NATIONAL INDIAN EDUCATION ASSOCIATION

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW, MIB–4660–MS
Washington, DC 20240

Re: Proposed Changes to Regulations for the Johnson-O'Malley Program

Dear Ms. Appel:

Thank you for the opportunity to submit comments regarding the proposed changes to the definition of an eligible student in regulations for the Johnson-O'Malley (JOM) program. The National Indian Education Association (NIEA) is the most inclusive national organization advocating for improved educational opportunities for American Indian, Alaska Native, and Native Hawaiian students. Our mission is to ensure that Native students receive a high-quality academic and cultural education, a goal that is only possible if Congress upholds the federal trust responsibility to tribes.

The Federal Trust Relationship

The Bureau of Indian Education (BIE) has a federal trust responsibility for the education of Native students. Established through treaties, federal law, and U.S. Supreme Court decisions, the federal government's trust responsibility to tribes includes the obligation to provide parity in access and equal resources to all American Indian and Alaska Native students, regardless of where they attend school. Delivery of education services to Native students through federal programs such as JOM are critical to fulfilling the federal trust relationship to tribes.

Request to Postpone Regulatory Review and Update

Since 1984, regulations for the JOM program (25 CFR 273.12) have not reflected implementation. Though regulations should be updated to align with current practice, the proposed regulatory update seems ill timed. The BIE's proposal indicates a lack of foresight regarding current legislation in Congress. NIEA understands that federal agencies and Congress work in parallel and that federal agencies cannot halt ongoing activities based on pending legislation. However, the Johnson-O'Malley Supplemental Indian Education Program Modernization Act (S. 943) would require duplication of efforts under the current rulemaking process once Congress authorizes the bill.

As passed by the Senate and referred to the House of Representatives, S. 943 requires the Secretary of Interior to undertake and complete a rulemaking process to "determine how the regulatory definition of 'eligible Indian student' may be revised to clarify eligibility requirements" for the JOM program. If the BIE does not postpone the current regulatory review,

the above provision would require the BIE to duplicate current consultation and rulemaking again once Congress passes the bill. As a result, tribes and Native advocates will be required to go through the comment and rulemaking process twice on an issue that should be resolved once the bill is authorized. NIEA requests that the BIE postpone the tribal consultation to engage with tribes through effective, meaningful consultation that does not waste the time and efforts of tribal leaders and community members.

Recommendations on the Proposed Rule

NIEA makes the following recommendations regarding the proposed language for the definition of "eligible students" in JOM programs according to 25 CFR 273.12:

- **Proposed Language Lacks Clarity Regarding Definition of Eligible Students**
  The proposed language lacks clarity regarding student eligibility for JOM programs. Though this regulation is intended to define "eligible students" for JOM programs, the proposed rule fails to define key provisions. As written, the proposed text reads as follows:

  > "Indian students, from age 3 years through grade(s) 12, except those enrolled in Bureau or sectarian operated schools, shall be eligible for benefits provided by a contract pursuant to this part if they are recognized by the Secretary as being eligible for Bureau services."

  This language does not specify the specific requirements to be eligible for Bureau services. As a result, the proposed language perpetuates current regulatory ambiguities, failing to fully serve Native students through the JOM program.

- **Proposed Language Fails to Uphold Current Practice**
  NIEA recognizes and appreciates the intent to align regulations with current practice. However, the proposed language and background information provided in the federal notice of rulemaking (83 FR 12301) indicate a lack of understanding of current practice.

  Following the 1986 Ninth Circuit Federal District Court's ruling in *Diane Zarr v. Earl Barlow*, the Bureau of Indian Affairs issued a "program guidance memorandum" directing that "Indian students are eligible for benefits of a JOM contract if they are of 1/4 more-degree Indian blood ***or*** are recognized by the Secretary as being eligible for Bureau services." Under this guidance, eligibility for Bureau services was interpreted as enrollment in a federally recognized tribe. This eligibility standard is used by all but 2 of the over 350 JOM contractors.

  In contrast to this guidance, the federal notice of rulemaking incorrectly implied that current implementation of JOM programs requires enrollment within a federally recognized tribe. As a result, the proposed language removes language including Native students with at least ¼ blood quantum. The removal of such language expels hundreds of thousands of Native students that have at least ¼ blood quantum and currently participate in JOM programs, but are not enrolled in a federally recognized tribe due to enrollment requirements. The proposed rule would prevent such students from participating in JOM programs, even though they are eligible to attend BIE schools and participate in other Bureau funded programs. Such

inequities fail to uphold the federal trust responsibility to provide parity in education for Native students across the country.

- **Align JOM Eligibility with Current Practice and Other Bureau-funded Programs** NIEA recommends that the BIE align the definition of an eligible Indian student for the JOM program with current practice and other BIE funded programs. Such language must build on the 1984 ruling in *Zarr v. Barlow* to include all students currently participating in JOM programs across the country and fully define eligibility for Bureau services.

  Current practice aligns with implementation of student programs across the BIE, including the definition of an eligible Indian student for the Indian School Equalization Program (ISEP) in 25 USC 2007(f)(1). Under *Zarr v. Barlow* and the ISEP definition, tribes have flexibility to provide services to students that are enrolled in a tribe ***or*** are a descendent with at least ¼ blood quantum. Such language supports the right of tribes to provide educational services and opportunities to tribal members and their descendants. Any updates to the JOM regulations must support tribal sovereignty and self-determination in Native education systems.

Conclusion

In addition to our recommendations above, NIEA supports comments provided by the National Johnson-O'Malley Association. With these concerns and through these comments on the proposed updates to regulations for the Johnson-O'Malley program, NIEA looks forward to working with the Bureau of Indian Education to serve the unique needs of the only students that the federal government has a direct responsibility to educate – Native students. If you have any questions, please contact Ahniwake Rose, NIEA's Executive Director, at arose@niea.org.

Sincerely,

Jolene Bowman

Dr. Jolene Bowman
President, NIEA