

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 39**

RIN 1076-AE14

**Indian School Equalization Program****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule with request for comments.

**SUMMARY:** In order to comply with part B of the Individuals with Disabilities Education Act (IDEA), the Bureau of Indian Affairs is revising the sections of the Indian School Equalization Program (ISEP) Exceptional Child Program regulations concerning placement and funding. The changes will ensure that the funding mechanism under the Indian School Education program (ISEP) does not result in placements that violate the requirement of IDEA that special education students are placed in the least restrictive environment possible and that placements are based upon the needs of students, not the funding formula.

**DATES:** *Effective Date:* August 19, 2002.*Comment Date:* Comments must be received on or before September 12, 2002.

**ADDRESSES:** If you wish to comment on the interim rule, you may submit your comments to William Mehojah, Director, Office of Indian Education Programs, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW., Mail Stop 3512-MIB, Washington, DC 20240. *See*

**SUPPLEMENTARY INFORMATION** section for other methods to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Glenn F. Allison, Office of Indian Education Programs, Bureau of Indian Affairs, 202-208-3628 (This is not a toll free number).

**SUPPLEMENTARY INFORMATION:** The Department of Education—Office of Special Education Programs (Education) has found us to be out of compliance with certain requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* Specifically, Education determined that special education students are not being served in the least restrictive environment in part because of our funding formula under the Indian School Equalization Program (ISEP). This funding formula resulted in placements that violated the requirement that, to the maximum extent appropriate, children with disabilities be placed in the least

restrictive environment for educational services based upon their individual needs. In accordance with section 612(a)(5)(B) of IDEA, the Secretary of the Interior and the Office of Indian Education Programs assured the Department of Education that the current regulations regarding the funding mechanism would be revised as soon as possible to ensure that the regulations do not result in placements that violate the least restrictive environment requirements of IDEA.

**What Regulations Will Be Changed**

In order to comply with IDEA and maintain the Bureau of Indian Affairs's eligibility for IDEA funding, we are making the following changes:

1. Eliminating the definitions of high and moderate service levels in 25 CFR 39.11(i)(16) and 25 CFR 39.11(i)(17);
2. Changing the weighted student unit factors under 25 CFR 39.12 and eliminating the Exceptional Child Residential Program weights under 25 CFR 39.13; and
3. Eliminating the eligibility restrictions for the Exceptional Child Residential Programs and the Intensive Residential Guidance Program under 25 CFR 39.11(h)(1)(v).

We are also changing the weighted unit for the Gifted and Talented Program to conform with Public Law 100-297, which states that a gifted and talented student generates two weighted units. Because we changed the basic instructional program weight by grade level, the gifted and talented weighted unit had to be changed to conform with Public Law 100-297.

**Purpose of the Change**

The purpose of this change is to ensure that all children with disabilities as defined under IDEA, including those students living in dormitories, are provided a free and appropriate public education in the least restrictive environment under a neutral placement funding formula.

**Detailed Discussion of Change**

Education found that the definitions in our current regulations do not encourage neutral placement funding for children with disabilities as required by IDEA. As now written, the regulations inadvertently encourage schools to place the children outside the regular classroom in order to receive additional funding. (See § 39.11(i)(16), Full Time—High Service Level, and § 9.11(i)(17), Part Time—Moderate Service Level, and the weighted formula found in § 39.12.) As now written, the regulations also inadvertently encourage schools to place children in certain

disability categories outside the regular classroom.

In response to the Department of Education's findings, we certified on January 2, 2001, that we would correct the ISEP formula. We presented these changes in the regulations to the various Indian tribes at consultation proceedings in several locations. We then reviewed and considered comments generated by those sessions and made changes to the formula based upon those comments. The changes resulting from this process:

1. Change the funding mechanism under ISEP to comply with Part B of IDEA;
2. Ensure the Department of Education that the Bureau is in compliance with the law; and
3. Provide a free and appropriate public education to children with disabilities and place them in an educational setting which provides the least restrictive environment appropriate to the child's disability.

**No Child Left Behind Act of 2001—Negotiated Rulemaking Requirement**

This interim rule is not intended to supplant the requirements of negotiated rulemaking defined under Public Law 107-110, No Child Left Behind Act of 2001 (NCLBA). We recognize our responsibility to include the ISEP formula in the negotiated rulemaking process and will do so. Negotiating changes under NCLBA would delay compliance with IDEA for at least 2 years and would jeopardize funding under Part B of IDEA. Therefore, until we complete the negotiated rulemaking process, the changes we publish today will ensure that we do not forfeit Part B monies because we have failed to comply with our certification to the Department of Education. In addition, it is in the public interest that all eligible students attending Bureau funded schools receive a free and appropriate public education in the least restrictive environment. Any delay in implementing these changes, pending notice and comment, might place those children in jeopardy of not receiving those services.

**Determination To Make Rule Effective Immediately**

The Department has determined that the public notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), do not apply because of the good cause exception created under 5 U.S.C. (b)(3) which allows the agency to suspend the notice and comment period provisions. The Department further concludes that this rule should be effective

immediately because it relieves possible restrictions on the efficient and necessary distribution of IDEA Part B funds for all Bureau funded schools. It is in the public interest, and in the interest of the IDEA eligible students attending Bureau funded schools, not to delay implementation. However, BIA invites and will consider public comments submitted in response to this final rule. BIA will consider the comments and amend the rule as appropriate.

#### General Comments

Interested persons may submit written comments regarding the interim rule to William Mehojah, Director, Office of Indian Education Programs, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, NW, Mail Stop 3512—MIB, Washington, DC, 20240; or hand-deliver to Room 3512 at the above address. You may send comments by facsimile to 202—208—3312. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record. We will honor the request to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submission from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### Electronic Access and Filing

Electronic Access and Filing is not available at this time.

#### Regulatory Planning and Review (Executive Order 12866)

This interim rule is not a significant regulatory action and is not subject to review by the Office of Management and Budget under Executive Order 12866.

(a) 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. For example, in School Year 2001—2002, BIA received \$48,938,830 in Part B funds to distribute to Bureau funded

schools; in School Year 2002—2003, BIA will receive \$62,179,630 in Part B funds for distribution.

(b) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule applies only to Bureau-funded elementary and secondary schools enrolling ISEP eligible students. The Bureau of Indian Affairs has worked closely with the Department of Education in preparing this rule.

(c) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The program does not impose any additional rights to any other program.

(d) This rule does not raise novel legal or policy issues. The regulations have not changed since the passage of Title XI, the Education Amendments of 1978, Public Law 95—561, November 1978, establishing formula funding for Bureau-funded elementary and secondary schools.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to Indian tribes.

#### 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:

(a) Does not have an annual effect on the economy of \$100 million or more. The amount of money available for special education servicing eligible ISEP students is \$48,938,830 in School Year 2001—2002, and \$62,179,630 in School Year 2002—2003.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies, or geographic regions.

(c) 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 small amount of money and the student oriented uses of the funding are too limited to affect competition between U.S. firms and foreign-based firms.

#### Unfunded Mandates Reform Act

This interim rule imposes no unfunded mandates on any government or private entity of more than \$100 million per year. The rule does not have a significant or unique effect on state, local, or tribal governments or the private sector because of the limited

amount of special education funds available. A statement containing the information required by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) is not required.

#### Takings Implication Assessment (Executive Order 12630)

The Department has determined that this interim rule does not have "significant" takings implications. The interim rule does not pertain to "taking" of private property interests, nor does it impact private property.

#### Federalism (Executive Order 13132)

The Department has determined that this interim rule does not have significant federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of states.

#### Civil Justice Reform (Executive Order 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 requirement of sections 3(a) and 3(b)(2) of the Order.

#### National Environmental Policy Act

The Department has determined that this interim rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

#### Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 (d)), the Department of the Interior reviewed and sent an information collection request package to the Office of Management and Budget for its approval. The information collection, with OMB Control Number of 1076—0122, was approved for use until June 30, 2002. We are currently renewing OMB approval for this information collection. This change to the regulations will not affect the information collection. All information is collected annually from each eligible ISEP student. The annual responses are submitted in order to maintain or to obtain a benefit, specifically funding for instructional and/or residential programs covered by the Indian School Equalization Program. Please note that we will not sponsor nor conduct, and a person need not respond to, a request for information unless we have a valid OMB Control Number.

**Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)**

In keeping with this Executive Order and with the Bureau's Government-to-Government Consultation Policy, the rewriting of this interim rule was subject to a process involving the open discussion and joint deliberation of options with respect to potential issues or changes between the Bureau and all interested parties, in May 1998 and July 2000.

**Clarity of This Regulation**

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of the sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A "section" appears in bold type and is preceded by the symbol "§" and a numbered heading; for example, § 39.1 Purpose and scope). (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the interim rule? What else could we do to make the rule easier to understand? Send a copy of any comments that concern how we could make this interim rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240.

**List of Subjects in 25 CFR Part 39**

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

For the reasons given in the preamble, we are amending selected sections of part 39 of Title 25 of the Code of Federal Regulations as follows:

**PART 39—INDIAN SCHOOL EQUALIZATION PROGRAM**

1. The authority citation for part 39 continues to read as follows:

**Authority:** 25 U.S.C. 13; 25 U.S.C. 2008.

2. In § 39.11, remove paragraph (h)(2)(v) and remove paragraphs (i)(16) through (18).

3. Revise § 39.12 to read as follows:

**§ 39.12 Instructional funding.**

(a) Schools are to use the following sources to fund their special Education programs:

(1) 15 percent of the Indian Student Equalization Program (ISEP) funds generated by their ADM; and

(2) Funds under Part B of the Individuals with Disabilities Education Act (IDEA), if the 15 percent of ISEP funds is inadequate to fund the services needed by all eligible ISEP students with disabilities.

(b) All ISEP special education funds must be spent before the need for Part B of IDEA funds can be demonstrated. Part B funds are designed to provide for special education needs not funded by ISEP. By demonstrating that 15 percent of the ISEP base instructional funds were spent on special education, there is support for the need for Part B funds.

(c) To receive ISEP special education funding a student must be:

(1) At least 5 years old by December 31 to be counted as a kindergarten student;

(2) At least 6 years old by December 31 to be counted as a first grade student; and

(3) Under 22 years of age and not have received a high school diploma or its equivalent on the first day of full attendance during the ISEP student count week.

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

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

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

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

(e) Public Law 100-297 establishes a weighted unit for each ISEP-eligible full-time student that is gifted and talented. The weighted unit for gifted and talented is 2.0 weighted student units minus the basic instructional program weight by grade level. The weights for eligible gifted and talented students must be computed according to

the following revised weighted student unit factors:

Grade level	Add-on weight
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

(f) This paragraph applies to disabled students who are eligible for ISEP and were not counted during the ISEP Student Count Week. Schools must fund services for these students using the 15 percent of the ISEP funds based upon the school ADM for those students counted during the ISEP Student Count Week. See paragraph (a)(2) of this section for further guidance.

(g) To compute the funding for individual elementary and secondary children, schools must use the weighted student unit factors in paragraphs (g)(1) and (g)(2) of this section.

(1) The factors for basic programs are contained in the following table:

Basic programs	Base weights
Kindergarten .....	1.15
Grades 1 to 3 .....	1.38
Grades 4 to 6 .....	1.15
Grades 7 to 8 .....	1.38
Grades 9 to 12 .....	1.50

(2) For each student in the intense bilingual supplemental program, the school must add to the base weight an add-on weight of .20.

4. Revise § 39.13 to read as follows:

**§ 39.13 Residential funding.**

Basic funds for student residential purposes must be computed according to the following weighted student unit factors:

Basic programs	Add-on weights
Grades 1 to 3 .....	1.40
Grades 4 to 8 .....	1.25
Grades 9 to 12 .....	1.25
Intensive Residential Guidance ....	.50

Dated: August 5, 2002.

**Neal A. McCaleb,**

*Assistant Secretary—Indian Affairs.*

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