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2d Session }

SENATE

{ REPORT
{ 115-201

TO DIRECT THE SECRETARY OF THE INTERIOR TO CONDUCT AN ACCURATE COMPREHENSIVE STUDENT COUNT FOR THE PURPOSES OF CALCULATING FORMULA ALLOCATIONS FOR PROGRAMS UNDER THE JOHNSON-O'MALLEY ACT, AND FOR OTHER PURPOSES

JANUARY 24, 2018.—Ordered to be printed

Mr. HOEVEN, from the Committee on Indian Affairs,
submitted the following

R E P O R T

[To accompany S. 943]

[Including cost estimate of the Congressional Budget Office]

The Committee on Indian Affairs, to which was referred the bill (S. 943) to direct the Secretary of the Interior to conduct an accurate comprehensive student count for the purposes of calculating formula allocations for programs under the Johnson-O'Malley Act, and for other purposes, reports favorably thereon with an amendment in the nature of a substitute and recommends the bill, as amended, do pass.

PURPOSE

The bill, S. 943, would amend the *Act of April 16, 1934*, commonly known as the *Johnson-O'Malley Act*, to direct the Secretary of the Interior (Secretary), in coordination with the Bureau of Indian Education (BIE) Director, to take steps to ensure the full participation of all qualified and eligible Indian students in the Johnson-O'Malley (JOM) program. The bill, S. 943, is intended to clarify current contracting and reporting practices and address the challenges in serving eligible students and obtaining accurate student counts.

BACKGROUND

The JOM program awards supplemental assistance through contracts to eligible entities to address the unique cultural and academic needs of Indian students in public schools, where more than 90% of all Indian students attend.

Originally authorized by the *Act of April 16 1934* to allow “the Secretary of the Interior to arrange with States or Territories for the education, medical attention, relief of distress, and social welfare of Indians,”¹ In 1985, Congress modified the scope of the JOM program to its current form (i.e., contracts for supplementary education) through passage of the *Act of December 19 1985*.² Ten years later and upon further instruction from Congress to modify the JOM program,³ the Bureau of Indian Affairs (BIA) transferred allocations for tribal contractors into the tribal priority allocations (TPA) base funding category.

Federal law prohibits changes to a tribe’s base funding⁴ and the FY1995 TPA transfer caused BIA to suspend updating student counts for the JOM program. At the time, the student count was approximately 271,884 eligible Indian students. According to the 2010 U.S. Census, there were 798,486 qualified American Indian and Alaska Native students in the JOM-eligible age group. This discrepancy between FY1995 and the 2010 U.S. Census student counts indicates that a substantial number of Indian students are not being served by the JOM program.

Through the appropriations process, Congress directed BIE to update the JOM student count in FY2012 and FY2014.⁵ BIE attempted to conduct student counts to update the number of eligible Indian students but the agency was unable to verify, or make official, any of these counts.⁶ As a result, the student count from FY1995 remains in place. Congress previously noted concerns (in Appropriations Committee and Conference reports) about the persistent inaccuracies of eligible Indian student counts and continues to direct the BIE to update the student count.⁷

NEED FOR LEGISLATION

The JOM student count is important because it is used by the BIA to provide its yearly funding distribution to eligible entities in JOM programs. The President of the National Johnson-O’Malley Association, Carla Mann, testified that the FY1995 student count freeze detrimentally impacts the funding level of the program and, in turn, limits the scope of services available to the children participating in JOM-funded projects.⁸ Despite Congressional instruction to the Department of the Interior to update the JOM student count, BIE has not conducted an accurate, verifiable, and current student count nor have they produced a plan to assist the substantial number of eligible Indian students who are not served by the program. Stronger Congressional action appears necessary to resolve this specific issue.

¹ Act of April 6, 1934, Pub. L. No. 73–167, 25 U.S.C. 5342 (1934).

² Act of December 19, 1985, Pub. L. No. 99–190, § 101(d), 99 Stat. 1185, 1235 (1985).

³ S. Rep. No. 103–294 (1994); H. Rep. No. 103–551 (1994); H. Rep. No. 103–740 (1994).

⁴ 25 U.S.C. § 450j–1(b)(2).

⁵ S. 2417, the *Tribal Veterans Health Care Enhancement Act*, and S.2842, the *Johnson O’Malley Supplemental Indian Education Program Modernization Act Before the S. Comm. on Indian Affairs*, 114th Cong. 2 (2016) (statement of Michael S. Black, Director, Bureau of Indian Affairs, U.S. Dep’t of the Interior).

⁶ S. 943, S. 1223, and S. 1285 *Before the S. Comm. on Indian Affairs*, 114th Cong. 1 (2017) (statement of Tony Dearman, Director, Bureau of Indian Education, U.S. Dep’t of the Interior).

⁷ H.R. Rep. No. 112–151 at 42–43 (2012); H.R. Rep. No. 113–551 at 45 (2014); H.R. Rep. No. 114–170 at 39 (2015).

⁸ S. 943, S. 1223, and S. 1285 *Before the S. Comm. on Indian Affairs*, 114th Cong. 1 (2017) (statement of Carla Mann, President, National Johnson-O’Malley Association).

Additionally, during the Committee hearing on July 12, 2017, BIE Director Tony Dearman testified that current law does not require JOM contractors to submit student count data to the BIE.⁹ Director Dearman cited the lack in data submission requirement as a primary contributor to the BIE's failed efforts to update and verify the JOM student count in FY2012 and FY2014.

LEGISLATIVE HISTORY

On April 26, 2017, Senator Heitkamp with Senators Daines and Lankford, introduced S. 943, the *Johnson-O'Malley Supplemental Indian Education Program Modernization Act*. The Committee held a legislative hearing on S. 943 on July 12, 2017. BIE Director, Tony Dearman, testified at this legislative hearing and expressed support for legislation that would address the gap in contractor reporting requirements as a means to improve BIE's ability to update the JOM student count. Ms. Carla Mann, in her capacity as President of the National Johnson O'Malley Association, testified in support of S. 943. On October 4, 2017, the Committee held a duly called business meeting to consider S. 943.

One amendment in the nature of a substitute was filed by Senator Heitkamp. The amendment incorporates the following changes:

- Clarifies only one process for both new and existing contractors to determine the number of eligible Indian students. This modification is intended to establish a less burdensome process for the agency and eligible entities. The amendment makes conforming changes throughout the bill to accommodate the shift to one process.
- Authorizes the use of a ratable reductions in appropriations exception to the hold harmless provision of the bill to account for any potential reduction in funding during a fiscal year. This provision will ensure that, if there is a reduction in funding to JOM, all, not just some, existing contracting parties receive funding at a ratably reduced amount.
- Changes the sunset of the Hold Harmless provision from an undefined term to 4 years after the date of enactment of the Act, and provides that no contracting party will receive more than a 10% decrease in funding per eligible Indian student within one fiscal year at a time at the conclusion of that four year hold harmless period.
- Changes the due date for the report from the Comptroller General required under Section 2 from 2 years after the date of enactment of the Act to 18 months after the final report from the Secretary regarding the initial determination of the number of eligible Indian students served or potentially served by each contracting party. The Government Accountability Office requested this change.
- All other changes within the amendment were made to be conforming and technical in nature.

The Committee passed S. 943, as amended, by voice vote and ordered the bill, as amended, to be favorably reported. At this time, there is no House companion bill to S. 943.

⁹Id supra 8.

114th Congress. On April 21, 2016, Senator Heitkamp with Senators Daines and Lankford, introduced S. 2842, the *Johnson-O'Malley Supplemental Indian Education Program Modernization Act*. On May 11, 2016, the Committee held a legislative hearing on S. 2842. Michael Black, Director of the Bureau of Indian Affairs, and Carla Mann, President of the National Johnson-O'Malley Association testified at the legislative hearing. Ms. Mann's testimony supported S. 2842. No further action was taken on S. 2842.

Representative McCollum introduced H.R. 4390, the *Johnson-O'Malley Supplemental Indian Education Program Modernization Act*, with Representatives Cole, Huffman, and D. Young as cosponsors on January 13, 2016. Representative Napolitano joined as cosponsor on February 11, 2016. Representative Ellison joined as cosponsor on February 23, 2016. Representatives Moore and Grijalva joined as cosponsors on February 29, 2016. The bill, H.R. 4390, was referred to the Committee on Education and the Workforce of the House of Representatives, where no further action was taken on H.R. 4390.

113th Congress. Representative Cole with Representatives McCollum and D. Young, introduced H.R. 4328, the *Johnson-O'Malley Supplemental Indian Education Program Modernization Act*, on March 27, 2014. Representative Huffman was added as a cosponsor on May 22, 2014. The bill, H.R. 4328, was referred to the Committee on Education and the Workforce of the House of Representatives where no further action was taken on the bill. There was no Senate companion bill to H.R. 4328.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This Act may be cited as the "Johnson-O'Malley Supplemental Indian Education Program Modernization Act".

Sec. 2. Indian Education Program student count update

This section amends the *Act of April 16, 1934* (25 U.S.C. 452 et seq.) (commonly known as the "*Johnson-O'Malley Act*") by adding the following at the end:

"SEC. 7. COMPUTATION OF STUDENT COUNT."

(a) Definitions

The term 'contracting party' means an entity that has a contract through a program authorized under this Act.

The term 'eligible entity' means an entity that is eligible to apply for a contract for a supplemental or operational support program under this Act.

The term 'existing contracting party' means an eligible entity with a contract under this Act that is in effect on the date of enactment of the JOM Modernization Act.

The term 'JOM Modernization Act' means the Johnson-O'Malley Supplemental Indian Education Program Modernization Act.

The term 'new contracting party' means an entity that enters into a contract under this Act after the date of enactment of the JOM Modernization Act.

The term 'Secretary' means the Secretary of the Interior.

(b) Determination of the number of eligible indian students

This subsection describes the process for the Secretary, in consultation with eligible entities and current contracting parties, to make an initial determination of the number of eligible Indian students served or potentially served under the JOM program. The Secretary will publish a preliminary report on the initial determination and establish a 60-day comment period to gain feedback from eligible entities. The final report will be published not later than 120 days after concluding the comment period.

(c) Contracting party student count reporting compliance

Contracting parties shall submit to the Secretary an annual report describing the number of eligible Indian students served or potentially served by a contracting party. If a contracting party fails to submit a report, then it will not receive funds for the next fiscal year. The Secretary shall provide technical assistance and training on compliance with the reporting requirements to contracting parties.

(d) Annual report

The Secretary shall provide to Congress an annual program assessment including the most recent determination of the number of eligible Indian students served by each contracting party, recommendations on appropriate funding levels for the program based on such determination, and an assessment of the contracts under the JOM program.

(e) Hold harmless

Existing contractors shall be held harmless from funding decreases until funding for new contractors is equal to or greater than the amount that existing contracts received per eligible Indian student in the fiscal year before enactment. However, an existing contractor shall receive less funding if it fails to submit its student count report, violates the terms of the contract or has otherwise violated Federal law, or if the number of students served decreases below the numbers identified in the 1995 student count.

If the funds available under the JOM program for a fiscal year are insufficient to pay the full amounts that all existing contracting parties are eligible to receive for the fiscal year, the Secretary shall ratably reduce those amounts for the fiscal year.

This hold harmless provision will sunset four years after the date of enactment of the JOM Modernization Act, at which point no contracting party shall receive for a fiscal year more than a 10 percent decrease in funding per eligible Indian student from the previous fiscal year.

(f) Funding allocation and reform

The Secretary shall propose, in consultation with Indian tribes and contracting parties, a present day per student funding allocation that shall serve as a funding baseline for the JOM program.

This subsection allows the Secretary to make recommendations to increase the amount of funding to equal to or greater than the amount of funds that were available for fiscal year 1995, which is when the most recent official and verified student count was conducted by BIA.

This subsection provides for how funds should be allocated in fiscal years with an increase in program funding.

(g) Increased geographical and tribal participation in the Johnson-O'Malley Supplementary Education Program

To the maximum extent practicable, the Secretary shall consult with Indian tribes and contact State educational agencies and local educational agencies that have not previously entered into a JOM contract to determine the level of interest and to share information on the application process.

(h) Rulemaking

Not later than one year after enactment of the Act, the Secretary shall complete a rulemaking process to determine how the regulatory definition of 'eligible Indian student' may be revised to clarify eligibility requirements, determine how the funding formula may be clarified and revised, and to otherwise modernize the program. The Secretary will then submit a report to Congress, not later than 30 days after the date the rulemaking is completed, on the results of such rulemaking and recommendations on implementation.

(i) Student privacy

The Secretary shall ensure that data is collected and each report is prepared in a manner that protects the rights of eligible Indian students under section 444 of the *General Education Provisions Act* (20 U.S.C. 1232g).

(j) GAO report

Not later than 18 months after the final report describing the initial determination of eligible Indian students is published, the Comptroller General shall conduct a review of the implementation of the amendment and submit the review to Congress.

(l) Effect

This subsection ensures that the amendment does not create a new program, duplicate programmatic activities, or replaces or diminishes the effect of regulations to carry out this Act unless expressly provided in the amendment.

COST AND BUDGETARY CONSIDERATIONS

The following cost estimate, as provided by the Congressional Budget Office, dated November 13, 2017, was prepared for S. 943:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 13, 2017.

Hon. JOHN HOEVEN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 943, the Johnson-O'Malley Supplemental Indian Education Program Modernization Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leah Koestner.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 943—Johnson-O'Malley Supplemental Indian Education Program Modernization Act

Summary: S. 943 would amend the Johnson-O'Malley Act to require the Department of the Interior (DOI) to annually update its count of students who are eligible to be served by the Johnson-O'Malley (JOM) program. Under that program, DOI contracts with tribal organizations, states, and school districts to provide supplemental educational services for Indian students. Assuming appropriation of the estimated amounts, CBO estimates that implementing the bill would cost \$13 million over the 2018–2022 period.

Enacting S. 943 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 943 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 943 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary effect of S. 943 is shown in the following table. The costs of this legislation fall within budget function 500 (education, training, employment, and social services).

| | By fiscal year, in millions of dollars— | | | | | |
|--|---|------|------|------|------|-----------|
| | 2018 | 2019 | 2020 | 2021 | 2022 | 2018–2022 |
| INCREASES IN SPENDING SUBJECT TO APPROPRIATION | | | | | | |
| Estimated Authorization Level | 0 | 0 | 5 | 5 | 5 | 15 |
| Estimated Outlays | 0 | 0 | 3 | 5 | 5 | 13 |

Basis of estimate: CBO assumes that S. 943 will be enacted before October 1, 2018, that the new student count would be implemented by 2020, and that the estimated amounts will be appropriated each year. Estimated outlays are based on historical spending patterns for the current program.

The JOM program is permanently authorized to be appropriated such sums as are necessary; it received an appropriation of \$14.8 million in fiscal year 2017. The current program's funding allocation is based on an official count from 1995 of 271,884 eligible Indian students.

S. 943 would direct the DOI to update the count of students who could be served by the JOM program and to ensure that the number of students is consistent with available data from the Census Bureau, the National Center for Education Statistics, and the Office of Indian Education. The bill would require JOM program contractors to submit annual reports to DOI, and would require DOI to update the student count annually on the basis of that information. S. 943 also would require DOI to propose a new per-pupil funding formula and allow the department to recommend legisla-

tion to increase the amount of funds available for each eligible student.

CBO expects that the count of eligible students would be higher than the count from 1995; therefore, S. 943 would effectively increase the amount authorized to be appropriated for the JOM program. DOI conducted an unofficial count in 2014, which showed a 26 percent increase in the number of eligible students since the 1995 count. Because contractors were not required to participate in the 2014 count, and many did not, CBO believes that count underestimates the number of eligible students. Adjusting for that undercount, CBO estimates that the count conducted under this bill would be 30 percent higher than in 1995—about 80,000 additional students. CBO calculated per-pupil spending by dividing the 2017 grant amount by the number of students in the 1995 count and then adjusting that amount, \$54 per student in 2017, for expected inflation each year. CBO estimates that implementing the bill would cost \$13 million over the 2018–2022 period and around \$5 million each year thereafter (80,000 students times \$56 per student in 2020).

Finally S. 943 would require the Government Accountability Office to submit a report evaluating the bill's implementation. Based on the cost of similar studies, CBO estimates that completing that report would cost less than \$500,000.

Pay-As-You-Go considerations: None.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 943 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

Mandates: S. 943 contains no intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Leah Koestner; Mandates: Rachel Austin.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 943 will have minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 943.

CHANGES IN EXISTING LAW

In accordance with Committee Rules, subsection 12 of rule XXVI of the Standing Rules of the Senate is waived. In the opinion of the Committee, it is necessary to dispense with subsection 12 of rule

XXVI of the Standing Rules of the Senate to expedite the business of the Senate.

