

**DEPARTMENT OF EDUCATION****34 CFR Part 222**

RIN 1810-AA94

**Impact Aid Programs**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary issues these proposed regulations to implement the Impact Aid Discretionary Construction Program, which is authorized under section 8007(b) of the Elementary and Secondary Education Act of 1965 (the Act), as amended by the No Child Left Behind Act of 2001. The program provides competitive grants for emergency repairs and modernization of school facilities to certain eligible school districts that receive Impact Aid formula funds. These proposed regulations incorporate statutory requirements and provide guidance for applying and qualifying for, as well as spending, the Federal funds provided under this program. These proposed regulations would apply to the grant competitions after fiscal year (FY) 2002.

**DATES:** We must receive your comments on these proposed regulations on or before November 21, 2003.

**ADDRESSES:** Address all comments about these proposed regulations to Catherine Schagh, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202-6244. If you prefer to send comments through the Internet, use the following address: *Impact.Aid@ed.gov*.

If you want to comment on the information requirements, you must send your comments to the Office of Management and Budget at the address listed in the Paperwork Reduction Act of 1980 section of this preamble. You may also send a copy of these comments to the Department representative named in this section.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Hall, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202-6244. Telephone: (202) 260-3858 or via the Internet, at: *Impact.Aid@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:****Invitation to Comment**

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations. The Secretary is particularly interested in comments on proposed §§ 222.176, 222.185, and 222.192.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations in Room 3C101, 400 Maryland Avenue, SW., Washington, DC, 20202-6244 between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**Background**

These proposed regulations implement the Impact Aid Discretionary Construction Program, which is authorized under section 8007(b) of the Act, as amended by the No Child Left Behind Act of 2001 (Pub. L. 107-110, enacted January 8, 2002). Final regulations for the FY 2002 grant competition were published in the **Federal Register** on August 16, 2002. These proposed regulations are similar to the final FY 2002 regulations, but we have included clarifying language based on our own experiences in implementing this program. These clarifications are made in sections

222.172, 222.173, and 222.176. These proposed regulations are otherwise substantially identical to the final rule for FY 2002.

The purpose of the Impact Aid Discretionary Construction Program is to assist certain eligible Impact Aid school districts in meeting the emergency or modernization needs of their school facilities.

The following is a summary of the proposed regulatory provisions, such as interpretations of statutory text, and standards and procedures for the operation of the program that the Secretary believes are necessary for implementing the statute. We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address regulatory provisions that are technical or otherwise minor in effect.

*Section 222.172 What Activities May an LEA Conduct With Funds Under This Program?*

The proposed regulations detail the types of construction activities that recipients of emergency and modernization grants may conduct with grant funds. The regulations clarify that allowable repairs and improvements must be for educational facilities, and this does not include improvements to school grounds or teacher housing. These proposed provisions also clarify that both emergency and modernization grants may be used for new construction only if a local educational agency (LEA) holds title to an existing facility and the proposed construction meets the standards detailed in the regulations for determining that improving a current facility is less cost-effective than replacing it.

*Section 222.173 What Activities Are Prohibited?*

Proposed section 222.173 specifies the various types of activities that may not be supported with grant funds under this program. The statute prohibits using grant funds for acquiring real property but allows these funds to be used for the construction of a new building in limited circumstances. Since a building is also typically considered to be "real property," the proposed provision clarifies, consistent with the authorizing statute, that grant funds cannot be used to acquire an interest in real property except when the Secretary determines under § 222.173 that construction of a new building will be permitted.

### *Section 222.176 What Definitions Apply to This Program?*

The proposed regulations define the term “emergency” to include health and safety conditions that present an immediate threat to the building’s occupants, as well as those conditions that will present health and safety hazards in the very near future, including accessibility for the disabled as part of a larger project. The proposed definition also provides examples of some of the types of health and safety conditions that the Secretary anticipates the emergency grants will address.

The proposed provisions clarify that “modernization” grants must be used to repair, renovate, alter, or extend facilities in order to support a contemporary educational program that is consistent with the laws, standards, or common practices in the LEA’s State. Since the Secretary anticipates that the need for these grants will exceed the amount of available funds, this provision clarifies that the Secretary does not intend for these grants to be used to fund facility modernization projects that exceed a State’s standards.

### *Sections 222.177–182 Eligibility*

The statutory eligibility criteria for emergency and modernization grants are complex and are further complicated by funding provisions that specify, in descending priority order, two emergency grant and two modernization grant eligibility categories. These proposed regulations provide details on each of the four eligibility categories so that applicants can determine under which funding priority their application will be considered. This will be particularly important for applicants to understand, because the statute mandates that the Secretary must first use available funds for applications in the first priority. After all eligible applications in the first priority have been funded, the Secretary considers applications in the second priority, followed by the third and fourth priorities in descending order.

### *Sections 222.183–187 How To Apply for a Grant*

The statute does not specify a complete application process; the proposed regulations provide for an application that requests objective and subjective information that will be used to rank applicants. An applicant will also be required to agree to certain assurances that are contained in the application package. In addition, the Secretary, before making final award decisions, will request detailed data on the funds that the highest-ranked

applicants have available to contribute to their proposed projects. The proposed regulations specify that the applications must be based on student and fiscal data from the preceding fiscal year, unless satisfactory fiscal data from that year are not available.

The regulations clarify that an applicant may submit more than one emergency repair application for the same facility, and may also submit both modernization and emergency repair applications for the same facility. Emergency repair grant applications must include an independent certification of the health and safety concerns, signed by a local building inspector, a licensed architect, or a licensed engineer.

### *Sections 222.188–194 How Grants Are Made*

The Department will review applications separately among the four funding priorities. Field readers will review the applications by category, based on the selection criteria and any other applicable factors that will be detailed in an application notice published in the **Federal Register**. Field readers will also evaluate and make recommendations to the Department as to whether emergency repair applications submitted under the first and second priorities represent valid health and safety considerations under the program definitions. Similarly, when field readers review modernization applications under the third and fourth priorities, they will evaluate and make recommendations to the Department as to whether those applications represent valid modernization considerations under the program definitions.

Prior to making final funding decisions and determining final grant awards, the Secretary may verify certain data with applicants’ States and will also assess available resources for all highly ranked grantees, limitations on the grant awards for certain grantee categories, and the availability of in-kind contributions. The Secretary considers as available to fund the project the closing capital fund balance identified in the LEA’s audited financial report for the prior year, not including \$100,000 or ten percent of the average annual capital expenditures of the applicant for the three previous fiscal years, whichever is greater.

As detailed in the “Eligibility” portion of the proposed regulations, the Secretary will generally fund all eligible applications in the first application priority group before funding applications in each of the next three groups. This will vary if the remaining

funds are insufficient to fund another project in the highest-priority group but adequate to fund a project in the next priority group. The next-ranked applicants in the higher-priority group will be offered the opportunity to accept funds for a portion of their projects before lower-priority projects are funded. If they accept the lower grant amount, they would forfeit the right to have their applications carried over and considered for funding in the next year’s competition. However, they could submit new applications for the next year for the remainder of their projects. If they do not accept the lower grant award, the application is carried over and considered in the next year’s competition.

### **Executive Order 12866**

#### *1. Potential Costs and Benefits*

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the proposed regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently. Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading Paperwork Reduction Act of 1995.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits would justify the costs. We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

#### *2. Clarity of the Regulations*

Executive Order 12866 and the Presidential memorandum on “Plain Language in Government Writing” require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them

into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 222.189 What funding priority does the Secretary give to applications?)

- Could the description of the proposed regulations in the "Supplementary Information" section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?

- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the **ADDRESSES** section of the preamble.

### Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small LEAs receiving Federal funds under this program. However, in the FY 2002 grant competition, fewer than 40 applications that were eligible to be evaluated by field readers were small entities. In addition, we do not believe that the regulations would have a significant economic impact on the limited number of small LEAs affected because the regulations would not impose excessive regulatory burdens or require unnecessary Federal supervision.

The proposed regulations would benefit both small and large entities in that they clarify confusing and complex statutory requirements. Also, since the statute requires Impact Aid school districts to apply if they wish to receive these discretionary funds, the Department would not be able to award these funds without the specified application information. The proposed application process will ensure that districts do not provide significant amounts of information that is already available to the Department from annual Impact Aid formula fund applications.

In addition, we anticipate that electronic applications will first be available for the FY 2003 competition, which will further minimize burden to all applicants. The software will populate certain application data fields for applicants that submitted an FY 2003 Impact Aid section 8003 application, and will have built-in checks for completion of all necessary items. This software will reduce the burden on applicants of organizing and entering data that were already submitted to the Impact Aid Program,

will help applicants determine whether their LEAs meet the program's eligibility requirements, and will reduce the number of errors in applications. Also, whenever possible, certain fiscal data are collected from State agencies, which are not defined as "small entities" in the Regulatory Flexibility Act.

The regulations would impose minimal paperwork burden requirements for all applicants and minimal requirements with which the grant recipients must comply. However, the Secretary specifically invites comments on the effects of the proposed regulations on small entities, and on whether there may be further opportunities to reduce any potential adverse impact or increase potential benefits resulting from these proposed regulations without impeding the effective and efficient administration of the Impact Aid Discretionary Construction Program.

Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible. These comments will be placed in the public comment file and considered in the preparation of the final regulations.

### Paperwork Reduction Act of 1995

Sections 222.183, 222.184, 222.185, and 222.186 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education submitted a copy of the information collection "Impact Aid Discretionary Construction Grant Program" to the Office of Management and Budget (OMB) for its review and approval. OMB granted provisional clearance on the information collection requirements associated with the FY 2002 grant application package. The Department nevertheless sought public comment on these information collection requirements for the FY 2003 application, but did not receive any comments.

The Department will use the information collected in the application to determine whether an applicant meets the basic eligibility requirements of section 8007(b) of the Act, to determine whether the applicant is requesting an emergency or modernization grant, and to determine which of the four priorities described in the statute applies to the application. In addition, information on the application will be used to evaluate applications within each of the four priorities. Among the criteria the Secretary is required to consider are the applicant's total assessed value of real property that may be taxed for school purposes, its

use of bonding capacity, and the nature and severity of its need for funds.

Since the statute requires applicants to apply for funds, the Department would not be able to award these funds without the application to collect the required information.

We collect information only once for each school for which the applicant seeks funds. We estimate the annual reporting and recordkeeping burden for this collection of information to average 5.25 hours for each respondent for 250 applicants, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. In addition, we estimate that 188 of these applications will include the preparation of an emergency certification form, requiring 0.75 hours for completion by an independent certifying official. Thus, we estimate the total annual reporting and recordkeeping burden for this collection to be 1,453.5 hours.

If you want to comment on the information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education. You may also send a copy of these comments to the Department representative named in the **FOR FURTHER INFORMATION** section of this preamble.

We consider your comments on this proposed collection of information in—

- Deciding whether the proposed collection is necessary for the proper performance of our functions, including whether the information will have practical use;

- Evaluating the accuracy of our estimate of the burden of the proposed collection, including the validity of our methodology and assumptions;

- Enhancing the quality, usefulness, and clarity of the information we collect; and

- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

Your comments will be considered for the FY 2003 competition. To ensure that OMB gives your comments full consideration, we ask that you send comments concerning the collection of information contained in these regulations between 30 and 60 days

after publication of this document in the **Federal Register**.

### Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

### Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/legislation/FedRegister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

You may also view this document in PDF at the following site: <http://www.ed.gov/programs/8007b/>.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.access.gpo.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number 84.041C Impact Aid Discretionary Construction Program)

### List of Subjects in 34 CFR Part 222

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

Dated: October 17, 2003.

**Ronald J. Tomalis,**

*Acting Assistant Secretary for Elementary and Secondary Education.*

For the reasons discussed in the preamble, the Secretary proposes to amend title 34 of the Code of Federal Regulations by revising subpart L of part 222 to read as follows:

## PART 222—IMPACT AID PROGRAMS

1. The authority citation for part 222 continues to read as follows:

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

2. Revise subpart L of part 222 to read as follows:

### Subpart L—Impact Aid Discretionary Construction Grant Program Under Section 8007(b) of the Act

#### General

Sec.

222.170 What is the purpose of the Impact Aid Discretionary Construction grant program (Section 8007(b) of the Act)?

222.171 In general, what LEAs may be eligible for Discretionary Construction grants?

222.172 What activities may an LEA conduct with funds received under this program?

222.173 What activities are prohibited?

222.174 What other prohibitions apply to these funds?

222.175 What regulations apply to recipients of funds under this program?

222.176 What definitions apply to this subpart?

#### Eligibility

222.177 What eligibility requirements must an LEA meet to apply for an emergency grant under the first priority?

222.178 What eligibility requirements must an LEA meet to apply for an emergency grant under the second priority?

222.179 Under what circumstances may an ineligible LEA apply on behalf of a school for an emergency grant under the second priority?

222.180 What eligibility requirements must an LEA meet to apply for a modernization grant under the third priority?

222.181 What eligibility requirements must an LEA meet to apply for a modernization grant under the fourth priority?

222.182 Under what circumstances may an ineligible LEA apply on behalf of a school for a modernization grant under the fourth priority?

#### How to Apply for a Grant

222.183 How does an LEA apply for a grant?

222.184 What information must an application contain?

222.185 What additional information must be included in an emergency grant application?

222.186 What additional information must be included in a modernization grant application?

222.187 Which year's data must an SEA or LEA provide?

#### How Grants Are Made

222.188 What priorities may the Secretary establish?

222.189 What funding priority does the Secretary give to applications?

222.190 How does the Secretary rank and select applicants?

222.191 What is the maximum award amount?

222.192 What local funds may be considered as available for this project?

222.193 What other limitations on grant amounts apply?

222.194 Are “in-kind” contributions permissible?

#### Conditions and Requirements Grantees Must Meet

222.195 How does the Secretary make funds available to grantees?

222.196 What additional construction and legal requirements apply?

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

#### General

### § 222.170 What is the purpose of the Impact Aid Discretionary Construction grant program (Section 8007(b) of the Act)?

The Impact Aid Discretionary Construction grant program provides competitive grants for emergency repairs and modernization of school facilities to certain eligible local educational agencies (LEAs) that receive formula Impact Aid funds.

(Authority: 20 U.S.C. 7707(b))

### § 222.171 In general, what LEAs may be eligible for Discretionary Construction grants?

(a) Applications for these grants are considered in four funding priority categories. The specific requirements for each priority are detailed in §§ 222.177 through 222.182.

(b)(1) Generally, to be eligible for an emergency construction grant, an LEA must—

(i) Enroll a high proportion (at least 40 percent) of federally connected children in average daily attendance (ADA) who reside on Indian lands or who reside on Federal property and have a parent on active duty in the U.S. uniformed services;

(ii) Have a school that enrolls a high proportion of one of these types of students;

(iii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act; or

(iv) Meet the specific numeric requirements regarding bonding capacity.

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of the emergency.

(c)(1) Generally, to be eligible for a modernization construction grant, an LEA must—

(i) Be eligible for Impact Aid funding under either section 8002 or 8003 of the Act;

(ii) Be eligible for funding for heavily impacted LEAs under section 8003(b)(2) of the Act;

(iii) Enroll a high proportion (at least 40 percent) of federally connected children in ADA who reside on Indian lands or who reside on Federal property and have a parent on active duty in the U.S. uniformed services;

(iv) Have a school that enrolls a high proportion of one of these types of students;

(v) Meet the specific numeric requirements regarding bonding capacity; or

(vi) Be eligible for funding under section 8002 of the Act (payments for Federal property).

(2) The Secretary must also consider such factors as an LEA's total assessed value of real property that may be taxed for school purposes, its availability and use of bonding capacity, and the nature and severity of its need for modernization funds.

(Authority: 20 U.S.C. 7707(b))

**§ 222.172 What activities may an LEA conduct with funds received under this program?**

(a) An LEA may use emergency grant funds received under this program only to repair, renovate, alter, and, in the limited circumstances described in paragraph (c) of this section replace a public elementary or secondary school facility used for free public education to ensure the health and safety of students and personnel, including providing accessibility for the disabled as part of a larger project.

(b) An LEA may use modernization grant funds received under this program only to renovate, alter, retrofit, extend, and, in the limited circumstances described in paragraph (c) of this section replace a public elementary or secondary school facility used for free public education to provide school facilities that support a contemporary educational program for the LEA's students at normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

(c)(1) An emergency or modernization grant under this program may be used for the construction of a new school facility but only if the Secretary determines—

(i) That the LEA holds title to the existing facility for which funding is requested; and

(ii) In consultation with the grantee, that partial or complete replacement of the facility would be less expensive or more cost-effective than improving the existing facility.

(2) When construction of new school facilities is permitted, emergency and

modernization funds may be used only for new school facilities that are used for free public education. These may include the—

(i) Construction of instructional, resource, food service, and general or administrative support areas, so long as they are a part of the instructional facility; and

(ii) Purchase of initial equipment, machinery, and initial utility connections.

(Authority: 20 U.S.C. 7707(b))

**§ 222.173 What activities are prohibited?**

The Secretary does not fund the following activities under a Discretionary Construction grant:

(a) Improvements to facilities for which the LEA does not have full title or other interest.

(b) Improvements to or repairs of school grounds, such as environmental remediation, traffic remediation, and landscaping, that do not directly involve instructional facilities.

(c) Repair, renovation, alteration, or construction for stadiums or other facilities that are primarily used for athletic contests, exhibitions, and other events for which admission is charged to the general public.

(d) Improvements to or repairs of teacher housing.

(e) Except in the limited circumstances as provided in § 222.172(c), when new construction is permissible, acquisition of any interest in real property.

(f) Maintenance costs associated with any of an LEA's school facilities.

(Authority: 20 U.S.C. 7707(b))

**§ 222.174 What other prohibitions apply to these funds?**

Grant funds under this program may not be used to supplant or replace other available non-Federal construction money. These grant funds may be used for emergency or modernization activities only to the extent that they supplement the amount of construction funds that would, in the absence of these grant funds, be available to a grantee from non-Federal funds for these purposes.

*Example of supplanting:* An LEA signs a contract for a \$300,000 roof replacement and plans to use its capital expenditure fund to pay for the renovation. Since the LEA already has non-Federal funds available for the roof project, it may not now use a grant from this program to pay for the project or replace its own funds in order to conserve its capital fund.

*Example of non-supplanting:* The LEA above that has the \$300,000 roof commitment has also received a

\$400,000 estimate for the replacement of its facility's heating, ventilation, and air conditioning (HVAC) system. The LEA has not made any commitments for the HVAC system because it has no remaining funds available to pay for that work. Since other funds are not available, it would not be supplanting if the LEA received an emergency grant under this program to pay for the HVAC system.

(Authority: 20 U.S.C. 7707(b))

**§ 222.175 What regulations apply to recipients of funds under this program?**

The following regulations apply to the Impact Aid Discretionary Construction program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 75 (Direct Grant Programs) except for 34 CFR through 75.617.

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(4) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(5) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(6) 34 CFR part 82 (New Restrictions on Lobbying).

(7) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in 34 CFR part 222.

(Authority: 20 U.S.C. 1221e-3)

**§ 222.176 What definitions apply to this subpart?**

(a) In addition to the terms referenced in 34 CFR § 222.2, the following definitions apply to this program:

*Bond limit* means the cap or limit that a State may impose on an LEA's capacity for bonded indebtedness. For applicants in States that place no limit on an LEA's capacity for bonded indebtedness, the Secretary shall consider the LEA's bond limit to be ten percent of its total assessed valuation.

*Construction* means (1) preparing drawings and specifications for school facilities; (2) repairing, renovating, or altering school facilities; (3) extending school facilities as described in § 222.172(b); (4) erecting or building school facilities, as described in § 222.172(c); and (5) inspections or supervision related to school facilities projects.

*Emergency* means a school facility condition that is so injurious or hazardous that it either poses an immediate threat to the health and safety of the facility's students and staff or can be reasonably expected to pose such a threat in the near future. These conditions can include deficiencies in the following building features: a roof; electrical wiring; a plumbing or sewage system; or heating, ventilation, or air conditioning; or the need to bring a school facility into compliance with fire and safety codes, or providing accessibility for the disabled as part of a larger project.

*Level of bonded indebtedness* means the amount of long-term debt issued by an LEA divided by the LEA's bonding capacity.

*Minimal capacity to issue bonds* means that the total assessed value of real property in an LEA that may be taxed for school purposes is at least \$25,000,000 but not more than \$50,000,000.

*Modernization* means the repair, renovation, alteration, or extension of a public elementary or secondary school facility in order to support a contemporary educational program for an LEA's students in normal capacity, and in accordance with the laws, standards, or common practices in the LEA's State.

*No practical capacity to issue bonds* means that the total assessed value of real property in an LEA that may be taxed for school purposes is less than \$25,000,000.

*School facility* means a building used to provide free public education, including instructional, resource, food service, and general or administrative support areas, so long as they are a part of the facility.

*Total assessed value per student* means the assessed valuation of real property per pupil (AVPP), unless otherwise defined by an LEA's State.

(Authority: 20 U.S.C. 7707(b))

(b) *Definitions in EDGAR.* The following terms used in this subpart are defined or referenced in 34 CFR 77.1:

Applicant  
Application  
Award  
Contract  
Department  
EDGAR  
Equipment  
Fiscal year  
Grant  
Grantee  
Project  
Public  
Real property  
Recipient

(Authority: 20 U.S.C. 7707(b) and 1221e-3)

## Eligibility

### § 222.177 What eligibility requirements must an LEA meet to apply for an emergency grant under the first priority?

An LEA is eligible to apply for an emergency grant under the first priority of section 8007(b) of the Act if it—

- (a) Is eligible to receive formula construction funds for the fiscal year under section 8007(a) of the Act;
- (b)(1) Has no practical capacity to issue bonds;
- (2) Has minimal capacity to issue bonds and has used at least seventy-five percent of its bond limit; or
- (3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and
- (c) Has a school facility emergency that the Secretary has determined poses a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

### § 222.178 What eligibility requirements must an LEA meet to apply for an emergency grant under the second priority?

Except as provided in § 222.179, an LEA is eligible to apply for an emergency grant under the second priority of section 8007(b) of the Act if it—

- (a) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act;
- (b)(1) Has federally connected children living on Indian lands equal to at least 40 percent of the total number of children in average daily attendance (ADA) in its schools; or
- (2) Has federally connected children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools;
- (c) Has used at least seventy-five percent of its bond limit;
- (d) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and
- (e) Has a school facility emergency that the Secretary has determined is a health or safety hazard to students and school personnel.

(Authority: 20 U.S.C. 7707(b))

### § 222.179 Under what circumstances may an ineligible LEA apply on behalf of a school for an emergency grant under the second priority?

An LEA that is eligible to receive section 8003(b) assistance for the fiscal year but that does not meet the other eligibility criteria described in § 222.178(a) or (b) may apply on behalf of a school located within its geographic boundaries for an emergency grant

under the second priority of section 8007(b) of the Act if—

- (a) The school—
  - (1) Has children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or
  - (2) Has children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;
- (b) The school has a school facility emergency that the Secretary has determined is a health or safety hazard to students and school personnel;
- (c) The LEA has used at least 75 percent of its bond limit; and
- (d) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average.

(Authority: 20 U.S.C. 7707(b))

### § 222.180 What eligibility requirements must an LEA meet to apply for a modernization grant under the third priority?

An LEA is eligible to apply for a modernization grant under the third priority of section 8007(b) of the Act if it—

- (a) Is eligible to receive funds for the fiscal year under section 8002 or 8003(b) of the Act;
- (b)(1) Has no practical capacity to issue bonds;
- (2) Has minimal capacity to issue bonds and has used at least 75 percent of its bond limit; or
- (3) Is eligible to receive funds for the fiscal year for heavily impacted districts under section 8003(b)(2) of the Act; and
- (c) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

### § 222.181 What eligibility requirements must an LEA meet to apply for a modernization grant under the fourth priority?

An LEA is eligible to apply for a modernization grant under the fourth priority of section 8007(b) of the Act if it—

- (a)(1) Is eligible to receive funds for the fiscal year under section 8003(b) of the Act; and
- (i) Has children living on Indian lands equal to at least 40 percent of the total number of children in ADA in its schools; or
- (ii) Has children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA in its schools; or

(2) Is eligible to receive assistance for the fiscal year under section 8002 of the Act;

(b) Has used at least 75 percent of its bond limit;

(c) Has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) Has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

**§ 222.182 Under what circumstances may an ineligible LEA apply on behalf of a school for a modernization grant under the fourth priority?**

An LEA that is eligible to receive a payment under Title VIII for the fiscal year but that does not meet the other eligibility criteria described in § 222.181 may apply on behalf of a school located within its geographic boundaries for a modernization grant under the fourth priority of section 8007(b) of the Act if—

(a) The school—

(1) Has children living on Indian lands equal to at least 40 percent of the total number of children in ADA; or

(2) Has children with a parent in the U.S. uniformed services equal to at least 40 percent of the total number of children in ADA;

(b) The LEA has used at least 75 percent of its bond limit;

(c) The LEA has an average per-student assessed value of real property available to be taxed for school purposes that is below its State average; and

(d) The school has facility needs resulting from the presence of the Federal Government, such as the enrollment of federally connected children, the presence of Federal property, or an increase in enrollment due to expanded Federal activities, housing privatization, or the acquisition of Federal property.

(Authority: 20 U.S.C. 7707(b))

**How To Apply for a Grant**

**§ 222.183 How does an LEA apply for a grant?**

(a) To apply for funds under this program, an LEA may submit more than one application in a fiscal year.

*Examples:* 1. An LEA wants to receive both an emergency and a modernization grant for one school that has a failing roof and that also needs significant classroom modernization. The LEA would submit an emergency repair grant application to address the roof issues and a separate modernization

application to request funds to renovate classroom space.

2. An LEA has five schools and seeks emergency grants to replace a roof and a boiler in one school and to replace windows in a second school. It should submit two applications—one for each of the two school facilities.

3. An LEA has one school that has several conditions that need to be corrected—a failing roof, aging windows that impair the efficiency of the heating system, and asbestos in floor tiles. The LEA may submit a single application for all of these conditions or separate emergency repair grant applications for each condition, if the LEA judges that they present varying degrees of urgency.

(b) An application must—

(1) Contain the information required in §§ 222.184 through 222.186, as applicable, and in any application notice that the Secretary may publish in the **Federal Register**; and

(2) Be timely filed in accordance with the provisions of the Secretary's application notice.

(Authority: 20 U.S.C. 7707(b))

**§ 222.184 What information must an application contain?**

An application for an emergency or modernization grant must contain the following information:

(a) The name of the school facility the LEA is proposing to repair, construct, or modernize.

(b)(1) For an applicant under section 8003(b) of the Act, the number of federally connected children described in section 8003(a)(1) enrolled in the school facility, as well as the total enrollment in the facility, for which the LEA is seeking a grant; or

(2) For an applicant under section 8002 of the Act, the total enrollment (based on the fall State count date) for the preceding year in the LEA and in the school facility for which the LEA is seeking a grant.

(c) An identification of the LEA's interest in, or authority over, the school facility involved, such as an ownership interest or a lease arrangement.

(d) The original construction date of the school facility that the LEA proposes to renovate or modernize.

(e) The dates of any major renovations of that school facility and the areas of the school covered by the renovations.

(f) The proportion of Federal acreage within the geographic boundaries of the LEA.

(g) Fiscal data including the LEA's—

(1) Maximum bonding capacity;

(2) Amount of bonded debt;

(3) Total assessed value of real property for school purposes;

(4) State average assessed value per pupil of real property that was taxed for school purposes;

(5) Local real property tax levy, in mills or dollars, that was used for capital expenditures; and

(6) Sources of funds available for the proposed project.

(h) A description of the need for funds and the proposed project for which a grant under this subpart would be used, including a cost estimate for the project.

(i) Applicable assurances and certifications identified in the approved grant application package.

(Authority: 20 U.S.C. 7707(b))

**§ 222.185 What additional information must be included in an emergency grant application?**

In addition to the information specified in § 222.184, an application for an emergency grant must contain the following:

(a) A description of the deficiency that poses a health or safety hazard to occupants of the facility.

(b) A description of how the deficiency adversely affects the occupants and how it will be repaired.

(c) A statement signed by an appropriate local official, as defined below, that the deficiency threatens the health and safety of occupants of the facility or prevents the use of the facility. An appropriate local official may include a local building inspector, a licensed architect, or a licensed structural engineer. An appropriate local official may not include a staff person of the applicant LEA.

(Authority: 20 U.S.C. 7707 (b))

**§ 222.186 What additional information must be included in a modernization grant application?**

In addition to the information specified in § 222.184, an application for a modernization grant must contain a description of—

(a) The need for modernization; and

(b) How the applicant will use funds received under this program to address the need referenced in paragraph a of this section.

(Authority: 20 U.S.C. 7707(b))

**§ 222.187 Which year's data must an SEA or LEA provide?**

(a) Except as provided in paragraph (b) of this section, the Secretary will determine eligibility under this Discretionary Program based on student and fiscal data for each LEA from the fiscal year preceding the fiscal year for which the applicant is applying for funds.

(b) If satisfactory fiscal data are not available from the preceding fiscal year, the Secretary will use data from the most recent fiscal year for which data

that are satisfactory to the Secretary are available.

(Authority: 20 U.S.C. 7707(b))

### How Grants Are Made

#### § 222.188 What priorities may the Secretary establish?

In any given year, the Secretary may assign extra weight for certain facilities systems or emergency and modernization conditions by identifying the systems or conditions and their assigned weights in a notice published in the **Federal Register**.

(Authority: 20 U.S.C. 7707(b))

#### § 222.189 What funding priority does the Secretary give to applications?

(a) Except as provided in paragraph (b) of this section, the Secretary gives funding priority to applications in the following order:

(1) First priority is given to applications described under § 222.177 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the emergency.

(2) After all eligible first-priority applications are funded, second priority is given to applications described under §§ 222.178 and 222.179 and, among those applicants for emergency grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the emergency.

(3) Third priority is given to applications described under § 222.180 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the need for modernization.

(4) Fourth priority is given to applications described under §§ 222.181 and 222.182 and, among those applicants for modernization grants, priority is given to applications based on a rank order of the application quality factors referenced in § 222.190, including the severity of the need for modernization.

(b)(1) The Secretary makes awards in each priority described above until the Secretary is unable to make an approvable award in that priority.

(2) If the Secretary is unable to fund a full project or a viable portion of a project, the Secretary may continue to fund down the list of high-ranking applicants within a priority.

(3) The Secretary applies any remaining funds to awards in the next priority.

(4) If an applicant does not receive an emergency or modernization grant in a fiscal year, the Secretary will, subject to the availability of funds and to the priority and award criteria, consider that application in the following year along with the next fiscal year's pool of applications.

*Example:* The first five applicants in priority one have been funded. Three hundred thousand dollars remain available. Three unfunded applications remain in that priority. Application #6 requires a minimum of \$500,000, application #7 requires \$400,000, and application #8 requires \$300,000 for a new roof and \$150,000 for related wall and ceiling repairs. Applicant #8 agrees to accept the remaining \$300,000 since the roof upgrade can be separated into a viable portion of applicant #8's total project. Applications #6 and #7 will be retained for consideration in the next fiscal year and will compete again with that fiscal year's pool of applicants. Applicant #8 will have to submit a new application in the next fiscal year if it wishes to be considered for the unfunded portion of the current year's application.

(Authority: 20 U.S.C. 7707(b))

#### § 222.190 How does the Secretary rank and select applicants?

(a) To the extent consistent with these regulations and section 8007(b) of the Act, the Secretary will follow grant selection procedures that are specified in 34 CFR 75.215 through 75.222. In general these procedures are based on the authorizing statute, the selection criteria, and any priorities or other applicable requirements that have been published in the **Federal Register**.

(b) In the event of ties in numeric ranking, the Secretary may consider as tie-breaking factors: The severity of the emergency or the need for modernization; for applicants under section 8003 of the Act, the numbers of federally connected children who will benefit from the project; or for applicants under section 8002 of the Act, the numbers of children who will benefit from the project; the AVPP compared to the LEA's State average; and available resources or non-Federal funds available for the grant project.

(Authority: 20 U.S.C. 7707(b))

#### § 222.191 What is the maximum award amount?

(a) Subject to any applicable contribution requirements as described in §§ 222.192 and 222.193, the procedures in §§ 75.231 through 75.236, and the provisions in paragraph (b) of this section, the Secretary may fund up to 100 percent of the allowable costs in an approved grantee's proposed project.

(b) An award amount may not exceed the difference between—

(1) The cost of the proposed project; and

(2) The amount the grantee has available or will have available for this purpose from other sources, including local, State, and other Federal funds.

(Authority: 20 U.S.C. 7707(b))

#### § 222.192 What local funds may be considered as available for this project?

To determine the amount of local funds that an LEA has available under § 222.191(b)(2) for a project under this program, the Secretary will consider as available all LEA funds that may be used for capital expenditures except \$100,000 or ten percent of the average annual capital expenditures of the applicant for the three previous fiscal years, whichever is greater.

(Authority: 20 U.S.C. 7707(b))

#### § 222.193 What other limitations on grant amounts apply?

(a) Except as provided in paragraph (b) of this section and § 222.191, the amount of funds provided under an emergency grant or a modernization grant awarded under this subsection to an eligible LEA is subject to the following limitations:

(1) The award amount may not be more than 50 percent of the total cost of an approved project.

(2) The total amount of grant funds may not exceed four million dollars during any four-year period.

*Example:* An LEA that is awarded \$4 million dollars in the first year may not receive any additional funds for the following three years.

(b) Emergency or modernization grants to LEAs with no practical capacity to issue bonds as defined in § 222.176 are not subject to the award limitations described in paragraph (a) of this section.

(Authority: 20 U.S.C. 7707(b))

#### § 222.194 Are "in-kind" contributions permissible?

(a) LEAs that are subject to the applicable matching requirement described in § 222.193(a) may use allowable third party in-kind contributions as defined below to meet the requirements.

(b) Third party in-kind contributions mean property or services that benefit this grant program and are contributed by non-Federal third parties without charge to the grantee or by a cost-type contractor under the grant agreement.

(c) The provisions of 34 CFR 80.24 govern the allowability and valuation of in-kind contributions, except that it is permissible for a third party to contribute real property to a grantee for

a project under this program, so long as no Federal funds are spent for the acquisition of real property.

(Authority: 20 U.S.C. 7707(b))

#### **Conditions and Requirements Grantees Must Meet**

##### **§ 222.195 How does the Secretary make funds available to grantees?**

The Secretary makes funds available to a grantee during a project period using the following procedure:

(a) Upon final approval of the grant proposal, the Secretary authorizes a project period of up to 60 months based upon the nature of the grant proposal and the time needed to complete the project.

(b) The Secretary then initially makes available to the grantee 10 percent of the total award amount.

(c) After the grantee submits a copy of the emergency or modernization contract approved by the grantee's

governing board, the Secretary makes available 80 percent of the total award amount to a grantee.

(d) The Secretary makes available up to the remaining 10 percent of the total award amount to the grantee after the grantee submits a statement that—

(1) Details any earnings, savings, or interest;

(2) Certifies that—

(i) The project is fully completed; and

(ii) All the awarded funds have been

spent for grant purposes; and

(3) Is signed by the—

(i) Chairperson of the governing board;

(ii) Superintendent of schools; and

(iii) Architect of the project.

(Authority: 20 U.S.C. 7707(b))

##### **§ 222.196 What additional construction and legal requirements apply?**

(a) Except as provided in paragraph (b) of this section, a grantee under this program must comply with—

(1) The general construction legal requirements identified in the grant application assurances;

(2) The prevailing wage standards in the grantee's locality that are established by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*); and

(3) All relevant Federal, State, and local environmental laws and regulations.

(b) A grantee that qualifies for a grant because it enrolls a high proportion of federally connected children who reside on Indian lands is considered to receive a grant award primarily for the benefit of Indians and must therefore comply with the Indian preference requirements of section 7(b) of the Indian Self-Determination Act.

(Authority: 20 U.S.C. 7707(b) and 1221e-3)

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