



NATIONAL INDIAN EDUCATION ASSOCIATION

August 26, 2019

Tony Dearman, Director
Bureau of Indian Education
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: Proposed Rules for the Johnson-O'Malley Program

Dear Director Dearman:

On behalf of the National Indian Education Association (NIEA), I respectfully submit the following written comments in response to the Bureau of Indian Education's (BIE) proposed rules to update regulations for the Johnson-O'Malley Program, as required by the Johnson O'Malley Supplemental Education Program Modernization Act (S.943).

NIEA is the nation's most inclusive organization advocating for improved educational opportunities for American Indians, Alaska Natives, and Native Hawaiians. Our mission centers on ensuring that Native students have access to a high-quality academic and cultural education, a goal that is only possible if the Bureau of Indian Education (BIE) upholds the federal trust responsibility, a moral and legal obligation towards tribes. Our comments below provide recommendations to support the BIE as it works to fulfill this solemn duty.

FEDERAL TRUST RESPONSIBILITY

Established through treaties, federal law, and U.S. Supreme Court decisions, the Department of the Interior has a federal trust responsibility to provide excellent education options for Native students. The federal trust responsibility includes a fiduciary obligation to provide parity in access to all American Indian and Alaska Native students, regardless of where they attend school. As the lead agency for education within the public school system, the Department has a unique responsibility to ensure the 644,000 Native students in schools across the country have access to culturally-relevant education options which prepare them for success.

JOHNSON O'MALLEY PROGRAM

The Johnson O'Malley Supplemental Education Program Modernization Act became law in December 2018. The first version of the Act was originally passed in 1934, and was later expanded in size and scope to fit the current needs of Native students. In its current, updated form, the Act is intended to meet the unique educational needs of American Indian and Alaska

Native students, and authorizes contracts for the education of Indian students who are not enrolled in BIE-funded or private schools.

On June 27, the BIE proposed a new set of regulations related to the eligibility of Indian students and operation of the Johnson-O'Malley program, as required under the 2018 update. Since that time, the BIE engaged in a series of tribal consultations throughout Native communities to ensure proper consideration of the proposed language.

DEFINING ELIGIBLE INDIAN STUDENTS

While the Johnson O'Malley reauthorization was under consideration in Congress, the BIE preliminarily proposed to redefine the definition of an "eligible Indian student" through a March 2018 notice of public rulemaking. At that time, NIEA provided comments based on engagement with our tribes and partners.

NIEA recognizes and appreciates that the current proposed rule addresses our concerns. The new language not only ensures consistency with current practice and case law, but also provides parity with other Bureau-funded programs that provide education services for tribal citizens and descendants with at least one-quarter blood quantum. NIEA supports the BIE's proposal to expand the definition of "eligible Indian student" to include Indian students that are either, "(1) At least one-fourth (1/4) degree Indian blood descendant of a member of a federally recognized Indian Tribe; or (2) A member of a federally recognized Tribe." (25 CFR Section 273.112)

SHIFTING CONTRACT ADMINISTRATION

As part of the current proposed rule, the BIE has requested comment on a proposal to shift responsibility for approving Johnson-O'Malley program contracts from the Bureau of Indian Affairs (BIA) to the BIE. Due to budgetary processes and capacity, the BIA has historically processed Johnson-O'Malley contracts on behalf of the BIE. In early 2019, the Bureau of Indian Education took an unprecedented step toward managing its own budget and contracting processes.

As the BIE builds capacity for to support its own budgetary systems, management of contracts for education programs and services should be shifted to the BIE for administration and approval. Streamlining administration education programs under BIE authority provides greater flexibility for those with the most knowledge of education programs and avoids bureaucratic delays that inevitably occur when both the BIE and BIA are required to sign off on routine contracts. For this reason, NIEA supports the proposal to shift Johnson-O'Malley contract administration from the BIA to the BIE.

UPDATING THE STUDENT COUNT

The importance of an accurate and up-to-date JOM student count cannot be overstated. Funding and implementation of Johnson-O'Malley programs are dependent on accurate students counts, and students cannot be adequately served if they are not fully counted. The last full count was undertaken in 1995, before any current JOM-eligible students were born. Since that time, programs have continued to serve a growing student population based on

grossly outdated student counts that result in underfunding across the system. To address this issue, Congress mandated a full count of eligible students for JOM programs through S.943.

Over the month of July, the BIE engaged in tribal consultation and solicited comments regarding potential sources of data to ensure an accurate student count that reflects the full population of eligible Indian students. NIEA commends the BIE for prioritizing guidelines to ensure an updated student count and for upholding the Bureau's responsibility to engage in consultation with tribes.

While we applaud the BIE's efforts to determine the most accurate and applicable data source in a collaborative and rigorous way, NIEA has concerns regarding the efficacy of relying on a single source of data. During a June 2019 public notice, the BIE focused on three key sources:

- U.S. Census Bureau,
- U.S. Department of Education National Center on Education Statistics (NCES), and/or
- Johnson O'Malley (JOM) survey of current contractors.

Each of those sources have critical weaknesses and, as a result, should only be used in combination with another for verification purposes. NIEA encourages the BIE to continue exploring options for conducting an accurate count of American Indian and Alaska Native students, including engaging directly with tribes to gain a full picture of the number of tribal citizens that may meet eligibility requirements for the Johnson-O'Malley program.

INCREASING GEOGRAPHICAL AND TRIBAL PARTICIPATION

Under federal statute codified through S. 943, the Secretary of Interior is required to consult with tribes and to contact State educational agencies, local educational agencies, and Alaska Native organizations that have not previously contracted with the BIE to:

- Determine interest in entering into contracts under the Johnson-O'Malley program; and
- Share information related to the process for entering into a contract under this Act.

NIEA appreciates language to "ensure full geographic coverage and the full participation of all federally recognized tribes and school districts, regardless of whether the school districts had entered into a contract under the Johnson-O'Malley Act before fiscal year 1995." (25 CFR 273.104) However, effective implementation of S.943 requires the federal government to engage in formal tribal consultation. Though introductory language in the notice recognizes this consultation responsibility, such language is not reflected in the proposed regulatory text. NIEA recommends that the BIE insert language that recognizes the statutory requirement to uphold the federal trust responsibility by engaging formal tribal consultation to expand geographic coverage and enhance tribal participation.

In addition to formal consultation, NIEA recommends that the BIE undertake a comprehensive contractor count that includes all contractors **and potential eligible contractors**, allows adequate time for reporting, and abides by data collection best practices. In addition to increasing geographic and tribal participation in the Johnson-O'Malley program, such a count has the potential to support current and future counts of participating and potential eligible Indian students. Because of the importance of an accurate count, we urge the BIE to count

accurately rather than to count quickly. NIEA encourages the BIE to uphold the federal trust responsibility to all Native students by ensuring access to all eligible students and programs.

CONCLUSION

Through the recommendations provided here, the final regulations, and the delivery of education services through Johnson-O'Malley programs, NIEA looks forward to working alongside the BIE to drive federal resources to the only students that the federal government has a direct responsibility to educate— Native students. For more information or inquiries, please contact Adrienne Elliott, NIEA Legislative Analyst, at aelliott@niea.org.

Sincerely,



Robin Butterfield
President