The table that accompanies this section should be revised to make it clearer.

Response: The Committee acknowledged and considered this comment and changed the table to read 1–50 and 51–98.

Section 39.156 Is There an Adjustment for Small Residential Programs?

Comment: We object to this provision and request that it be stricken. Residential programs already attract additional weights for residential students. Residential programs that use commercial forms of transportation receive 100 percent reimbursement for transportation costs and therefore receive transportation funding at a higher rate than schools that only use surface bus transportation.

Response: The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.200 What Is the Purpose of the Indian School Equalization Formula?

Comment: The tribe would like the ISEP week to be changed to either the prior or subsequent week because the current week is American Indian Week, which is a short week for the school, and because students are allowed to participate in cultural activities taking place outside the school and during that week. As a result, many students do not attend that week, resulting in a loss of funding for the school.

Response: The comment was acknowledged and considered and no action was taken, as funding under the new regulations will be based on Average Daily Membership at schools.

Section 39.203 How Does OIEP Calculate ADM?

Comment: Paragraph (a) refers to Aperiodic reports' from schools but does not indicate when these reports are to be filed. No provision in part 39 states when ADM reports for academic programs are to be compiled or filed. The frequency must be set out with consideration to technological feasibility and administrative efficiency so that schools are not forced to perform administrative tasks or incur unreasonable expenses that are beyond their resources.

Response: The comment was acknowledged and considered and no action was taken.

Comments: Several commenters supported the Committee's recommendation to use Average Daily Membership to count students for the purposes of ISEP academic funding. The Tribe also agrees with the 3-year rolling average. The proposed mechanism would enable the school to better plan and budget for the upcoming school year based primarily on a 3-year rolling average of student enrollment.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.204 How Does OIEP Calculate ISEF?

Comment: Both the question and answer should be edited. OIEP does not calculate ISEF. It calculates the value of a WSU and then each school's allotment under the ISEF. Paragraph (a) says the 3-year average ADM is to be multiplied by ''the weighted student unit that is applicable to eligible students.'' At what point is this multiplication made? Is the 3-year average ADM multiplied by some weight total for the current year? If the latter, how would the 3-year average relate to weights assigned to the students for the current year? The terms ''supplemental units'' and ''supplemental weights'' are used in this section. One term should be selected and referred to consistently throughout the subpart.

Response: The Committee acknowledged and considered this comment and added a new question before § 39.203 to read: ''When does OIEP calculate a school's allotment? OIEP Calculates a school's allotment no later than July 1. Schools must submit final ADM enrollment figures no later than June 15.'' The rule then goes on to keep § 39.203 and then changed § 30.204 to read:

How does OIEP calculate a school's total WSU for the school year? OIEP will add the weights obtained from the calculations in paragraphs (1), (2), and (3) of this section to obtain the total weighted student units (WSUs) for each school.

(1) Each year's ADM is multiplied by the applicable weighted student unit for each grade level;

(2) Calculate any supplemental WSU generated by the students; and

(3) Calculate any supplemental WSU generated by the schools.

The total WSU for the school year is the sum of (1), (2), and (3). The method for calculating the three-year averages WSU is illustrated in a table.

Comment: Funding should be based on prior year student ADM, so schools will be better able to plan for the upcoming school year regarding calendar days, contract days, and the number of personnel and the budgets they can fund. The 3-year average requirement would make estimating budgets more complicated and confusing.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Comment: The Tribe recognizes the intent of the Committee to ensure that schools are funded up front using the Average Daily Membership method; however, the Tribe proposes using both Average Daily Attendance and ADM in the funding formula. For example, students are counted on the 40th and 100th days, while the ADM formula remains the same.

Response: The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.206 How Does OIEP Determine a School's Funding for the Upcoming School Year?

Comment: The term ''upcoming school year'' should probably read ''current school year.'' The term ''this year's'' appears in paragraph (f).

Response: The Committee acknowledged and considered this comment and deleted the term ''upcoming year's'' from the question and replaced it with ''current school year's,'' for clarity.

Comment: The 7-step process outlined here is incomplete and in some places incorrect. A full re-write of the provision is needed. There were also several comments on the terms and references used in this section.

Response: The Committee acknowledged and considered this comment and changed the process (now located in § 39.207) to read as follows:

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

(a) *Step 1.* Multiply the appropriate base academic and/or residential weight from § 39.103 by the number of students in each grade level category.

(b) *Step 2.* Multiply the number of students eligible for supplemental program funding under § 39.107 by the weights for the program.

(c) *Step 3.* Calculate the school-based supplemental weights under § 39.107.

(d) *Step 4.* Add together the sums obtained in steps 1 through 3 to obtain each school's total WSU.

(e) *Step 5.* Add together the total WSUs for all Bureau-funded schools.

(f) *Step 6.* Calculate the value of a WSU by dividing the current school year's funds by the average total WSUs as calculated under step 5 for the previous 3 years.

(g) *Step 7.* Multiply each school's WSU total by the base value of one WSU to determine funding for that school.

Comment: The cross-reference in paragraph (a) should be to § 39.103.

Response: The Committee acknowledged and considered this comment and changed the cross-reference to § 39.103.

Section 39.207 How Are ISEP Funds Distributed?

Comment: Paragraph (b) states that the Act requires the second payment to be made ''no later than December 1'' and the regulation should reflect this command. As written, the sentence could be interpreted as allowing the December 21 payment to be made after the two recited actions are completed—verification of the school count'' and any appeals for the prior year—which could be sometime after December 1. If the second payment were delayed to accommodate these actions the regulation would conflict with the Act. The confusion should be resolved by redrafting. What ''school (student)'' count is to be verified? Schools are to receive payments based on the average of the prior 3 years' student count, not on the count for the current year. Thus, there would be no count to verify for the December 1 payment.

Response: The comment was acknowledged and considered, but the Committee decided that it had already considered all of the concerns in the proposed rule. For this reason, no action was taken.

Comment: The Tribally Controlled Schools Act requires the first payment of funds to be an amount equal to 80 percent of the amount the school was entitled to in the preceding academic year. This needs to be continued. The integrity of the base academic and residential programs should not be eroded by special cost factors.

Response: The comment was acknowledged and considered, but since the Committee had already considered the concerns raised by comment, no action was taken.

Section 39.208 When May a School Count a Student for Membership Purposes?

Comment: At the end of the first sentence add ''and shall be counted for ADM purposes.''

Response: The Committee acknowledged and considered this comment and changed the first sentence as suggested.

Comment: The proposed rules for AYP include using the definitions from the State Accountability Workbook in which the tribally funded school is located. It would be appropriate to provide an option for using the State definition of the term ''enrolled student'' for the State in which the tribally funded school operates.

Response: The comment was acknowledged and considered and no action was taken.

Comments: There were several comments regarding the transition from count week to ADM. One Commenter suggested that the rule seems to omit from the student count students that are enrolled after the 10th day of school regardless of their attendance after that point. This would seem to include transfer students. Another felt the relationship of ADM to being ''counted as enrolled'' is unclear and as stated does not seem to make sense. It seems that only students who were present during one of the first 10 days of school can be used to calculate ADM no matter how often they are in attendance later on in the year. This does not seem to be true ADM, but is arbitrarily limited. One of the reasons for switching to ADM was to avoid such arbitrary funding calculations.

Response: The comment was acknowledged and considered and no action was taken because the Committee did not limit ADM to students enrolled the first 10 days of school. The rule allows for a student to be added to the membership and counted for ADM throughout the year.

Comment: The Tribe agrees with the proposal to stop using ''count week'' as the way to distribute funding to Bureau schools.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.210 What Other Categories of Students Can a School Count for Membership Purposes?

Comment: The physical attendance requirement for alternative, Internet, college, and video courses is not real. Students are in these programs because they struggle with attending school regularly. There needs to be another

way of tracking participation, maybe reimbursement for completed courses.

Response: The comment was acknowledged and considered and no action was taken because the Bureau of Indian Affairs is not authorized to fund satellite schools and because the comment did not present any additional argument that had not already been considered by the Committee in the draft proposed rules.

Section 39.211 Can a Student Be Counted as Enrolled in More Than One School?

Comment: This section states that a student can be counted in more than one school as long as the student meets the criteria of § 39.208. However, it would seem that the student would be counted as being in two different schools at the same time.

Response: The comment was acknowledged and considered and no action was taken because the Committee felt the language of the section was clear.

Section 39.213 What Are the Minimum Number of Instructional Hours Required in Order To Be Considered a Full-time Educational Program?

Comment: Each accreditation agency requires different instructional hours. It would be better to state that if a school is accredited it can receive funding.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.215 How Does ISEF Fund Residential Programs?

Comment: Edit the second sentence to read ''funding for residential programs is based on the average of the 3 previous years'' residential WSUs.

Response: The Committee acknowledged and considered this comment and changed the second sentence as suggested.

Comment: Residential programs are smaller and have fewer staff than schools. Requiring more documentation and reporting seems overwhelming and discriminating in nature.

Response: The comment was acknowledged and considered and no action was taken.

Comment: The existing ISEP formula does not provide adequate funding to operate a residential and boarding school program. The regulations as written will effectively eliminate peripheral dormitories and significantly impact the ability of residential boarding schools to financially survive. The regulations should be revisited to make the necessary corrections to raise the residential and boarding school weights to adequately fund the program. The formula should be adjusted to fund all residential and boarding school students at a base weight of 2.0.

Response: The Committee acknowledged and considered this comment, however no change was made to the funding formula because the commenters did not present any additional arguments that had not already been considered by the Committee in the draft proposed rules.

Section 39.216 How Are Students Counted for the Purpose of Funding Residential Services?

Comment: Paragraphs (b) and (c) should be revised to refer to the ''first full week in October'' in order to be consistent with paragraph (a).

Response: The Committee acknowledged and considered this comment and changed the paragraphs to refer to the ''first full week in October.''

Comment: While instruction switched to ADM, residential service continues to be funded on a count week; however the average of the previous 3 years would be the count that is used. This decision was probably made due to the wide fluctuations of dormitory attendance due to various factors.

Response: The comment was acknowledged and considered and no action was taken because there was no suggested change.

Section 39.217 Are There Different Formulas for Different Levels of Residential Services?

Comment: There were several comments suggesting a discrepancy between § 39.217(c) and § 39.218. Section 39.217(c) states that 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. Section 39.218 states that schools must maintain 25 percent of its residency each month to avoid severe financial sanctions. The tribe request that § 39.217(c) be changed to 25 percent to retain continuity in the rule.

Response: The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Comment: Section 39.216 establishes a 3-week count period for residential programs. Did the Committee intend to add the weekend before the 3-week period for the purposes of qualifying for residential funding?

Response: This comment was acknowledged and considered and no action was taken.

Comment: Several commenters suggested changes to the table. One suggestion was that the table should be revised to read (in either table or sentence form): ''If a residential program operates 4 nights per week or fewer, the weight for each residential student shall be obtained by multiplying each student's base residential factor for the appropriate grade, as set out in § 39.103, by 4/7.'' ''If a residential program operates 5, 6 or 7 nights per week, the weight for each residential student shall be obtained by multiplying each student's base residential factor for the appropriate grades, set out in § 39.103 by 7/7.''

Another suggestion asked this question about paragraph (b): This paragraph requires at least 10 percent of the students in a residential program to be in the dormitory 3 of the 4 weekends during the count period. Is this correctly stated or should it read, ''2 of the 3 weekends during the count period?''

Response: These comments were acknowledged and considered and no action was taken.

Comment: There were several comments seeking clarification of the weekend services. One commenter suggested if a residential program only intends to serve students 4 nights per week and receives funding for only 4 nights, is it nonetheless expected to serve 10 percent of its students over the weekend?

Another commenter suggested the different treatment for dormitories that are open 5, 6, or 7 days from those open 4 nights a week will likely have the effect of more dormitories staying open on weekends or at least, being open on Sunday evening for returning students. The effect of this change will be a shift of funding from day schools to boarding schools. Even within boarding schools, a greater portion of costs will shift to residential programs and away from instruction.

Response: The comment was acknowledged and considered but the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.218 What Happens if a Residential Program Does Not Maintain Residency Levels Required by This Part?

Comments: Several commenters had questions pertaining to this section of the rule. One commenter asked, ''the penalty stated for failing to meet the minimum retention requirement each month is the loss of one-tenth of * * *

current year allocations. Since the school year runs for ten months, the penalty is a full month's worth of funding. How can such a program stay in operation for the month if it loses full funding for that month? Does the Committee intend that the dormitory would close? If that occurs, it is unlikely the dorm would reopen in the following month. How is the loss of funding to be implemented? Since the Act requires contract and grant schools to be paid in advance, does the Committee contemplate that the Bureau would send a bill for collection?''

Response: The comment was acknowledged and considered, but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Comment: The requirement that monthly residential reports be filed on the last school day of a month will likely pose an administrative difficulty for OIEP at the end of each year. Many schools do not complete their school year until sometime in June. Even if all residential programs file timely reports for the month of June, it is possible that OIEP will have only a few business days left in June to make the calculations needed to distribute the July 1 payment for the next academic year.

Response: The comment was acknowledged and considered and no action was taken because OIEP felt they would be able to make the calculations based on these timeframes.

Comment: Provisions should be made for circumstances that might temporarily close all or part of a dorm and prevent that program from meeting the 10 nights/students/month minimum. Examples of these circumstances are: (1) students absent due to an illness or injury and (2) unforeseen circumstances, such as a flu epidemic or health/safety situations.

Response: The comment was acknowledged and considered and no action was taken as the Committee felt this issue was addressed in § 39.217(d).

Comment: When referencing the use of counts obtained from the current system in the table, the term ''count weeks'' should be used to differentiate from the proposed new system for residential counts, which will occur over a 3-week period. In row (c) of the table ''systems or'' should be replaced with ''residential and academic programs are.''

Response: The comment was acknowledged and considered and no action was taken.

Section 39.219 What Reports Must Residential Programs Submit To Comply With This Rule?

Comment: A student must be in residence at least 10 nights during each full school month in order to be counted. Does this mean that months such as August, December, and June are not considered a ''full school month'' and would not have to achieve the 10-night minimum? It would be helpful to expressly list in the regulation the calendar months that are considered ''full school months'' for the purpose of the 10-night minimum.

Response: The Committee acknowledged and considered this comment and added a new question after § 39.219. The new question reads, ''What is a full school month?'' The answer is ''Each 30-day period following the first day residential services are provided to students based on the school residential calendar.''

Section 39.220 How Will the Provisions of This Subpart Be Phased In?

Comment: The answer should be reworded to read ''The calculation of the 3-year rolling average of ADM (WSU) for each school and for the entire Bureau-funded school system will be phased in as shown in the following table.''

Response: The Committee acknowledged and considered this comment and changed the answer to the language in the comment.

Section 39.400 What Is the Purpose of This Subpart?

Comment: This section, combined with § 39.409, adds more bureaucracy and additional expenses to OIEP. It is not necessary to hire independent auditors because it creates mistrust. Funds are wasted by implementing an external audit on the certified count.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Comment: This provision should be edited to read: ''The purpose of this subpart is to establish systematic verification and random independent outside auditing procedures to hold administrative officials and the school board, or tribal officials having responsibility for student count and student transportation expenditures reporting, accountable for accurate and reliable performance of these duties. The subpart establishes systematic verification and random independent outside auditing procedures to accomplish this goal.''

Response: The comment was acknowledged and considered and no action was taken.

Comment: The School Board wants to know how the Bureau would get a refund from a grant school if the school was overfunded.

Response: The comment was acknowledged and considered and no action was taken as the statute clearly outlines how the Bureau is to collect overpayments.

Section 39.403 What Certification Is Required?

Comments: Several commenters asked what teacher certification and school accreditation have to do with individual student records. This is not an ISEP requirement.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Comment: As written, paragraph (c) is meaningless. It should identify precisely the certifications required for ELO, specialists, and school superintendents so that a competent review of compliance with the requirement to maintain such certifications can be made. In addition, the provision should require that the certifications of personnel be maintained and available for inspection at the office in which they work as well as in a ''central location.''

Response: The comment was acknowledged and considered and no action was taken.

Comment: It should be clarified that for the purposes of confidentiality that Special Education files may be maintained in a separate location per IDEA and FERPA.

Response: The comment was acknowledged and considered and no action was taken because these regulations are subject to IDEA and FERPA, which have their own regulations addressing such issues.

Comment: The change in accountability of student eligibility and attendance is a good step. The commenter agrees that all schools should maintain files and certify their accuracy relating to documentation of student eligibility to receive base and supplemental services. The concept of holding each Bureau education line officer accountable for this shows an attempt to improve Bureau's level of service.

Response: The comment was acknowledged and considered and no action was taken.

Comment: Paragraphs (a) and (b) should specify when the required certifications must be made and submitted. Is this a one-time-per-academic-year requirement? If so, when must the requirement be satisfied? If this certification is a periodic requirement, state the frequency.

Response: The comment was acknowledged and considered and no action was taken.

Comment: When will the ELOs annual reviews be conducted? At the beginning or end of the academic year? Periodically throughout the year?

Response: The comment was acknowledged and considered and no action was taken because the Committee felt that § 39.405 answered this question.

Comment: Clarification is needed as to who will pay for the outside audits the Director is to conduct.

Response: The comment was acknowledged and considered and no action was taken because the Committee felt the regulation was clear.

Section 39.405 How Will Verifications Be Conducted?

Comments: There were several comments on the timing of verification. One commenter suggested the first two sentences seem to address verification of the academic count, and require a minimum of one day per grading period to be included in the verification survey. Does this mean that the verifications cannot be made until the end of the year when all the grading periods have been completed?

Another commented that the last sentence relates to verification of the residential count. Verification of the count for the count period makes sense, but there is no statement when that verification will occur. Since the regulations do not establish a time for submitting the residential count, it is impossible to tell when the verification will take place. Also, what method and frequency will the ELO use to verify residence during the remainder of the year?

Response: The comment was acknowledged and considered and no action was taken because the Committee felt that the regulation clarified that this was an ongoing process.

Section 39.406 What Documentation Must the School Maintain for Additional Services It Provides?

Comment: Services from certified education personnel should not be required.

Response: The comment was acknowledged and considered and no action was taken.

Comment: The requirement of physical attendance at the school for at least 3 hours per day may restrict students from fully participating in college-based advanced placement opportunities for more than half of an ordinary school day. This would impede the ability of some highly capable students to receive full dual high school and college credit from the many State programs. An arbitrary restriction of 3 hours per day in physical attendance is not consistent with the Bureau's post-secondary placement goals.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.407 How Long Must a School Maintain Records?

Comment: Records retention should be for only 3 years.

Response: The comment was acknowledged and considered and no action was taken because all records are subject to Federal records retention timeframes.

Section 39.409 How Does the OIEP Director Ensure Accountability?

Comment: In paragraph (a)(1), the purpose of the audit is clearly intended to be an audit of education line officer performance. But in (b)(1) and (2), the auditor tasks relate to the accuracy of the school's reports, rather than to the integrity of the ELO's review. Paragraph (b) should be revised to make it clear that it is the ELO's performance that is under review.

Response: The Committee acknowledged and considered this comment and changed the answer to reflect the language in the comment.

Comment: This section, read in conjunction with § 39.400, adds more bureaucracy and additional expenses to OIEP. It is not necessary to hire independent auditors because it creates mistrust. Funds are wasted by implementing an external audit on the certified count.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Comment: Paragraph (a)(1): Who will decide which school in each OIEP line office is selected for the random filed audit each year? There should be a method to ensure that contract, grant, and Bureau-operated schools in a line office are selected over time, and that the same school is not ''randomly'' selected for repeated audit. If such were to be permitted, a line offer's model school could be routinely selected.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Comment: This section calls for an independent audit of at least one school per line officer per year. This would be over 20 audits per year to be done at Central Office expense. This could become an unfunded mandate, as there has been little or no interest in increasing funding for Bureau education administration. If this is the key to accountability, then it needs to be in the FY 2005 or 2006 budget request.

Response: The comment was acknowledged and considered and no action was taken as this regulation has no impact on budget requests.

Comment: This section establishes criteria for auditing firms and calls for licensed CPAs who audit under Single Audit Act. This does not seem appropriate since this is not an audit of accounting procedures. This is an audit of student counting and should call for consulting firms that are expert in such procedures and familiar with the classifications that result in student weights.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.412 What Sanctions Apply for Failure To Comply With This Part?

Comment: Paragraph (b) is intended to ensure that Bureau and school administrative officials are held to account for actions described in paragraph (a), but the phrase ''unless prohibited by law'' could defeat the sunlight the provision seeks to ensure. Bureau should provide the Committee with a legal opinion on the question whether Federal law permits or prohibits performance deficiency personnel actions involving Federal employees to be reported to the affected tribal governing body. If Federal law would prohibit such reporting, this provision is meaningless with regard to Federal employees and would apply only to contract and grant school employees. The Committee should determine if such an outcome is supportable.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.413 Can a School Appeal the Verification of the Count?

Comment: This provision does not state when disallowances would be made nor when they will be communicated to the affected school. Nor does it set out a time period for the appeal.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.500 What Emergency and Contingency Funds Are Available?

Comment: Paragraph (a) says the reserved amount is to be ''1 percent of funds from the allotment formula.'' This is not a precise description of the funds involved. It should be re-written to reflect the Act (25 U.S.C. 2007).

Response: The comment was acknowledged and considered and no action was taken as the Committee felt the language in the proposed rule was sufficient.

Section 39.501 What Is an Emergency or Unforeseen Contingency?

Comment: This section requires that all criteria in paragraphs (a) through (e) be met to qualify for contingency funds. Paragraphs (c) and (e) should be revisited by the Committee. Paragraph (c) would eliminate any event that could have been covered by an insurance policy. This is objectionable, as in theory; nearly any event could be covered by an insurance policy if one is willing to pay the premium for the coverage. Paragraph (e) requires someone (OIEP Director) to make a very subjective judgment as to whether the event could have or have not been prevented by prudent action by officials responsible for the education program. The presence of these two provisions in the regulation could prevent any event from qualifying for contingency funds.

Response: The Committee acknowledged and considered this comment and changed paragraph (c) to read ''It is not covered by an insurance policy in force at the time of the event.''

Comment: The section states the criteria for identifying what the contingency fund can be used for and indicates that the fund cannot be used in cases of mismanagement, malfeasance, or willful neglect. While it is clearly not the intent of the fund to cover such costs, the Bureau needs to be ready for situations where a school has been grossly mismanaged and there has been a resumption or other change in management late in the year and little or no funding remains in the school's budget. There is probably no other source of funds in such a situation.

Response: The comment was acknowledged and considered and no action was taken as the comment did not suggest a change to the rule.

Section 39.502 How Does a School Apply for Contingency Funds?

Comment: The final sentence must be revised to provide that the Director will respond to the request for contingency funds ''within 30 days or receipt of request.'' The provision should also allow a school to send a request for contingency funds directly to the Director, with a copy to the ELO. This is needed to ensure that a school's request reaches the Director even if the ELO fails to forward it to the Director within 48 hours as required by this section.

Response: The comment was acknowledged and considered but the Committee decided that the comments did not raise concerns that the Committee had not already considered in the proposed rule and therefore no action was taken.

Section 39.504 May Contingency Funds be Carried Over to a Subsequent Fiscal Year?

Comment: Add a second sentence: ''Contingency funds provided to a contract or grant school shall be available for expenditures without fiscal year limitations.''

Response: The comment was acknowledged and considered and no action was taken.

Comment: This states that Bureau operated schools may carry over contingency funds to the next fiscal year. Has it been researched and verified that this is possible?

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.600 Are Bureau-Operated School Board Expenses Funded by ISEP Limited?

Comment: The school board does not believe money should be used for school board expenses and training because it will take away from student funding.

Response: The comment was acknowledged and considered and no action was taken as the school board is authorized by statute to use these funds.

Comment: The Tribe agrees with proposed rules on school board training.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.602 Can Grant and Contract Schools Spend ISEP Funds for School Board Expenses, Including Training?

Comment: There were several comments discussing which funds should be used for school board training.

Response: The Committee acknowledged and considered this comment and deleted § 39.602 after determining it was unnecessary.

Section 39.603 Is School Board Training Required for All Bureau-Funded Schools?

Comment: The answer to this question is incomplete as it does not reflect the statutory provision at 25 U.S.C. 2007(c)(2)(B)(iii) which recommends, but does not require, training for a tribal council that serves as a school board. The provision should be revised as follows: ''Yes. Any new member of a local board or an agency school board must complete 40 hours to training within one year of appointment, provided that such training is recommended, but is not required, for a tribal governing body that serves in the capacity of a school board.''

Response: The Committee acknowledged and considered this comment and changed the answer to read, ''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, provided that such training is recommended but is not required, for a tribal governing body that serves in the capacity of a school board.''

Section 39.700 What Is the Purpose of This Part?

Comment: Subpart G should be revised to read ''Student Transportation.''

Response: The Committee acknowledged and considered this comment and made the suggested change.

Comment: This question should be revised to read ''What is the purpose of this subpart?''

Response: The Committee acknowledged and considered this comment and made the suggested change.

Comment: Paragraph (a) does not expressly state that a school will receive funding for student transportation. Proposed revision: ''(a) The purposes of this subpart are to provide funds to each school for the round trip transportation

of students between home and school, and to describe how transportation mileage and expenses are to be calculated and reported.''

Response: The comment was acknowledged and considered and no action was taken.

Comment: The tribe supports the proposed rules regarding transportation but recommends that schools be funded for two curricular enrichment activities as a part of the outdoor education programs.

Response: The comment was acknowledged and considered but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.701 What Definitions Apply to Terms Used in This Subpart?

Comment: ISEP count week is defined but that method for counting students would be replaced with the 3-year rolling average. Perhaps the term and its definition should be changed to ''transportation mileage count week'' since the last full week in September would be used to count mileage only. If this revision is made, the new term must be reflected elsewhere in the subpart.

Response: The Committee acknowledged and considered this comment and made the suggested changes.

Comment: Is the definition of ''unimproved roads'' consistent with the current usage where ''unimproved roads'' generate additional weight for mileage count? If a road has a drainage ditch but is unpaved, it would not meet the stated definition.

Response: The comment was acknowledged and considered, but the Committee decided that the comments raised concerns that the Committee had already considered in the proposed rule and therefore no action was taken.

Section 39.704 Are Schools Eligible for Other Funds To Transport Residential Students?

Comment: If this provision is intended to apply only to expenses incurred in transporting residential students by commercial carriers, the question and answer should be revised to so state.

Response: The Committee acknowledged and considered this comment changed the question to read, ''Are schools eligible to receive chaperone expenses to transport residential students?''

Section 39.705 Are Schools Eligible for Other Funds To Transport Special Education Students?

Comment: The term ''other funds'' in the question is misleading. Suggested rephrase: ''Under what circumstances may a school count mileage incurred in transporting special education students?'' The answer seems to be contradicted with § 39.707(a)(3).

Response: The Committee acknowledged and considered this comment and changed the question to read ''Are schools eligible for transportation funds to transport special education students?''

Comment: It would be better to identify what school bus transportation is allowable and count all of it and then request appropriations. If you say these are not fundable then Congress will never fund them.

Response: The Committee acknowledged and considered this comment and changed the question to read ''Which student transportation expenses are currently not eligible for Student Transportation Funding?'' The answer was also changed to read ''The following transportation expenses are currently not eligible for transportation funding, although the funding will be collected under the provisions in this subpart.''

Section 39.708 Are Non-ISEP Eligible Children Eligible for Transportation Funding?

Comment: There were several comments suggesting changing the language of this section to reflect the fact that transportation funding is based on miles, not students. There were also comments on the language referring to the transport of non-ISEP eligible students.

Response: The Committee acknowledged and considered these comments and changed this section to read, ''Are miles generated by non-ISEP eligible students eligible for transportation funding? No. Only miles generated by ISEP eligible students enrolled in and attending a school are eligible for student transportation funding.''

Section 39.710 How Does a School Calculate Annual Bus Transportation Miles for Day Students?

Comment: When is ISEP count week?

Response: The Committee acknowledged and considered this comment and changed this section to refer to ''student transportation count week''.

Sections 39.720–722 [Various Titles]

Comment: There were several comments on the limitations of trips outlined in the chart.

Response: The Committee acknowledged and considered this comment and deleted the chart.

Section 39.721 What Transportation Information Must Off-reservation Boarding Schools Report?

Comment: There were several comments on the need for additional clarity in this section.

Response: The Committee acknowledged and considered this comment and changed this section to read as follows:

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 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 busses, 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 sites of special services, and to extra-curricular activities;

(4) Medical trips;

(5) Maintenance and Service costs;

(6) Driver costs; and

(7) All expenses referred to in § 39.707.

Section 39.722 What Transportation Information Must Day Schools or On-reservation Boarding Schools Report?

Comment: The question should be edited to read ''What transportation program information must day schools, on reservation boarding schools, and peripheral dormitories report?''

Response: The Committee acknowledged and considered this comment and changed the question as suggested.

Comment: Paragraph (b) should be edited for clarity. For example, all of the information requested in paragraph (b)(1) is useful, but all elements do not constitute ''fixed vehicle costs.'' Some of the information sought is descriptive of the vehicles used not their costs.

Response: The Committee acknowledged and considered this comment and changed paragraph (b) to add the term ''and other costs.''

Comment: Paragraph (b)(4) should be revised to read ''mileage driven to student medical trips'' and (b)(5) should be revised to read ''costs of vehicle maintenance and

service, including cost of miles driven to obtain maintenance and service.''

Response: The Committee acknowledged and considered this comment and changed these sections to read (b)(4) ''Mileage driven for student medical trips'' and paragraph (b)(5) to read, ''Costs of vehicles maintenance and service costs including cost of miles driven to obtain maintenance and service.''

Section 39.730 Which Standards Must Student Transportation Vehicles Meet?

Comment: There were two comments suggesting tribal standards be incorporated into this section.

Response: The Committee acknowledged and considered this comment and changed this section to include ''State or tribal motor vehicle safety standards.''

Section 39.732 How Does OIEP Allocate Transportation Funds to Schools?

Comment: Change ''OIEP allocates transportation miles'' to ''OIEP allocates transportation funds.''

Response: The Committee acknowledged and considered this comment and changed the section to read ''OIEP allocates transportation funds.''

Section 39.801 What Is the Formula to Determine the Amount Necessary to Sustain a School's Academic or Residential Program?

Comment: Paragraph (a), ''minimal annual amount'' should read ''minimum annual amount.'' The formula should read ''Student Unit Value × weighted Student Unit = Annual Minimum amount per student.''

Response: The Committee acknowledged and considered this comment and changed the sections as suggested.

Comment: This would provide useless information for a useless report and should be eliminated.

Response: The comment was acknowledged and considered and no action was taken.

Section 39.802 What Is the Student Unit Value in the Formula?

Comment: The first sentence should be revised to read ''The student unit value is the dollar value applied to each student in an academic or residential program.''

Response: The Committee acknowledged and considered this comment and changed the section as suggested.

Comment: Revise to read ''(a) The student unit instructional value (SUIV) applies to a student enrolled in an instructional program. It is an annually established ratio of 1.0 that represents a student in grades 4–6 of an instructional program.''

Response: The Committee acknowledged and considered this comment and changed the section as suggested.

Section 39.804 How Is the SUIV Calculated?

Comment: Additional instructions are needed to describe the calculation in this part.

Response: The Committee acknowledged and considered this comment and made the following changes:

(b) Step 2. Subtract the average specific Federal share per student (title I part A and IDEA, part B) of the total revenue for Bureau-funded elementary schools for the last school year for which data is available as reported by NCES (15 percent)

(c) Step 3. Subtract the administrative cost grant/agency area technical services revenue per student as a percentage of the total revenue and current expenditures of Bureau-funded schools from the last year data that is available

(d) Step 4. Subtract the day transportation revenue per student as a percentage of the total revenue (current revenue) Bureau-funded schools for the last school year, for which the date is available.

Section 39.805 What Was the Student Unit for Instruction Value (SUIV) for the School Year 1999–2000?

Comment: What was the student unit for instruction value (SUIV) for the school year 1999–2000? Revise the first sentence to read: ''The process described in § 39.804 looks like this, produces the following results using figures for the 1999–2000 school year: $8,030 ANACE 1205 Average per student specific Federal share of total revenue for Bureau of Indian Affairs-funded schools, 993 Administrative Cost grant/technical services revenue as a percentage of total revenue, 658 Transportation revenue as a percentage of the total revenue, 85 Johnson O'Malley funding 5259 SUIV.''

Response: The Committee acknowledged and considered this comment and changed the section to read:

Section 39.805 What Was the Student Unit for Instruction Value (SUIV) for the School Year 1999–2000?

The process described in § 39.804 is illustrated in the table below, using figures for the 1999–2000 school year:

Step 1: $8,030 ANACE

Step 2: −1205 Average specific Federal share of total revenue for Bureau-funded schools

Step 3: −993 Cost grant/technical services revenue as a percentage total revenue

Step 4: −658 Transportation revenue as a percentage of the total revenue

Step 5: 85 Johnson O'Malley funding

Total: $5,259 SUIV

Section 39.806 How Is the SURV Calculated?

Comments: There were several comments on this section. Paragraph (b) refers to a procedure but no procedure is set out.

Response: The comments were acknowledged and considered and no action was taken.

VI. Comments on Part 42—Student Rights

25 U.S.C. 2016 requires 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. As was the case with the proposed rule, the intent of this final rule is to provide minimum requirements for fulfilling due process and student rights obligations owed to students while allowing schools to provide for higher requirements and to develop their own processes for handling violations of school policies, including alternative dispute resolution where appropriate. The final rule changes the proposed rule by including a new section on when a formal disciplinary hearing is required.

General Comments: Some commenters agreed with the proposed rules in part 42 and one commenter noted with approval the alternative dispute resolution provisions.

Comment: Revise part 42.2 to set a threshold for disciplinary actions that require a due process hearing. Limit the hearing requirement to cases where potential disciplinary action is suspension for more than 10 days or expulsion and expressly state it in the rules.

Response: We deleted in § 42.2(c) ''for alleged violation of school regulations for which the student may be subjected to penalties'' after ''disciplinary actions.'' In order to set a threshold for requiring disciplinary hearings and to provide for local school policies and procedures, we added a new section: ''When does due process require a formal disciplinary hearing? Unless local school policies and procedures provide for less, at a minimum, a formal disciplinary hearing is required prior to a suspension in excess of 10 days or expulsion.''

Comment: Include in part 42.2 information from the Notice of Proposed Rulemaking Preamble to part 42 to provide more information on the purpose of § 42.2.

Response: We added a new question and answer setting a threshold for requiring disciplinary hearings and providing for local school policies and procedures which may require more than the minimum set out in § 42.2. (see response above)

Comment: Add to part 42 a provision addressing notices of disciplinary action in Native languages and providing for an interpreter at hearings.

Response: We did not add a provision addressing notices in Native languages or interpreters at hearings because these issues can be addressed at the local school level as needed.

Comment: Revise part 42 to allow schools to set due process procedures that address both tribal and legal precedents and provide for legal counsel only after these processes are completed.

Response: We did not make the suggested changes because § 42.7 (now § 42.8) provides for the right to legal counsel only at the formal disciplinary hearing stage, not before it. In addition, § 42.2 provides for use of applicable tribal constitutional and statutory protections and does not preclude use of tribal precedents.

VII. Comments on Part 44—Grants Under the Tribally Controlled Schools Act

Part 44 provides rules to comply with 25 U.S.C. 2501 *et seq.*, the Tribally-Controlled Schools Act of 1988 (TCSA). The Act included a new section 25 U.S.C. 2509 which provides that, ''the Secretary is authorized to issue rules relating to the discharge of duties specifically assigned to the Secretary in this part.'' This rule provides that Bureau of Indian Affairs manuals, guidelines, and policy directives apply only if the grantee agrees. This rule provides eligibility requirements and methods for termination. It incorporates subpart E, part 900, 25 CFR for standards on financial, property, and procurement management. The final rule amends the proposed rule provision for method for payment to an annual payment. We said in preamble to NPRM we were changing payments to once a year.

General Comments: One commenter states that this part is under-funded. A commenter agrees that the TCSA needs little or no adjustment. A commenter agrees with grant payments in July and December.

Comment: Provide for holding grant schools accountable after the annual payment is issued.

Response: The Tribally-Controlled Schools Act covers this. We made no changes.

Comment: Provide guidance for the Bureau for its role as the responsible Federal agency under the Single Audit Act.

Response: No change is necessary. The comment is based on a misunderstanding of the rule.

Comment: Clarify the Bureau's significant role with Bureau-funded schools and the Memorandum of Agreement between Bureau and the Department of Education (DOE) for Bureau's administering of funds that come through DOE.

Response: No change was made. The comment is based on a misunderstanding of the rule.

Comment: Revise § 44.101 to add a new (a): ''The Tribally Controlled Schools Act'' and reformat the remaining paragraphs as (b) and (c).

Response: The change was made for clarity.

Comment: Revise § 44.101 because the Secretary is bound also by Public Law 100–297 and appropriations laws.

Response: No change is necessary. The comment is based on a misunderstanding of the rule.

Comment: Revise § 44.104 to change ''resumption'' to ''reassumption'', change ''BIA'' to ''the Secretary'', and change ''tribe'' to ''the tribal governing body.''

Response: We changed § 44.104(c) to read as follows:

§ 44.104 How Can a Grant Be Terminated?

A grant can be terminated only by one of the following methods:

(a) Retrocession;

(b) Revocation of eligibility by the Secretary; or

(c) Reassumption by the Secretary.

Comment: Revise duplicative portions of § 44.106 and revise to complete statement of requirements of 25 U.S.C. 2505(c).

Response: No change is necessary because 25 U.S.C. 2001 covers this issue.

Comment: In § 44.106 add a new section to add the conditions for corrective action for a grant school that fails to become accredited by January 8, 2005.

Response: No change is necessary because 25 U.S.C. 2001 covers this issue.

Comment: In §§ 44.106 and 44.107 include guidance for the Bureau and tribes for dealing with problems grant schools have had regarding eligibility.

Response: The comment suggests discussions that are not relevant to this rule. No change was necessary.

Comment: Revise the question in § 44.107 to read: ''Under what circumstances may the Secretary reassume a program?''

Response: The change was made for clarity.

Comment: Revise the answer in § 44.107 to read: ''The Secretary may only reassume a program in compliance with 25 U.S.C. 450m and 25 CFR part 900, subpart P. The tribe or school board shall have a right to appeal the reassumption pursuant to 25 CFR part 900, subpart L.''

Response: The answer was revised as suggested for clarity.

Comment: In § 44.108 the citation to the Prompt Payment Act needs legal review.

Response: No change was made. The comment is based on a misunderstanding of this section.

Comment: Revise § 44.108 to include funding available under continuing resolutions.

Response: No change was made. The comment is not relevant to the rule.

Comment: Revise §§ 44.108 and 47.3 for consistency on date for notification of funding.

Response: This cannot be done because the Act includes two different dates.

Comment: Revise § 44.109 to include that the grantee should have the right to appeal the assertion that an overpayment occurred and appeal the amount of overpayment claimed.

Response: Section 44.109 was revised to delete that the grantee must return the overpayment within 30 days of notification of an overpayment. The grant recipient has 30 days after the final determination that an overpayment occurred to return the amount of the overpayment.

Comment: In § 44.109 clarify whether it is procedurally possible for the Bureau to receive the overpayments to grant schools and redistribute them.

Response: No change was made. The comment is based on a misunderstanding of the rule.

Comment: In § 44.110(a) add a new ''(6)'' to read: ''Subpart L: Appeals.''

Response: This change was not made because it was not needed. In (b)(5) ''our'' was changed to ''the Secretary's'' for clarity.

VIII. Comments on Part 47—Uniform Direct Funding and Support for Bureau-Funded Schools

25 U.S.C. 2010 requires the Secretary to establish by regulation a system for the direct funding and support of all Bureau-funded schools that allots funds under 25 U.S.C. 2007. The existing rule in 25 CFR 39.50 adequately covered this issue and it was edited for plain language with no substantive changes for the proposed rule. There are no substantive changes to the final rule.

General Comments: Some commenters agreed with the proposed rules at part 47. One commenter questioned the allocation percentage mentioned in the Preamble to the proposed part 47.

Comment: Standardize use of terms ''local financial plan'' and ''local educational financial plan'' throughout part 47 by using ''local financial plan'' as in 25 U.S.C. 2010(b).

Response: We changed ''local financial plans'' to ''local educational financial plans'' in part 47 for clarity.

Comment: Delete part 47 as unnecessary because part 47 ignores grant schools, referring only to Bureau-operated and contract schools.

Response: We did not delete part 47 because part 47 is necessary to describe uniform direct funding and support for Bureau-funded schools. We changed the title of this part to add ''for Bureau-funded Schools.''

Comment: Change ''schools'' in part 47 to ''Bureau-operated schools'' because Bureau-operated schools are the only schools required to prepare local financial plans under the relevant statute, 25 U.S.C. 2010(b).

Response: We changed the title of part 47 to ''Uniform Direct Funding and Support for Bureau-Operated Schools'' and changed all references to schools in part 47 to ''Bureau-operated schools'' for clarity. We deleted the definition of ''school'' in the definitions in § 47.2.

Comment: Change the October 1 date in § 47.12 because 25 U.S.C. 2010(a)(2)(A)(i) states that funds shall become available July 1 of the fiscal year for which funds are appropriated.

Response: We deleted in its entirety § 47.12 on how funds are obligated because it is unnecessary. 25 U.S.C. 2010(a)(2)(A)(i), the Indian Affairs Manual, and 25 CFR part 900 cover the issue.

Comment: Change ''school boards'' to ''Bureau-operated school boards'' in the definition of ''Consultation'' in part 47 because Bureau-operated school boards are the only school boards required to prepare local financial plans.

Response: We made the suggested change to add ''Bureau-operated'' before ''school boards.''

Comment: Add a definition of ''school board'' to refer only to ''Bureau-operated school board'' because only Bureau-operated school boards are the only schools required to prepare local financial plans.

Response: We did not add a definition of ''school board'' because we changed references to ''school board'' to ''Bureau-operated school board'' for clarity.

Comment: Make dates consistent in § 47.3 and § 44.108 on notification of funding.

Response: We made no change because there is no inconsistency.

Comment: Change ''all funds'' to ''80 per cent of the funds'' in § 47.4 to comply with 25 U.S.C. and change the reference to which fiscal year funding is available from ''that fiscal year that begins on the following October 1st'' to, ''for the fiscal year that began on the preceding October 1'' because as written it implies that OIEP will distribute funds before they are appropriated.

Response: We made the suggested change.

Comment: Change the question in § 47.6 to refer to ''records of local financial plans.''

Response: We did not make the suggested change because it was not necessary for clarity.

Comment: Strike the reference to ''contract schools'' because contract schools are not required to prepare local educational financial plans.

Response: We deleted the reference to ''contract schools.'' We also changed the requirement for certification from the ''Agency Superintendent of Education'' to ''Education Line Officer'' to reflect the current designation for that position.

IX. 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 this 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 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 Act, 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, Bureau 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.

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 tribes on a government-to-government basis. The consultations have been open and candid to allow the affected tribes to fully evaluate the potential effect of the rule on trust resources.

(2) We have fully considered tribal views.

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

Paperwork Reduction Act

This rulemaking requires information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is required. Accordingly, the Department prepared submissions on these collections for review and approval by OMB. Having reviewed the Department's submissions, along with any comments that were submitted by the reviewing public, OMB has approved the information collection requirements contained in this rulemaking and has assigned the OMB control number 1076–0163. In addition to this number, the information collections in part 39 are also covered by OMB control numbers 1076–0134 and 1076–0122.

The information collected will be used to enable the Bureau to better administer Bureau-funded schools subject to this rulemaking. In all instances, the Department has striven to lessen the burden on the public and ask for only information essential to administering the programs affected and to carrying out the Department's fiduciary responsibility to federally recognized tribes. The public may make additional comments on the accuracy of our burden estimates (which are explained in detail in the preamble to the proposed rule published on February 25, 2004, at 69 FR 8752) and any suggestions for reducing this burden to the OMB Interior Desk Officer, Docket Number 1076–AE49, Office of Information and Regulatory Affairs, 202/395–6566 (facsimile); e-mail: *oira_docket@omb.eop.gov.*

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.

List of Subjects

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

Elementary and secondary education programs, Government programs—education, Grant programs—Indians, Indians—education, Schools.

25 CFR Part 42

Elementary and secondary education programs, Indians—education, Schools, Students.

Dated: April 20, 2005.

Michael D. Olsen,

Acting Principal Deputy Assistant Secretary—Indian Affairs.

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

■ 1. New part 30 is added to subchapter E 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 Act require the Secretary of the 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 AYP?

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 the Secretary's definition?

Technical Assistance

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?

Approval of Alternative Definition

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

Subpart B—Assessing Adequate Yearly Progress

30.114 Which students must be assessed?
30.115 Which students' performance data must be included for purposes of AYP?
30.116 If a school fails to achieve its annual measurable objectives, what other methods may it use to determine whether it made AYP?

Subpart C—Failure To Make Adequate Yearly Progress

30.117 What happens if a Bureau-funded school fails to make AYP?
30.118 May a Bureau-funded school present evidence of errors in identification before it is identified for school improvement, corrective action, or restructuring?
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30.120 Are Bureau-funded 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 it 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 is required for the Bureau to meet its reporting responsibilities?
30.150 Information Collection.

Authority: Public Law 107–110, 115 Stat. 1425.

§ 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?

Act means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and amends the Education Amendments of 1978.

Bureau means the Bureau of Indian Affairs in the Department of the Interior.

Department means the Department of the Interior.

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.

Secretaries means the Secretary of the Interior and the Secretary of Education.

Subpart A—Defining Adequate Yearly Progress

§ 30.102 Does the Act require the Secretary of the Interior to develop a definition of AYP for Bureau-funded schools?

Yes, the Act requires the Secretary to develop a definition of AYP through negotiated rulemaking. In developing the Secretary's definition of AYP, the No Child Left Behind Negotiated Rulemaking Committee (Committee) considered a variety of options. In choosing the definition in § 30.104, 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 definition 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 AYP?

The Secretary defines AYP as follows. The definition meets the requirements in 20 U.S.C. 6311(b).

(a) Effective in the 2005–2006 school year, the academic content and student achievement standards, assessments, and the definition of AYP are those of the State where the school is located, unless an alternative definition of AYP is proposed by the tribal governing body or school board and approved by the Secretary.

(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, academic content and student achievement standards, and definition of AYP.

(3) The use of the State's definition of AYP does not diminish or alter the Federal Government's trust 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 May 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 academic content and achievement standards, assessments, and AYP. However, unless an alternative definition is approved under § 30.113, the school must use the Secretary's definition of academic content and achievement standards, assessments, and AYP.

§ 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 meet the requirements of 20 U.S.C. 6311(b) and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and the students served.

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

(a) An alternative definition of AYP must meet the requirements of 20 U.S.C. 6311(b)(2) of the Act and 34 CFR 200.13–200.20, taking into account the unique circumstances and needs of the school or schools and the students served.

(b) In accordance with 20 U.S.C. 6311(b) of the Act and 34 CFR 200.13–200.20, an 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 and reading or language arts;

(5) Measure progress separately for reading or language arts and for mathematics;

(6) Unless disaggregation of data cannot yield statistically reliable information or reveals personally identifiable information, apply the same annual measurable objectives to each of the following:

(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;

(7) Establish a starting point;

(8) Create a timeline to ensure that all students are proficient by the 2013–2014 school year;

(9) Establish annual measurable objectives;

(10) Establish intermediate goals;

(11) Include at least one other academic indicator which, for any school with a 12th grade, must be graduation rate; and

(12) Ensure that at least 95 percent of the students enrolled in each group under § 30.107(b)(6) are assessed.

(c) If a Bureau-funded school's alternative definition of AYP does not use a State's academic content and student achievement standards and academic assessments, the school must include with its alternative definition the academic standards and assessment it proposes to use. These standards and assessments must meet the requirements in 20 U.S.C. 6311(b) and 34 CFR 200.1–200.9.

§ 30.108 May an alternative definition of AYP use parts of the Secretary's definition?

Yes, a tribal governing body or school board may take part of the Secretary's definition and propose to waive the remainder. The proposed alternative definition of AYP must, however, include both the parts of the Secretary's AYP definition the tribal governing body or school board is adopting 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 20 U.S.C. 7301.

§ 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, the tribal governing body or school board should request technical assistance before formally notifying the Secretary of its intention to waive the Secretary's definition of AYP.

Approval of Alternative 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 60 days of receiving a proposed alternative definition of AYP, OIEP will notify the tribal governing body or the school board of:

(1) Whether the proposed alternative definition is complete; and

(2) If the definition is complete, an estimated timetable for the final decision.

(c) If the proposed alternative definition is incomplete, OIEP will provide 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) The Secretaries will review the proposed alternative definition of AYP to determine whether it is consistent with the requirements of 20 U.S.C. 6311(b). This review must take into account the unique circumstances and needs of the schools and students.

(e) The Secretaries shall approve the alternative definition of AYP if it is consistent with the requirements of 20 U.S.C. 6311(b), taking into consideration the unique circumstances and needs of the school or schools and the students served.

(f) If the Secretaries approve the alternative definition of AYP:

(1) The Secretary 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.

(g) The Secretaries will disapprove the alternative definition of AYP if it is not consistent with the requirements of 20 U.S.C. 6311(b). If the alternative definition is disapproved, the tribal governing body or school board will be notified of the following:

(1) That the definition is disapproved; and

(2) The reasons why the proposed alternative definition does not meet the requirements of 20 U.S.C. 6311(b).

(h) If the Secretaries deny a proposed definition under paragraph (g) of this section, they 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 at least once in grades ten through twelve 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 assessed pursuant to § 30.114 must be included for purposes of AYP if the student is enrolled in a Bureau-funded school for a full academic year as defined by the Secretary or by an approved alternative definition of AYP.

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

A school makes AYP if each group of students identified in § 30.107(b)(6) meets or exceeds the annual measurable objectives and participation rate identified in §§ 30.107(b)(9) and 30.107(b)(12) respectively, and the school meets the other academic indicators identified in § 30.107(b)(11). If a school fails to achieve its annual measurable objectives for any group identified in § 30.107(b)(6), 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 for each group referenced under § 30.107(b)(6) that does not achieve the school's annual measurable objectives:

(1) In each group that does not achieve the school's annual measurable objectives, the percentage of students who were below the ''proficient'' level of academic achievement decreased by at least 10 percent from the preceding school year; and

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

(3) Not less than 95 percent of the students in that group participated in the assessment.

(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?

Number of yrs of failing to make AYP in same academic subject	Status	Action required by entity operating school for the following school year
1st year of failing AYP	No status change	Analyze AYP data and consider consultation with outside experts.
2nd year of failing AYP	School improvement, year one	Develop a plan or revise an existing plan for school improvement in consultation with parents, school staff and outside experts.
3rd 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 year of failing AYP	Corrective Action	Implement at least one of the six corrective actions steps found in 20 U.S.C. 6316(b)(7)(C)(iv).
5th year of failing AYP	Planning to Restructure	Prepare a restructuring plan and make arrangements to implement the plan.
6th 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 year (and beyond) of failing AYP.	Restructuring	Continue implementation of the restructuring plan until AYP is met for two consecutive years.

§ 30.118 May a Bureau-funded school present evidence of errors in identification 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 on which the bureau would identify a school for improvement, and present evidence as set out in 20 U.S.C. 6316(b)(2).

§ 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.

(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 offering school choice and supplemental educational services when identified for school improvement, corrective action, and restructuring?

Yes, Bureau-funded schools are exempt from offering public school choice and supplemental educational 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' responsibilities under 20 U.S.C. 6316(b). 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 under title I, part A of the Act, for any school below the level for the preceding year. To the extent that reserving funds under this section would reduce the title I, part A dollar amount of any school

below the amount of title I, part A dollars the school received the previous year, the Secretary is authorized to reduce the title I, part A allocations of those schools receiving an increase in the title I, part A funds over the previous year to create the 4 percent reserve. This section does not authorize a school to receive title I, part A dollars it is not otherwise eligible to receive.

(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 20 U.S.C. 6316(b)(4) and 20 U.S.C. 6316(g)(3) .

§ 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 Bureau apply for funds that are available to help schools that fail to meet AYP?

Yes, 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 is required for the Bureau to meet its 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 20 U.S.C. 6316(g)(5).

§ 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 1076–0163.

■ 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 definitions apply to the terms in this part?
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: Public Law 107–110, 115 Stat. 1425.

§ 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 definitions apply to the terms in this part?

Act means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and the amended Education Amendments of 1978.

Bureau means the Bureau of Indian Affairs in the Department of the Interior.

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 1076–0163.

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 ISEP-eligible students, residing within the tribe's jurisdiction, to receive transportation funding to attend schools outside the geographic attendance area in which the student lives; and

(c) Authorize tribal member students who are ISEP-eligible and are not residing within the tribe's jurisdiction to receive transportation funding to attend schools outside the student's geographic attendance area.

§ 37.112 Must each school have a geographic attendance boundary?

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

PART 39—THE INDIAN SCHOOL EQUALIZATION PROGRAM

■ 3. The authority citation for part 39 is revised to read as follows:

Authority: 25 U.S.C. 13, 2008; Public Law 107–110, 115 Stat. 1425.

■ 4. In part 39, subparts A through H are revised to read as follows:

Subpart A—General

Sec.
39.1 What is the purpose of this part?≤
39.2 What definitions apply to terms 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 academic 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 disabilities?
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 student and/or school 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 What characteristics may qualify a student as gifted and talented for purposes of supplemental funding?
39.115 How are eligible gifted and talented 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 gifted and talented 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?
39.145 Can a school receive both a small school adjustment and a small high school adjustment?
39.146 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 When does OIEP calculate a school's allotment?
39.204 How does OIEP calculate ADM?
39.205 How does OIEP calculate a school's total WSUs for the school year?
39.206 How does OIEP calculate the value of one WSU?
39.207 How does OIEP determine a school's funding for the school year?
39.208 How are ISEP funds distributed?
39.209 When may a school count a student for membership purposes?
39.210 When must a school drop a student from its membership?
39.211 What other categories of students can a school count for membership purposes?
39.212 Can a student be counted as enrolled in more than one school?
39.213 Will the Bureau fund children being home schooled?
39.214 What is the minimum number of instructional hours required in order to be considered a full-time educational program?
39.215 Can a school receive funding for any part-time students?

Residential Programs

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

Phase-in Period

39.230 How will the provisions of this subpart be phased in?

Subpart D—Accountability

39.401 What is the purpose of this subpart?
39.402 What definitions apply to terms used in this subpart?
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?
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Subpart A—General

§ 39.1 What is the purpose of this part?

This part provides for the uniform direct funding of Bureau-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 definitions apply to terms in this part?

Act means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and the amended Education Amendments of 1978.

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.

At no cost means provided without charge, but does not preclude incidental fees normally charged to non-disabled students or their parents as a part of the regular education program.

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.

Basic program means the instructional program provided to all students at any age level exclusive of any supplemental programs that 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.

Bureau means the Bureau of Indian Affairs in the Department of the Interior.

Bureau-funded school means

(1) Bureau school;

(2) A contract or grant school; or

(3) A school for which assistance is provided under the Tribally Controlled Schools Act of 1988.

Bureau school means a Bureau-operated elementary or secondary day or boarding school or a Bureau-operated dormitory for students attending a school other than a Bureau school.

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

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.

Limited English Proficient (LEP) means a child from a language background other than English who needs language assistance in his/her 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 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.

Physical education means the development of physical and motor fitness, fundamental motor skills and patterns, and skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports). The term includes special physical education, adapted physical education, movement education, and motor development.

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 or another Bureau-funded school.

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 or Bureau-funded school; 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.

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

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

School bus means a passenger vehicle that is:

(1) Used to transport day students to and/or from home and the school; and

(2) Operated by an operator in the employ of, or under contract to, a Bureau-funded school, who is qualified to operate such a vehicle under Tribal, State or Federal regulations governing the transportation of students.

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.

Special education means:

(1) Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including:

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes each of the following, if it meets the requirements of paragraph (1) of this definition:

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(1) Travel training; and

(2) Vocational education.

Specially designed instruction means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery or instruction:

(1) To address the unique needs of the child that result from the child's disability; and

(2) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children

Three-year average means:

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

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

Travel training means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to:

(1) Develop an awareness of the environment in which they live; and

(2) Learn the skills necessary to move efficiently and safely from place to place within that environment (*e.g.,* in school, in the home, at work, and in the community).

Tribally operated 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 25 U.S.C. 450 *et seq.,* or under the Tribally Controlled Schools Act of 1988.

Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

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 contains in §§ 39.410 and 39.502 collections of information subject to the PRA. These collections have been approved by OMB under control number 1076–0163.

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 academic base funding?

Academic base funding is the ADM times the weighted student unit.

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

To determine base funding, schools must use the factors shown in the following table. The school must apply the appropriate factor to each student for funding purposes.

Grade level	Base academic funding factor	Base residential funding factor
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 disabilities?

(a) Each school must provide for students with disabilities 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 needs of students with disabilities under the National Criteria for Home-Living Situations.

(b) A school may spend all or part of the 15 percent academic base funding reserved under paragraph (a)(1) of this section on school-wide programs to benefit all students (including those without disabilities) only if the school can document that it has met all needs of students with disabilities with such funds, and after having done so, there are unspent funds remaining from such funds.

§ 39.105 Are additional funds available for special education?

(a) Schools may supplement the 15 percent base academic funding reserved under § 39.104 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 § 39.104(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 staff 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 student and/or school costs?

Yes, schools are allotted supplemental funds for special student and/or school costs. ISEF provides additional funds to schools through add-on weights (called special cost factors). ISEF adds special cost factors as shown in the following table.

Cost Factor	For more information see
Gifted and talented students.	§§ 39.110 through 39.121
Students with language development needs.	§§ 39.130 through 39.137
Small school size	§§ 39.140 through 39.156
Geographic isolation of the school.	§ 39.160

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 What characteristics may qualify a student as gifted and talented for purposes of supplemental funding?

To be funded as gifted and talented under this part, a student must be identified as gifted and talented 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 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 gifted and talented students identified and nominated?

(a) Screening can be completed annually to identify potentially eligible students. A student may be nominated for gifted and talented designation using the criteria in § 39.114 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) The student 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 student'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 reevaluated at least every 3 years through the 10th grade to verify eligibility for funding.

(b) If a school identifies a student as gifted and talented based on § 39.114 (d) or (e), 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 20 U.S.C. 6311(b)(1).

§ 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 Indian or Native languages, the factor to support the language development program will be no more than 0.25 WSU.

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.

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

§ 39.145 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
1–50	NA	12.5	NA	12.5
1–50	1–50	12.5	6.25	18.75
51–99	1–50	[2] 12.5–0.5	6.25	18.75–6.75
51–99	51–99	[1] 12.5–0.5	[2] 6.25–0.25	18.75–0.7
99	1–50	0.5	12.5	12.5
99	51–99	0.5	[2] 12.5–0.5	12.5–0.5

[1] The amount of the adjustment is within this range. The exact figure depends upon the results obtained using the formula in § 39.141.
[2] The amount of the adjustment is within this range. The exact figure depends upon the results obtained using the formula in § 39.144.

§ 39.146 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 current year of operation; and

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

§ 39.203 When does OIEP calculate a school's allotment?

OIEP calculates a school's allotment no later than July 1. Schools must submit final ADM enrollment figures no later than June 15.

§ 39.204 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.

§ 39.205 How does OIEP calculate a school's total WSUs for the school year?

(a) OIEP will add the weights obtained from the calculations in paragraphs (a)(1), (a)(2), and (a)(3) of this section to obtain the total weighted student units (WSUs) for each school.

(1) Each year's ADM is multiplied by the applicable weighted student unit for each grade level;

(2) Calculate any supplemental WSUs generated by the students; and

(3) Calculate any supplemental WSUs generated by the schools.

(b) The total WSU for the school year is the sum of paragraphs (a)(1), (a)(2), and (a)(3) of this section.

§ 39.206 How does OIEP calculate the value of one WSU?

(a) 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.

(b) To calculate the average WSU for a 3-year period:

(1) *Step 1.* Add together each year's total WSU (calculated under paragraph (b) of this section); and

(2) *Step 2.* Divide the sum obtained in step 1 by 3.

§ 39.207 How does OIEP determine a school's funding for the school year?

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

(a) *Step 1.* Multiply the appropriate base academic and/or residential weight from § 39.103 by the number of students in each grade level category.

(b) *Step 2.* Multiply the number of students eligible for supplemental program funding under § 39.107 by the weights for the program.

(c) *Step 3.* Calculate the school-based supplemental weights under § 639.107.

(d) *Step 4.* Add together the sums obtained in steps 1 through 3 to obtain each school's total WSU.

(e) *Step 5.* Add together the total WSUs for all Bureau-funded schools.

(f) *Step 6.* Calculate the value of a WSU by dividing the current school year's funds by the average total WSUs as calculated under step 5 for the previous 3 years.

(g) *Step 7.* Multiply each school's WSU total by the base value of one WSU to determine funding for that school.

§ 39.208 How are ISEP funds distributed?

(a) On July 1, schools will receive 80 percent of their funds as determined in § 39.207.

(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.

§ 39.209 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 and shall be counted for ADM purposes. 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.

§ 39.210 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.

§ 39.211 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 documentations 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.	The student is both: (1) Concurrently enrolled in, and receiving credits for both the school's courses and college courses; and (2) 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) Taking the courses at the school site under a teacher's supervision.

§ 39.212 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 39.209.

§ 39.213 Will the Bureau fund children being home schooled?

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

§ 39.214 What is 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

§ 39.215 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

§ 39.216 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' residential WSUs.

§ 39.217 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 was:

(a) In residence at least one night during the first full week of October;

(b) In residence at least one night during the week preceding the first full week in October;

(c) In residence at least one night during the week following the first full week in October; and

(d) Present for both the after school count and the midnight count at least one night during each week specified in this section.

§ 39.218 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 × 4/7.
(2) 5, 6 or 7 nights per week.	Total WSU × 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.

§ 39.219 What happens if a residential program does not maintain residency levels required by this subpart?

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.

§ 39.220 What reports must residential programs submit to comply with this subpart?

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.

§ 39.221 What is a full school month?

A full school month is each 30-day period following the first day that residential services are provided to students based on the school residential calendar.

Phase-in Period

§ 39.230 How will the provisions of this subpart be phased in?

The calculation of the three-year rolling average of ADM for each school and for the entire Bureau-funded school system will be phased-in as shown in the following table.

Time period	How OIEP must calculate ADM
(a) First school year after May 31, 2005	Use the prior 3 years' count period to create membership for funding purposes
(b) Second school year after May 31, 2005	(1) The academic program will use the previous year's ADM school year and the 2 prior years' count periods; and (2) The residential program will use the previous year's count period and the 2 prior years' count weeks
(c) Each succeeding school year after May 31, 2005	Add one year of ADM or count period and drop one year of prior count weeks until both systems are operating on a 3-year rolling average using the previous 3 years' count after period or ADM, respectively.

Subpart D—Accountability

§ 39.401 What is the purpose of this subpart?

The purpose of this subpart is to ensure accountability of administrative officials by creating procedures that are systematic and can be verified by a random independent outside auditing procedures. These procedures will ensure the equitable distribution of funds among schools.

§ 39.402 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.

§ 39.403 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 required by subpart G of this part 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 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. 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 subpart?

(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 applicable appeals process in 25 CFR part 2 or 25 CFR part 900, subpart L.

Subpart E—Contingency Fund

§ 39.500 What emergency and contingency funds are available?

The Secretary:

(a) Must reserve 1 percent of funds from the allotment formula to meet emergencies and unforeseen contingencies affecting educational programs;

(b) Can carry over to the next fiscal year a maximum of 1 percent the current year funds; and

(c) May distribute all funds in excess of 1 percent equally to all schools or distribute excess as a part of ISEP.

§ 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 is not covered by an insurance policy in force at the time of the event;

(d) The Assistant Secretary determines that Bureau 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 schools carry over contingency funds 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, Bureau/OIEP shall send an annual report to Congress detailing how the Contingency Funds were used during the previous fiscal year.

(b) 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 in § 39.600.

§ 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, provided that such training is recommended, but is not required, for a tribal governing body that serves in the capacity of a school board.

§ 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—Student Transportation

§ 39.700 What is the purpose of this subpart?

(a) This subpart 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.

Transportation mileage count week means the last full week in September.

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 to receive chaperone expenses to transport residential students?

Yes. 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 transportation funds to transport special education students?

Yes. 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 expenses are currently not eligible for Student Transportation Funding?

(a) The following transportation expenses are currently not eligible for transportation funding, however the data will be collected under the provisions in this subpart:

(1) Fuel and maintenance runs;

(2) Transportation home for medical or other emergencies;

(3) Transportation from school 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 miles generated by non-ISEP eligible students eligible for transportation funding?

No. Only miles generated by ISEP-eligible students enrolled in and attending a school are eligible for student transportation funding.

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 transportation mileage count week, W = Miles driven on Wednesday of the transportation mileage count week, and Th = Miles driven on Thursday of the transportation mileage 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 used to transport students from their homes to the school. 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 sum of the mileage from paragraphs (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 39.722.

§ 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 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 sites of special services, and to extra-curricular activities;

(4) Medical trips;

(5) Maintenance and Service costs; and

(6) Driver costs;

(7) All expenses referred to in § 39.707.

§ 39.722 What transportation information must day schools, on-reservation boarding schools and peripheral dormitory schools report?

(a) By August 1 of each year, all schools and peripheral dorms that provide transportation must submit a report that covers the preceding year. This report must include:

(1) Fixed vehicle costs and other 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 sites of special services, and to extra-curricular activities;

(4) Mileage driven for student medical trips;

(5) Costs of vehicle maintenance and service cost, including cost of miles driven to obtain maintenance and service;

(6) Driver costs; and

(7) All expenses referred to in § 39.707.

(b) In addition, all day schools and on-reservation boarding schools must include in their report a Day Student Transportation Form signed and certified as complete and accurate by the School Principal and the appropriate ELO.

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 and State or Tribal 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 funds 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 minimum 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 per student.

(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 pro rate funds distributed to schools using the Indian School Equalization Formula.

§ 39.802 What is the student unit value in the formula?

The student unit value is the dollar 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 student enrolled in an instructional program. 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 grades 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. Department of Education-National Center of Education Statistics (NCES) for the last school year for which data is available.

(b) *Step 2.* Subtract the average specific Federal share per student (title I part A 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 per student as a percentage of the total revenue (current expenditures) of Bureau-funded schools from the last year data is available.

(d) *Step 4.* Subtract the day transportation revenue per student as a percentage of the total revenue (current revenue) Bureau-funded schools for the last school year for which data is available.

(e) *Step 5.* Add Johnson O'Malley funding. (See the table, in § 39.805)

§ 39.805 What was the student unit for instruction value (SUIV) for the school year 1999–2000?

The process described in § 39.804 is illustrated in the table below, using figures for the 1999–2000 school year:

Step 1	$8,030	ANACE.
Step 2	−1205	Average specific Federal share of total revenue for Bureau-funded schools.
Step 3	−993	Cost grant/technical services revenue as a percentage total revenue.
Step 4	−658	Transportation revenue as a percentage of the total revenue.
Step 5	85	Johnson O'Malley funding.
Total	$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 the Association of Boarding Schools.

(b) Applying 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 instructional value (SUIV) and the student unit residential value (SURV) will be adjusted annually to derive the current year Student Unit Value (SUV) by dividing the calculated SUIV and the SURV into two parts and adjusting each one as shown in this section.

(1) The first part consists of 85 percent of the calculated SUIV and the SURV. OIEP will adjust this portion using the personnel cost of living increase of the Department of Defense schools for each year.

(2) The second part consists of 15 percent the calculated SUIV and the SURV. 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 to 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 annually to reflect current year expenditures of federally financed schools' cost of day and residential programs.

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.

§ 39.809 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 §§ 39.410 and 39.502. These collections have been approved by OMB under control numbers 1076–0122, 1076–0134, and 1076–0163.

■ 5. 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 When does due process require a formal disciplinary hearing?
42.7 What does due process in a formal disciplinary proceeding include?
42.8 What are a student's due process rights in a formal disciplinary proceeding?
42.9 What are victims' rights in formal disciplinary proceedings?
42.10 How must the school communicate individual student rights to students, parents or guardians, and staff?
42.11 Information collection.

Authority: 5 U.S.C. 301, Pub. L. 107–110, 115 Stat. 1425.

§ 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.

§ 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 § 42.4 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 § 42.7 consistent with the due process rights described in § 42.7.

§ 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*; 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 Act 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 § 42.8.

§ 42.6 When does due process require a formal disciplinary hearing?

Unless local school policies and procedures provide for less, a formal disciplinary hearing is required before a suspension in excess of 10 days or expulsion.

§ 42.7 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 related to the alleged 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 Act 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.

§ 42.8 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 the record of the disciplinary action, including written findings of fact and conclusions;

(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.

§ 42.9 What are victims' rights in formal disciplinary proceedings?

In formal disciplinary proceedings, each school must consider victims' rights when appropriate.

(a) The victim's rights may include a right to:

(1) Participate in disciplinary proceedings 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, not his or her parents or guardians.

§ 42.10 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.

§ 42.11 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 in §§ 42.6, 42.7, and 42.9 contains collections of information subject to the PRA. These collections have been approved by OMB under control number 1076–0163.

■ 6. 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 can a grant be terminated?
44.105 How does a tribal governing body retrocede a program to the Secretary?
44.106 How can the Secretary revoke an eligibility determination?
44.107 Under what circumstances may 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?
44.112 Information Collection

Authority: Public Law 107–110, Title 10, Part D, the Native American Education Improvement Act, 115 Stat. 2007; Part B, Section 1138, Regional Meetings and Negotiated Rulemaking, 115 Stat. 2057.

§ 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 Tribally Controlled Schools Act;

(b) The regulations in this part; and

(c) 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 25 U.S.C. 450 *et seq.*;

(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;

(b) Revocation of eligibility by the Secretary; or

(c) Reassumption by the Secretary.

§ 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 notifies 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 25 U.S.C. 450 *et seq.*; and

(2) If the tribal 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; and

(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 25 U.S.C. 450 *et seq.* or operate the program directly.

§ 44.107 Under what circumstances may the Secretary reassume a program?

The Secretary may only reassume a program in compliance with 25 U.S.C. 450m and 25 CFR part 900, subpart P. The tribe or school board shall have a right to appeal the reassumption pursuant to 25 CFR part 900, subpart L.

§ 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 the final determination that overpayment occurred.

(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 25 CFR part 900 apply to grants under the Tribally Controlled Schools Act.

(1) Subpart F; Standards for Tribal or Tribal Organization Management Systems, § 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 the Secretary's 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.

§ 44.112 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 in § 44.105 contains collections of information subject to the PRA. These collections have been approved by OMB under control number 1076–0163.

■ 7. New Part 47 is added to subchapter E to read as follows:

PART 47—UNIFORM DIRECT FUNDING AND SUPPORT FOR BUREAU-OPERATED SCHOOLS

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 Bureau-operated 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 Information collection.

Authority: Pub. L. 107–110, 115 Stat. 1425.

§ 47.1 What is the purpose of this part?

This part contains the requirements for developing local educational financial plans that Bureau-operated schools need in order to receive direct funding from the Bureau of Indian Affairs under section 1127 of the Act.

§ 47.2 What definitions apply to terms in this part?

Act means the No Child Left Behind Act, Public Law 107–110, enacted January 8, 2002. The No Child Left Behind Act reauthorizes and amends the Elementary and Secondary Education Act (ESEA) and the amended Education Amendments of 1978.

Budget means that element in the local educational financial plan which shows all costs of the plan by discrete programs and sub-cost categories.

Bureau means the Bureau of Indian Affairs in the Department of the Interior.

Consultation means soliciting and recording the opinions of Bureau-operated 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.

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

§ 47.3 How does a Bureau-operated school find out how much funding it will receive?

The Office of Indian Education Programs (OIEP) will notify each Bureau-operated school in writing of the annual funding amount it will receive as follows:

(a) No later than July 1 OIEP will let the Bureau-operated school know the amount that is 80 percent of its funding; and

(b) No later than September 30 OIEP will let the Bureau-operated school know the amount of the remaining 20 percent.

§ 47.4 When does OIEP provide funding?

By July 1 of each year OIEP will make available for obligation 80 percent of the funds for the fiscal year that begins on the following October 1.

§ 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 Bureau-operated school spends funds in accordance with the local educational 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 educational financial plan;

(d) Recommend changes in budget amounts to carry out the local educational 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 Bureau-operated 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:

(1) Certification by the chairman of the school board that the plan has been ratified in an action of record by the board; and

(2) Certification by the Education Line Officer 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 educational financial plan:

(1) Within 15 days after receiving the tentative allotment, the school supervisor must consult with the local school board on the local educational financial plan.

(2) Within 30 days of receiving the tentative allotment, the school board must review the local educational 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 educational 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 Bureau-operated 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 Bureau-operated school may use funds that it receives under this part as matching funds for other Federal programs.

§ 47.12 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 contains 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 1076–1063.

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