

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Requests for Review of the
Decisions of the
Universal Service Administrator by
Academia Discipulos de Cristo
Bayamon, Puerto Rico, et al.
Schools and Libraries Universal Service
Support Mechanism
File Nos. SLD-358081, 358083, et al.
CC Docket No. 02-6

ORDER

Adopted: August 15, 2006

Released: August 15, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we address 30 appeals of decisions by the Universal Service Administrative Company (USAC) denying 159 requests for funding from 30 participants in the schools and libraries universal service support mechanism. All of the decisions at issue involve the denial of funding on the ground that the underlying applications violated the Commission's competitive bidding requirements by failing to use price as the primary factor in the vendor selection process. As discussed below, in 29 instances, we find that the Petitioners complied with the Commission's competitive bidding requirements in place at the time of their applications. We therefore grant those appeals and remand the underlying applications to USAC for further action consistent with this Order. To ensure that the underlying applications are resolved expeditiously, we direct USAC to complete its review of each application listed in Appendices A and B and issue an award or a denial based on a complete review and analysis no later than 90 days from release of this Order. We also deny one appeal because the Petitioner failed to demonstrate that price was a primary factor in its vendor selection process.

II. BACKGROUND

2. Competitive Bidding Requirements. Under the schools and libraries universal service support mechanism, commonly referred to as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections. After an applicant has entered into agreements for

1 The term "appeals" refers to Requests for Review, Requests for Waiver, and Applications for Review. A list of appeals is attached in Appendices A and B. Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Universal Service Administrative Company may seek review from the Commission. 47 C.F.R. § 54.719(c).

2 See Appendices A-B.

3 See 47 C.F.R. §§ 54.501-54.503.

eligible services with one or more service providers, it must file an FCC Form 471 with USAC.<sup>4</sup> The FCC Form 471 notifies USAC of the services that have been ordered and supplies an estimate of funds requested for eligible services.<sup>5</sup> USAC then issues a funding commitment decision letter indicating the funding, if any, that the applicant may receive.

3. Applicants may purchase eligible services from “master contracts” negotiated by a third party such as a governmental entity.<sup>6</sup> The third party initiating the master contract must comply with the Commission’s competitive bidding requirements and state procurement laws.<sup>7</sup> The applicant is not required to satisfy the competitive bidding requirements if it takes service from a master contract that either has been competitively bid or qualifies for the existing contract exemption.<sup>8</sup> If a third party has negotiated a master contract without complying with the competitive bidding requirements, then the applicant must comply with the competitive bidding requirements before it may receive discounts or reduced rates for services purchased from that master contract.<sup>9</sup>

4. The Commission generally relies on state or local procurement regulations that include competitive bidding requirements as a means to ensure compliance with the Commission’s competitive bidding requirements because such rules will likely consider price to be a primary factor, resulting in selection of the most cost-effective proposal.<sup>10</sup> Absent evidence to the contrary in a particular case, we

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<sup>4</sup> See Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (December 1997) (Funding Year 1999 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (Funding Year 2000 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (Funding Year 2001 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2001) (Funding Year 2002 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2003) (Funding Year 2004 FCC Form 471); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (November 2004) (Funding Year 2005 FCC Form 471) (collectively, FCC Form 471).

<sup>5</sup> 47 C.F.R. § 54.504(c).

<sup>6</sup> See 47 C.F.R. § 54.500(g) (defining “master contract” as a contract negotiated with a service provider by a third party, the terms and conditions of which are then made available to an eligible school, library, rural health care provider, or consortium that purchase directly from the service provider.).

<sup>7</sup> See *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Report and Order and Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5452-53, para. 233 (1997) (*Fourth Reconsideration Order*).

<sup>8</sup> *Fourth Reconsideration Order*, 13 FCC Rcd at 5452-53, para. 233. The existing contract exemption applies to contracts signed on or before July 10, 1997. A contract signed after July 10, 1997, but before the date on which the universal service competitive bid system is operational, is exempt from the bidding requirements only with respect to services that are provided under such contract between January 1, 1998 and December 31, 1998. 47 C.F.R. § 54.511(c).

<sup>9</sup> *Id.*

<sup>10</sup> See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (1999) (*Tennessee Order*).

believe that compliance with state or local rules is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for the requested services.<sup>11</sup>

5. Prior to Funding Year 2004, the Commission released only one order addressing an appeal of the requirement that price be a primary factor in selecting the winning bid.<sup>12</sup> Specifically, in the *Tennessee Order*, released in 1999, the Commission determined that a competitive bidding process complies with program rules if price is taken into account during bid selection and the contract is awarded to the most cost-effective bidder.<sup>13</sup> The Commission further concluded that other factors, such as prior experience, personnel qualifications, and management capability, also may form a reasonable basis on which to evaluate whether an offering is cost-effective.<sup>14</sup>

6. Four years later, after the conclusion of the Funding Year 2003 competitive bidding process, the Commission released the *Ysleta Order* in which it revised the policies established in the *Tennessee Order*.<sup>15</sup> In the *Ysleta Order*, the Commission concluded that price must be the primary factor in selecting a winning bid.<sup>16</sup> This policy differs from the direction given in the *Tennessee Order* in that schools are now required to have a separate “cost category” when evaluating bids and that category must be given more weight than any other category.<sup>17</sup> The Commission stated that if, for example, a school assigns 10 points to reputation and 10 points to past experience, the school would be required to assign at least 11 points to price.<sup>18</sup> Because the *Ysleta Order* was released after the completion of Petitioners’ competitive bidding processes, however, it is not applicable for the appeals addressed herein. We therefore look to the *Tennessee Order* for guidance.

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<sup>11</sup> See *id.*

<sup>12</sup> *Id.* The Commission, however, used two different phrases to discuss how price should be taken into account; it said price should be “a primary factor,” but in discussing prior precedent, the order also said price should be “the primary factor.” *Id.* at 13739-40, paras. 10-11. Subsequently, in the *Ysleta Order*, the Commission acknowledged that the “varying phraseology in the same decision created some ambiguity on this issue.” See *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26406, 26429, para. 50 (2003) (*Ysleta Order*).

<sup>13</sup> See *Tennessee Order*, 14 FCC Rcd at 13737-39, paras. 7-9. See also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9029, para. 481 (1997) (*Universal Service Order*) (subsequent history omitted) (stating that price should be the primary factor in selecting a bid, but applicants are given maximum flexibility to take service quality into account and may choose the offering that meets their needs most effectively and efficiently).

<sup>14</sup> *Id.* at 13739-40, para. 10. See also 47 C.F.R. §§ 54.504(b)(2)(vii), 54.511(a).

<sup>15</sup> See *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

<sup>16</sup> *Id.* This rule was originally codified in 2003. See *Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202 (2004) (codifying 47 C.F.R. § 54.511(a)). See also *School and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808 (2004) (codifying 47 C.F.R. § 54.504(b)(2)(vii) and 47 C.F.R. § 54.504(c)(1)(xi)).

<sup>17</sup> See *Ysleta Order*, 18 FCC Rcd at 26429, para. 50.

<sup>18</sup> *Id.* at n.138.

7. Requests for Review. The Petitioners identified herein submitted FCC Form 470 applications to USAC to initiate the competitive bidding process for E-rate eligible services.<sup>19</sup> Subsequently, Petitioners entered into contracts with their respective service providers and filed their FCC Form 471 applications for Funding Year 2000, 2001, 2002, and 2003.<sup>20</sup> USAC denied the Petitioners' applications on the ground that the documentation provided by Petitioners during the selective review process demonstrated that price was not the primary factor in selecting their respective service providers.<sup>21</sup> USAC later affirmed these decisions on appeal.<sup>22</sup> Petitioners then filed the instant Requests for Review.

### III. DISCUSSION

8. For the reasons explained below, we grant 29 appeals of decisions denying requests for funding from the E-rate program and remand the underlying applications associated with these appeals to USAC for further action consistent with this Order. We also deny one appeal because the Petitioner failed to demonstrate that price was a primary factor in its vendor selection process.

9. Based upon our review of the facts and circumstances of these specific cases, we find that USAC improperly denied Petitioners' funding requests because it erroneously required Petitioners to give more weight to price in the competitive bidding process than to any other factor.<sup>23</sup> These Petitioners filed their applications and initiated their competitive bidding process before Funding Year 2004. As such, USAC should have applied the standard the Commission articulated in the *Tennessee Order*, rather than the standard from the *Ysleta Order* that it actually applied.<sup>24</sup> Specifically, USAC should have considered whether price was considered as a primary factor for vendor selection and whether the most cost-effective services were selected, not whether price was weighted the highest during bid evaluations.

10. The record shows that all Petitioners listed in Appendix A (except for the St. Jude School) conducted a competitive bidding process that adhered to relevant state and local procurement laws.<sup>25</sup>

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<sup>19</sup> See Appendices A-B.

<sup>20</sup> *Id.*

<sup>21</sup> USAC selects some applications for Selective Review to ensure that certain FCC program rules are followed. Applications are reviewed to examine compliance with the following: 1) competitive bidding process; 2) necessary resources certification; 3) endowment qualifications; and 4) consortia qualifications. See Schools and Libraries website regarding the Selective Review process, <http://www.universalservice.org/sl/applicants/step08/>.

<sup>22</sup> For purposes of this Order, decisions by both the Schools and Libraries Division and USAC will be referred to as decisions issued by USAC. Some of the Petitioners appealed USAC's initial funding decision directly to the Commission.

<sup>23</sup> See Appendix A. Several Petitioners filed an untimely appeal with the Commission in conjunction with a timely filed appeal. In each case, the untimely appeal was filed after Petitioners' appeal to USAC was rejected. Petitioners believed that USAC was prematurely applying the Commission's ruling in the *Ysleta Order*. After having a second application rejected due to the *Ysleta Order* standard, Petitioners appealed to the Commission for relief for each of their applications. Because the Commission may waive any provision of its rules on its own motion and for good cause, we find good cause to waive the filing deadline and address these appeals along with the timely filed appeals. 47 C.F.R. § 1.3. See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>24</sup> See *Tennessee Order*, 14 FCC Rcd at 13737-13739, paras. 7-9.

<sup>25</sup> Request for Review by Academia Discipulos de Cristo; Request for Review by Academia Immaculada Concepcion; Request for Review by Academia Immaculada Concepcion Elementary; Request for Review by

Each applicant submitted documentation to USAC detailing the competitive bidding process, including bid requests, bid proposals, and cost evaluation criteria.<sup>26</sup> Each applicant also evaluated the responsive bidders, using price as a primary consideration, and selected the vendor that offered the most cost-effective offering.<sup>27</sup> Furthermore, the Petitioners listed in Appendix B selected vendors from state master contracts.<sup>28</sup> As noted above, the Commission generally relies on such contracts to ensure compliance with program rules.<sup>29</sup> Indeed, the method for procuring supplies, materials, equipment and services in Arizona, Massachusetts, Mississippi, and West Virginia is by competitive sealed bidding.<sup>30</sup> According to procurement regulations in these states, awards are given to the lowest responsive and responsible bidder.<sup>31</sup> Based on these factors, we find that the Petitioners' competitive bidding processes, with the exception noted below, did not violate program rules. In addition, at this time, there is no evidence of waste, fraud or abuse, or misuse of funds, or a failure to adhere to core program requirements. We note that the actions taken in this Order should have minimal effect on the overall federal Universal Service Fund because the monies needed to fund these appeals have already been collected and held in reserve.<sup>32</sup> We therefore grant and remand the underlying applications to USAC for further consideration in accordance with the terms of this Order.

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Alamagordo City Public Schools; Request for Review by American Military Academy; Request for Review by Buffalo Public Schools; Request for Review by Cleveland Municipal School District; Request for Review by Pueblo School District 60; Request for Review by Colegio Evangelico Capitan Correa; Request for Review by Colegio Jardin; Request for Review by Colegio Kiany; Request for Review by Florida Department of Education; Request for Review by Guamani Private School; Request for Review by Hayes E-Government Resources, Inc.; Request for Review by Kalamazoo Public Schools; Request for Review by Moreno Valley Unified School District; Request for Review by San Diego School District; Request for Review by Smoky Hill Education Center; Request for Review by Southwestern Educational Society; Request for Review by St. Francis School, Inc.; Request for Review by St. Jude School; Request for Review by Wayne County Public Schools; Request for Review by Yeshiva Kehilath Yakov; Request for Review by Yeshiva Bais Mikroh.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Request for Review by Berkeley County School District; Request for Review by Boston Public Schools; Request for Review by Somerton School District No. 11; Request for Review by Sunnyside Unified School District; Request for Review by Washington Elementary School District; Request for Review by Yazoo County School District.

<sup>29</sup> *Id.* We note that USAC denied Somerton School District's funding requests (FRNs 834039, 851198, 851335, 851422, and 867521) stating that "excessive pricing on various components associated with th[e] service provider demonstrates that this service provider is not the most cost-effective alternative." *See* Somerton School District No. 11 Request for Review at 2. The Commission's rules, however, do not expressly establish a bright line test for what is a "cost effective service." Although the Commission has requested comment on whether it would be beneficial to develop such a test, it has not, to date, enunciated bright line standards for determining when a particular service is priced so high as to be considered excessive or not cost-effective. *See Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Red 26912 (2003).

<sup>30</sup> *See* Code of Massachusetts Regulations, 801 § 21.06(4)(a); Miss. Code Ann. § 31-7-13; A.R.S. §§ 41-2533, 41-2553; <http://www.state.wv.us/admin/purchase/Handbook/hand7.htm>.

<sup>31</sup> *See, e.g.*, A.R.S. § 41-2533(G).

<sup>32</sup> We estimate that the appeals granted in this Order involve applications for approximately \$65.5 million in funding for Funding Years 2000-2003. We note that USAC has already reserved sufficient funds to address outstanding appeals. *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2006, dated May 2, 2006.

11. We find, however, that the Commission's rules regarding competitive bidding were violated when the St. Jude School failed to consider price as a primary factor during the vendor selection process and failed to select the most cost-effective services.<sup>33</sup> Here, the St. Jude School gave primary consideration to factors other than price. Specifically, during selective review, the applicant stated that the vendor was selected based upon the school's previous experience with the vendor.<sup>34</sup> The St. Jude School also failed to select more cost-effective bid offerings.<sup>35</sup> We find that even under the standard established in the *Tennessee Order*, St. Jude School did not comply with the Commission's competitive bidding requirements, and we therefore deny St. Jude School's Request for Review.

12. In conclusion, we stress that the Commission is committed to guarding against waste, fraud, and abuse, and to ensuring that funds disbursed through the E-rate universal service mechanism are used for appropriate purposes.<sup>36</sup> Although we grant 30 of the appeals addressed here, we make no findings as to the ultimate eligibility of the requested services.<sup>37</sup> Furthermore, this action in no way affects the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were improperly disbursed or in a manner inconsistent with the statute or the Commission's rules. To the extent we find that funds were not used properly, we will require USAC to recover such funds through its normal processes. We emphasize that we retain the discretion to evaluate the uses of monies disbursed through the E-rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred and whether recovery is warranted. We remain committed to ensuring the integrity of the program and will continue to aggressively pursue instances of waste, fraud, or abuse under our own procedures and in cooperation with law enforcement agencies.

#### IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), this Order IS ADOPTED.

14. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291, 1.3, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 54.722(a), that section 54.720(b) of the Commission's rules, 47 C.F.R. § 54.720(b), is WAIVED with regard to Requests for Review filed by Colegio Evangelico Capitan Correa, Colegio Jardin, Colegio Kiany, Guamani Private School, Southwestern Educational Society, and St. Francis School, Inc.

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<sup>33</sup> See Request for Review by St. Jude School. See also 47 C.F.R. § 54.511(a).

<sup>34</sup> See Letter from Schools and Libraries Division of the Universal Service Administrative Company to Michael Deegan, St. Jude School, filed January 21, 2004.

<sup>35</sup> *Id.* The applicant rejected two other bids that offered comparable services at a much lower price.

<sup>36</sup> *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (rel. May 19, 2006).

<sup>37</sup> The ultimate burden of proving compliance with program rules remains with the applicant. See 47 C.F.R. § 54.504(c)(1)(C)(x).

15. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), any and all pending appeals before this Commission identified in Appendices A and B of this Order, with the exception of St. Jude School, ARE GRANTED and REMANDED to USAC for further consideration in accordance with the terms of this Order.

16. IT IS FURTHER ORDERED that, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), the Request for Review filed by St. Jude School on March 2, 2004, is DENIED.

17. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and pursuant to authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, USAC SHALL COMPLETE its review of each remanded application listed in Appendices A-B and ISSUE an award or a denial based on a complete review and analysis no later than 90 days from release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin  
Chief  
Wireline Competition Bureau

## APPENDIX A

Requests for Review- Erroneous Application of *Ysleta Order*

| Applicant   | Application Number           | Funding Year |
|---|------------------------------|--------------|
| Academia Discipulos de Cristo<br>(7-12)<br>Bayamon, PR        | 358081,<br>358083            | 2003         |
| Academia Immaculada<br>Concepcion<br>Mayaguez, PR             | 348142,<br>348174,<br>348181 | 2003         |
| Academia Immaculada<br>Concepcion Elementary<br>Mayaguez, PR  | 348144                       | 2003         |
| Alamagordo City Public<br>Schools<br>Alamagordo, NM           | 377799<br>377841             | 2003         |
| American Military Academy<br>Guayanabo, PR                    | 348405,<br>348431            | 2003         |
| Buffalo Public Schools<br>Buffalo, NY                         | 382734<br>382779             | 2003         |
| Cleveland Municipal School<br>District<br>Cleveland, OH       | 321819,<br>323210,<br>323152 | 2002         |
| Colegio Evangelico Capitan<br>Correa<br>Hatilo, PR            | 348452,<br>348517            | 2003         |
| Colegio Jardin<br>Bayamon, PR                                 | 348532,<br>348573            | 2003         |
| Colegio Kiany<br>Vista Mar Caguas, PR                         | 359786,<br>359870            | 2003         |
| Florida Department of<br>Education<br>Tallahassee, FL         | 338600<br>352390<br>346659   | 2003         |
| Guamani Private School<br>Guayama, PR                         | 348594,<br>348624            | 2003         |
| Hayes E-Government<br>Resources, Inc.<br>Tallahassee, Florida | 338600<br>352390<br>346659   | 2003         |
| Kalamazoo Public Schools<br>Kalamazoo, MS                     | 164612                       | 2000         |
| Moreno Valley Unified School<br>District<br>Moreno Valley, CA | 296044                       | 2002         |
| Pueblo School District 60<br>Pueblo, CO                       | 416616<br>444063             | 2004<br>2005 |
| San Diego School District<br>San Diego, CA                    | 339004                       | 2003         |
| Smoky Hill Education Service                                  | 365506,                      | 2003         |



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| Center<br>Salina, KS                                       | 358212                               |      |
| Southwestern Educational<br>Society (SECO)<br>Mayaguez, PR | 348696,<br>348729                    | 2003 |
| St. Francis School, Inc.<br>Carolina, PR                   | 358107,<br>353958                    | 2003 |
| St. Jude School<br>New York, NY                            | 249418                               | 2001 |
| Wayne County Public Schools<br>Goldsboro, NC               | 375634<br>375658<br>375599<br>375448 | 2003 |
| Yeshiva Kehilath Yakov<br>Brooklyn, NY                     | 364209                               | 2003 |
| Yeshiva Bais Mikroh<br>Monsey, NY                          | 347563                               | 2003 |

## APPENDIX B

## Requests for Review- Vendors Obtained from State Master Contracts

| <b>Applicant</b>                                     | <b>Application Number</b> | <b>Funding Year</b> |
|--|---------------------------|---------------------|
| Berkeley County School District<br>Martinsburg, WV   | 346450                    | 2003                |
| Boston Public Schools<br>Boston, MA                  | 369847                    | 2003                |
| Somerton School District<br>No. 11<br>Somerton, AZ   | 312031                    | 2002                |
| Sunnyside Unified School District<br>Tuscon, AZ      | 300611,<br>300645         | 2002                |
| Washington Elementary School District<br>Phoenix, AZ | 307702<br>300221          | 2002                |
| Yazoo County School District<br>Yazoo City, MS       | 363676                    | 2003                |