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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

SOURCE: 70 FR 22205, Apr. 28, 2005, unless otherwise noted.

§ 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.

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§ 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

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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;

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- (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

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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:

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(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.

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§ 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:

$$\text{WSU adjustment} = ((100 - X)/200) * X$$

§ 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: $\text{WSU} = ((100 - X)/200) * X/2$	Yes.
50 or fewer students	12.5 base WSU	No.
51 to 99 students	determined using the following formula: $\text{WSU} = ((100 - X)/200) * X$	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

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ADM—entire school	ADM—high school component	Small school adjustment	Small high school adjustment	Total adjustment
99	1–50	0.5	12.5	12.5
99	51–99	0.5	² 12.5–0.5	12.5–0.5

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

SOURCE: 70 FR 22205, Apr. 28, 2005, unless otherwise noted.

§ 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.