

**DEPARTMENT OF THE INTERIOR****Bureau of Indian Affairs****25 CFR Part 273**[201D0102DB/DS5A300000/  
DR.5A311.IA000520]

RIN 1076-AF24

**Education Contracts Under Johnson-O'Malley Act****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

**SUMMARY:** Under the Johnson-O'Malley (JOM) Act, the Bureau of Indian Education (BIE) provides assistance, through contracts, for Indian students attending public schools and nonsectarian private schools. This rule implements the JOM Act, as amended by the JOM Supplemental Indian Education Program Modernization Act (JOM Modernization Act), to clarify the eligibility requirements for Indian students to receive the benefits of a JOM contract, clarify the funding formula and process to ensure full participation of contracting parties, and to otherwise reconcile and modernize the regulations to comport with the activities of contracting parties under the JOM Modernization Act.

**DATES:** This rule is effective on March 26, 2020.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; [elizabeth.appel@bia.gov](mailto:elizabeth.appel@bia.gov).

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**I. Background**

The JOM Act authorizes the Secretary of the Interior (Secretary), in his or her discretion, to enter into contracts with States, schools, and private nonsectarian organizations, and to expend appropriated funds in support of Indian students under such contracts. See, 25 U.S.C. 5341 *et seq.* Federally recognized Indian Tribes and Tribal organizations are also eligible to apply for JOM contracts. Contracts under JOM contain educational objectives that adequately address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives. See, 25 U.S.C. 5345. The regulations at 25 CFR part 273 that implement this authority became effective in 1975 and the rule has been in effect over 40 years without substantial changes. In 2018, Congress updated the JOM Act with the JOM Modernization Act. The rule being finalized today updates 25 CFR part 273 to implement the JOM Modernization Act and make other changes necessary to update the rule, as described below.

The proposed rule was published on June 27, 2019. See 84 FR 30647. During the 60-day public comment period, BIE held four consultations sessions directly with the Tribes and four consultation sessions with eligible entities and

interested parties: July 16, 2019, in Tahlequah, OK; July 19, 2019, in Bismarck, ND; July 23, 2019, via webinar; and July 25, 2019, via webinar. See 84 FR 30647. The public comment period on the proposed rule ended on August 26, 2019.

**II. Overview of the Final Rule**

The JOM Modernization Act requires the BIE to revise the existing regulations at 25 CFR part 273, to:

1. Determine how the regulatory definition of "eligible Indian student" may be revised to clarify eligibility requirements for contracting parties under the Act;

2. Determine, as necessary, how the funding formula may be clarified and revised to ensure full participation of contracting parties and provide clarity on the funding process under the Act; and

3. Reconcile and modernize the rule to comport with the activities of the contracting parties under the Act.

The final rule includes changes to meet these requirements, by:

- Clarifying who is an eligible Indian student;
  - Specifying how funds can be used;
  - Describing how a new contracting party can enter into contracts and clarifying the process for existing contracting parties to renew contracts;
  - Clarifying what requirements do not apply to Tribal organizations;
  - Revising the funding formula to reflect how it is currently calculated;
  - Clarifying the annual reporting requirements;
  - Adding a new subpart J—Responsibility and Accountability, to address the Secretary's reporting requirements and compliance with Paperwork Reduction Act; and
  - Clarifying the appeals processes.
- The rule also makes other technical edits to improve clarity and readability.

**III. Comments on the Proposed Rule and Responses to Comments**

The BIE sought public comment on the proposed rule, as well as Tribal input through a series of consultation sessions. Overall, BIE heard from a wide variety of stakeholders including Tribal leaders, existing JOM contractors, potential JOM contracts, public school districts, tribal organizations, Indian corporations, JOM Indian Education Committee members, employees of public schools serving American Indian students, and parents. In total, BIE received 54 written comment submissions, including a few submissions that included 11 to 145 signatures each. All public comments received in response to the proposed

rule are available for public inspection. To view all comments, search by Docket Number “BIA–2018–0002” in <https://www.regulations.gov>. The BIE has decided to proceed to the final rule stage after careful consideration of all comments. The BIE’s responses to such comments are detailed below.

#### A. Terminology

*Comment:* Change the term “student” to “child” to include children who are homeschooled and in foster care.

*Response:* The regulation uses the term “student” because the statutory authority uses that term; however, there is nothing preventing a non-traditional student, such as a homeschooled student, or child in foster care from meeting the eligibility requirements set out for Indian students in § 273.112.

*Comment:* The proposed definition of “Tribal organization” is too broad because it combines sovereign Tribes with others. If “Tribal organization” includes others, there should be a requirement for specific support from the Tribe or Tribes who will receive services.

*Response:* The final rule adds to the definition of “Tribal organization” a requirement for the approval of the Tribe or Tribes. This language is adapted from the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5304.

#### B. Comments Regarding “Eligible Indian Student”

Many commenters requested changes to restrict, broaden, or clarify who an “eligible Indian student” is. BIE weighed these concerns, looked to Congress’s intent to provide for the education of Indian students, and also considered that there should be a connection to a federally recognized Tribe (*i.e.*, a Tribe with whom the U.S. Government has a government-to-government relationship). As a result, the substance of the final rule is the same as the proposed rule regarding who qualifies as an eligible Indian student, requiring that the student either: (1) Be a Tribal member; or (2) have a link to a Tribal member (through descendency) that is within a certain proximity (through  $\frac{1}{4}$  degree blood quantum). BIE acknowledges the concerns expressed by some of the comments that any reliance on blood quantum is antiquated and distasteful; therefore, BIE may revisit this standard in the future. For the purposes of this rule, however, BIE has chosen to retain the standard to ensure consistency with the Indian Student Equalization Program (ISEP) standard, as explained below. Pending any comprehensive

review of the standard used for both JOM and ISEP eligibility, the Department believes the proposed eligibility standard establishes guidelines sufficient to identify who the population of eligible Indian students is, while allowing for some discretion in implementation to ensure that Congress’ intent is met on a case-by-case basis, as further described in the responses to comments, below.

##### 1. One-Fourth Degree Indian Blood

*Comment:* Does a student have to be a descendant of someone who has  $\frac{1}{4}$  degree of Indian blood?

*Response:* The rule provides that, if the Indian student is not a Tribal member, then the Indian student himself or herself must have  $\frac{1}{4}$  degree of Indian blood, as a descendent of a member of a federally recognized Tribe, in order to be eligible.

*Comment:* Explain where the requirement for  $\frac{1}{4}$  degree of Indian blood came from and how long it has been used.

*Response:* The regulatory requirement requiring  $\frac{1}{4}$  or more degree Indian blood for eligibility for JOM contracts dates back to 1957. See 22 FR 10533 (December 24, 1957). For additional history, see the discussion in the preamble to the proposed rule at 84 FR 30648 (June 27, 2019). However, the rule no longer contains a  $\frac{1}{4}$  degree or more Indian blood requirement as a prerequisite for student eligibility in the JOM program. The rule instead provides an option for eligibility if the student is  $\frac{1}{4}$  degree Indian blood descendant of a member of a Tribe.

*Comment:* Remove mention of  $\frac{1}{4}$  degree of Indian blood and instead require descendency back to the Tribe’s base roll or historical roll, to open the door for more descendants who may not be eligible as Tribal members due to enrollment practices, etc. Our ancestors who signed the Tribe’s roll agreed to have all their descendants eligible for future assistance and did not specify any degree of blood, so the Federal Government should not withhold assistance for any descendants.

*Response:* The final rule retains the requirement for  $\frac{1}{4}$  degree of Indian blood in one of the two options for eligibility to ensure consistency with the ISEP standard. Consistency between the ISEP and JOM programs is important because an eligible Indian student may move between a JOM contractor school and Bureau-funded school and should be equally eligible for both. Should BIE consider changing the blood quantum standard in the future, it will propose to do so for both JOM and ISEP simultaneously to ensure consistency.

*Comment:* Using blood quantum is a racist practice and is tantamount to telling a child that they are not “Indian enough.” It is becoming a discriminatory issue to include a child with  $\frac{1}{4}$  Indian blood quantum as eligible and exclude another student with  $\frac{1}{8}$  Indian blood quantum. A  $\frac{1}{4}$  blood quantum limit will decrease the number of Native American children that will be educated about their heritage, decrease the number of future Native American leaders, and begin to deplete Native American culture. Many have more Native blood than they can prove because their ancestors did not want to be recognized as Native or because of mistakes made in the records.

*Response:* The final rule codifies the practice that has been in place since 1991, which aligns with the eligibility criteria with ISEP, so this final rule is not expected to cause a decrease in current student eligibility.

*Comment:* Remove mention of  $\frac{1}{4}$  degree of Indian blood to get out of the business of defining which Tribal members qualify, and instead defer to Tribes’ determinations.

*Response:* Tribes have the sovereign right to determine their membership and Tribes are free to limit membership according to blood quantum or not. This rule is determining who is an “eligible Indian student” for the purposes of a Federal program and does not affect Tribes’ right to determine their own memberships. The rule defers to Tribes’ determinations of their members by making Tribal members eligible regardless of blood quantum, as long as the Tribe has determined the student is a member.

*Comment:* Remove mention of  $\frac{1}{4}$  degree of Indian blood and instead allow only Tribal members to be eligible, to defer to Tribes’ sovereign right to decide Tribal membership.

*Response:* BIE has determined that restricting eligibility to students who are themselves Tribal members is more restrictive than Congress intended in the Act. As the National Indian Education Association (NIEA) pointed out in response to the 2018 proposed rule, restricting eligibility to only those students who are Tribal members may exclude thousands of Native students who are at least  $\frac{1}{4}$  Indian blood descendant of a member of a Tribe and currently participate in JOM programs, but who are not Tribal members due to enrollment requirements. For example, a Tribe may not formally enroll a student until he or she reaches a certain age, or the student’s application for enrollment may be pending review with the Tribe.

*Comment:* Require both  $\frac{1}{4}$  degree Indian blood descendant and Tribal membership.

*Response:* BIE has determined, in accordance with Federal district court precedent, that requiring both  $\frac{1}{4}$  degree Indian blood descendant and Tribal membership for eligibility is too restrictive.

*Comment:* Remove the  $\frac{1}{4}$  degree Indian blood requirement if the Federal district court said it was too restrictive.

*Response:* The Federal district court ruled that requiring both a  $\frac{1}{4}$  degree Indian blood descendant and Tribal membership is too restrictive. Deleting the requirement for  $\frac{1}{4}$  degree Indian blood descendant from a member of a Tribe as one of the two options for eligibility would be more restrictive than the proposed rule, which allows for either  $\frac{1}{4}$  degree Indian blood descendant from a member of a Tribe or Tribal membership.

*Comment:* Allow students who are either a member of a federally recognized Tribe or at least  $\frac{1}{4}$  degree Indian blood descendant of a member of a federally recognized Tribe to be eligible.

*Response:* This comment reflects what was in the proposed rule and is included in the final rule.

*Comment:* Allow a student who is a Tribal member, but who does not have  $\frac{1}{4}$  degree Indian blood of the Tribe in which the student is enrolled, to be eligible.

*Response:* This comment reflects what was in the proposed rule and is included in the final rule; a student that is a Tribal member is eligible regardless of the student's Indian blood quantum.

*Comment:* Requiring the student be either a Tribal member or  $\frac{1}{4}$  degree Indian blood descendant of a member would exclude several children who rely on JOM and value the programs, resources, and connections it offers.

*Response:* The final rule codifies the practice that has been in place since 1991, so this final rule will not affect current student eligibility.

*Comment:* Add a definition of "descendant" to clarify.

*Response:* A descendant is one who follows in lineage, such as a child or grandchild (*i.e.*, offspring). The final rule does not add a definition because the rule uses the term "descendant" only once and the meaning of the term is the plain, dictionary meaning of the term.

*Comment:* Clarify whether students who are  $\frac{1}{4}$  degree Indian blood from more than one member of an Indian Tribe meet the requirement for being  $\frac{1}{4}$  degree Indian blood descendant of "a member of a federally recognized

Tribe." In other words, clarify that the  $\frac{1}{4}$  Indian blood quantum can be from more than one Tribe (*i.e.*, a combination of Tribes).

*Response:* A strict reading of the proposed rule would exclude a student who is  $\frac{1}{4}$  degree Indian blood descendant of more than one member of a Tribe. As one Tribal commenter stated, in keeping with the intent of the JOM program, Indian students should have eligibility verified using the most inclusive interpretation possible; therefore, BIE interprets the regulation to allow for blood quantum calculations to include blood from different federally recognized Tribes. This interpretation is also consistent with the interpretation for ISEP eligibility.

*Comment:* A student may not be eligible for membership in a Tribe because he or she does not meet the Tribe's blood quantum requirement for membership, but a student could be full-blood Native from eight different Tribes. The JOM eligibility criteria should allow for blood quantum to be measured from multiple Tribes, to be more inclusive than Tribes are for membership.

*Response:* As explained above, BIE interprets the regulation to allow for blood quantum calculations to include blood from different federally recognized Tribes.

*Comment:* Allow anyone who has a Certificate of Degree of Indian Blood (CDIB) to qualify as an eligible Indian student.

*Response:* If the CDIB or other documentation shows that the child is a member of a federally recognized Tribe, then no further documentation is necessary. Otherwise, a CDIB alone is sufficient to show eligibility as an Indian student only if it shows that the student has  $\frac{1}{4}$  degree blood quantum from a federally recognized Tribe. Or, as explained above, multiple CDIBs showing the student has blood quantum from more than one federally recognized Tribe are sufficient to show eligibility as an Indian student if the blood quantum from federally recognized Tribes add up to  $\frac{1}{4}$  degree or more.

*Comment:* If you do not allow anyone with a CDIB to be eligible, then children who are waiting for their Tribal enrollment to be processed by their Tribe will be penalized.

*Response:* If a child is not yet a Tribal member and the CDIB does not show  $\frac{1}{4}$  blood quantum from a federally recognized Tribe, then the CDIB alone would not be sufficient to show eligibility, but the student could show eligibility by providing a letter or other documentation from the Tribe explaining the circumstances (*e.g.*, that

the Tribe is still processing the enrollment paperwork but the child meets Tribal membership requirements).

*Comment:* Is a waiver permissible where the student is not yet formally enrolled with the Tribe but we can verify that the enrollment paperwork is pending with the Tribe and that the student meets the enrollment criteria?

*Response:* As explained in the above response, BIE may consider other documentation if the enrollment paperwork is pending with the Tribe.

*Comment:* Include as eligible any student who can provide any documentation that shows he or she is "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." This change would ensure that all Alaska Native and American Indian students would be "eligible Indian students" regardless of their Tribal membership status or Indian blood quantum.

*Response:* There may be documentation showing eligibility for a special program or service provided by another Federal agency; to the extent that documentation supports eligibility under this rule, BIE may consider that documentation.

## 2. Documentation Showing Eligibility

*Comment:* Accept Indian Health Service (IHS) documents such as an IHS card, health records showing vaccinations, or birth certificates, because that documentation may be more readily available given that the student must have vaccinations to enroll in public school and would prove eligibility because the IHS will administer vaccinations to only Tribal members or individuals with a CDIB.

*Response:* In some cases, IHS documentation may be sufficient, if it includes information showing that the student is a Tribal member or  $\frac{1}{4}$  degree blood quantum of a federally recognized Tribe.

*Comment:* Some students are in foster care or other child custody or are in an institution away from home but do not have their Tribal paperwork available because they are not living at home.

*Response:* BIE will examine these situations on a case-by-case basis to determine whether other documentation can verify that the child is an eligible Indian student.

*Comment:* Accept the following documents as evidence of eligibility: Student Tribal documentation, such as Tribal enrollment cards, Tribal citizenship cards, documentation from Tribal enrollment offices; Student CDIBs; and parent Tribal enrollment documentation with a child's birth

certificate. Accept documentation showing ANCSA descendency. Accept Title VI or Title VII forms indicating the child is part of a Tribe as documentation to support that the child is a member, even if not enrolled.

*Response:* BIE accepts Tribal enrollment cards and other official documentation from Tribal enrollment offices as evidence of Tribal membership and will examine other documentation on a case-by-case basis to determine whether it verifies that the child is an eligible Indian student.

### 3. Other Comments Regarding Eligibility of Indian Students

*Comment:* Several commenters referred to specific membership requirements in their Tribes.

*Response:* Tribes, as sovereigns, have the right to determine their own qualifications for membership.

*Comment:* Change references to Tribal “membership” to Tribal “citizenship” to differentiate from other non-sovereign groups.

*Response:* The Act uses the term Tribal “member,” so the regulations use that term for consistency.

*Comment:* Clarify whether Indian students are eligible for JOM if they reside in a boarding school.

*Response:* An Indian student is eligible for JOM services if he or she resides in a “previously private” Bureau-funded boarding school, or in a Bureau-funded boarding facility for the purpose of attending public school within the school district.

*Comment:* Why does the age range first refer to age (“age three years”), then to grade (“grade 12”)?

*Response:* The age range begins at age 3 to capture pre-K, and ends at grade 12 to include all who are enrolled in grade 12 regardless of age.

*Comment:* Allow students who are on an Indian Education Plan until age 21, or who have special needs, disabilities, or other challenges that may need to stay in school until they are age 21, to be included as eligible Indian students.

*Response:* Under the rule, any student who is an eligible Indian student remains so through grade 12, regardless of age.

### C. Indian Education Committee

*Comment:* The proposed rule grants Indian Education Committees too much authority. When a Tribe compacts JOM or includes it in a 477 plan, Committees should no longer have programmatic or budgetary authority over that program. A Committee should not have the power to recommend termination of a contract with a Tribe; Tribes should not have to fret about potential loss of services to

Indian children because of Committee politics.

*Response:* Congress requires establishment of an Indian Education Committee to participate fully in the development of programs to be conducted under a JOM contract, approve or disapprove programs to be conducted under those contracts, and carry out other duties as Interior provides by regulation. See 25 U.S.C. 5346(a). The full participation in development and authority to approve or disapprove of programs requires programmatic and budgetary authority. While an IEC may recommend cancellation or suspension of a contract with a Tribe under the specific circumstance that the Tribal contractor fails to permit the Committee to exercise its powers and duties, the final decision rests with the awarding official, who is certified under the Awarding Official Certification System. See § 273.117.

*Comment:* Indian Education Committees should not be formed for every school district, but instead should be a single body that serves all school districts that receive JOM funds within a Tribal jurisdiction.

*Response:* The composition of the Indian Education Committee is directed by the statute requires establishment of an Indian Education Committee for school districts and refers to whether the local school board is composed of a majority of Indians. Because the composition of the Committee depends upon the local school board composition, a Committee must necessarily be established for each school district. See 25 U.S.C. 5346(a).

*Comment:* Employees of the school district, regardless of whether they are Indian or have a child enrolled at the school, have a conflict of interest. They should be made ex-officio non-voting members or technical advisors of the Committee, excluded, or be required to disclose their conflict of interest for the Committee to address.

*Response:* The composition of the Indian Education Committee is directed by the statute.

*Comment:* Having family members serve on an Indian Education Committee may create issues in covertly or overtly wresting control of the Committee.

*Response:* The composition of the Indian Education Committee is directed by the statute.

*Comment:* Legal guardians should be entitled to vote with parents on the Indian Education Committee.

*Response:* The final rule defines “parent” to include legal guardians. See § 273.106.

*Comment:* Tribes, instead of parents, should have authority to determine who serves on the Indian Education Committee.

*Response:* The composition of the Indian Education Committee is directed by the statute. See 25 U.S.C. 5346.

*Comment:* Allow the Tribe, rather than the Indian Education Committee, the authority to cancel a contract.

*Response:* The Indian Education Committee may recommend cancellation, but does not have the authority to cancel. See § 273.117.

*Comment:* Education directors should have no decision-making ability over parents as to what funding is spent on; the directors should have administrative power only over implementing the programs and disbursing the funds. Also, local education agencies and Tribes that run and disburse programs have attempted to control what the Indian Education Committee can do in public schools. The Indian Education Committee keeps schools from misusing funding and using JOM funding for what is already in the general budget for the public school.

*Response:* The Indian Education Committee may bring to the attention of the awarding official if the contractor fails to permit the Committee to exercise their powers. See § 273.117.

*Comment:* The Indian Education Committee should consult the Tribe when it adopts a grievance policy, as the Tribe has a say over their citizens receiving the JOM benefits.

*Response:* The Indian Education Committee is encouraged to work with the Tribe when developing a grievance policy.

*Comment:* The sections addressing the Indian Education Committee are geared toward the Committee working with contractors that are public school districts, rather than self-governance Tribes or Tribal contractors under the 477 program.

*Response:* The Indian Education Committee is a component of all JOM contracts that is required by Congress. See 25 U.S.C. 5346.

### D. Education Plan

*Comment:* Clarify whether “prospective contractor” in § 273.119 refers to a new contractor.

*Response:* “Prospective contractor” in § 273.119 refers to a new contractor. For contract renewals, see § 273.192.

*Comment:* Clarify why costs that parents normally are expected to pay for each school must be included in the budget estimates and financial information that is part of the Education Plan; Native American parents normally cannot pay for their children’s

additional education costs and rely on JOM services and resources for their children.

*Response:* The requirement for this information is included in the current regulation and carried forward to the final rule. It is required to provide estimates for justifying the need for JOM funds to support the unique educational needs of eligible Indian students.

*Comment:* The Tribe(s) should have the opportunity to review the education plan to ensure it properly uses funds to benefit the children.

*Response:* If the Tribe is the contractor, the Tribe will formulate an education plan in consultation with the Indian Education Committee. *See* § 273.119.

*Comment:* Can we continue to use the same format we have been using for the Education Plan?

*Response:* Yes, there is no prescribed form for the Education Plan, as long as it meets the requirements of subpart D.

#### *E. Priority to Contracts Serving Indian Students On or Near Reservations*

*Comment:* Clarify what the contracts are being prioritized for in § 273.128.

*Response:* This section prioritizes how new contracts will be awarded if BIE receives more funding.

*Comment:* The Fiscal Year 2020 budget justification states that priority is given to programs that are on or adjacent to Indian reservations located in Oklahoma and Alaska. We disagree with this priority because the funding should be for all Indian students who have specialized and unique needs.

*Response:* The definition of “eligible Indian student” does not include a requirement to live on or near a reservation. Section 273.128 establishes a mechanism for prioritization of new programs where there may be limited funding available. This prioritization does not limit contracts only to eligible entities located on or near reservations.

*Comment:* Because of the importance of the JOM program to Tribes, BIE should prioritize Tribes in JOM funding even as it seeks to expand the geographic reach of the program. Under no circumstances should contracts to non-Tribal entities, such as States or public schools, reduce the funds that are available to Tribes to support their children. Tribes should never have to compete with States or other entities for funds, and Tribes should always have priority when seeking or renewing JOM contracts.

*Response:* The final rule adds a provision, which exists in the current regulation, that gives the Tribe the first opportunity to contract, by notifying the BIE by February 1 preceding the school

year to be covered by the contract. If the Tribe does not notify the BIE by this date, then BIE may contract with the State, public school district, or Indian corporation. *See* § 273.131(a)–(b).

*Comment:* Proposed § 273.128 states that priority will be given to contracts that serve Indian students on or near reservations. Revise this section to include Alaska Native villages, to account for the fact that there is only one reservation in Alaska.

*Response:* The definition of “reservation” at § 273.106 accounts for Alaska Native villages by including “Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act.”

*Comment:* Indian students should be considered a priority no matter where they reside. Many eligible Indian students live in urban areas far from their reservations and rely on the JOM program. Delete reference to “on or near” a reservation because Tribal reservations were assigned arbitrarily and the large majority of our Tribal members live off-reservation and far from the reservation.

*Response:* The definition of “eligible Indian student” does not include a requirement to live on or near a reservation. Section 273.128 establishes a mechanism for prioritization of new programs where there may be limited funding available. This prioritization does not limit contracts only to eligible entities located on or near reservations.

*Comment:* Clarify how many miles from a reservation is considered “near” a reservation. We have public schools that are near the reservation and would like to apply if possible.

*Response:* The rule does not intend to establish a distance from a reservation for eligibility; rather, § 273.128(a) establishes a mechanism for prioritization of new programs where there may be limited funding available.

#### *F. Comments on Funding and the Funding Formula*

The proposed rule set out the funding formula for distribution of JOM funds to contractors. The formula includes a “weight factor” that is multiplied by the number of eligible Indian students.

##### *1. Funding Formula*

*Comment:* The national average cost per pupil that is used in the formula should be broken down to national average cost per Native pupil and national average cost per non-Native pupil.

*Response:* The U.S. Department of Education does not currently provide a breakdown of data on average cost per pupil by Native versus non-Native.

*Comment:* The weight factor does not benefit our Tribe; it reduces the amount of funds allocated to us.

*Response:* The new formula based on the 1.3 weight factor was implemented in 1988 at the direction of Congress as a more realistic weight factor given the level of appropriations.

*Comment:* Funding should not be based on the State average cost per pupil for States that poorly fund their education programs because children are then at the whim of the politics of that State. Instead, use a blended rate or the medium of all States.

*Response:* The weight factor provides a lower boundary to help equalize among States. Specifically, if the State average divided by the national average is less than the weight factor (1.3), then the weight factor is used.

*Comment:* Explain how the per pupil amount is determined.

*Response:* The cost per pupil is based upon U.S. Department of Education public data.

*Comment:* The national average cost per pupil does not accurately reflect the average cost per pupil in Tribal communities where we lack infrastructure. For example, in Alaska, we have kindergarten and high school students in the same facility, being taught by the same teacher.

*Response:* The national average cost per pupil is used as the denominator in calculating the weight factor, so if the national average cost per pupil is significantly higher than the State average cost per pupil, then calculated weight factor will be lower than 1.3, and the minimum weight factor of 1.3 will be used instead. The minimum weight factor is an equalizer for communities where the State average cost per pupil is low.

*Comment:* If the schools that receive JOM funds are required to meet State standards, then JOM funding is treated like general funding for students, and not specialized and unique funding as intended to meet the needs of eligible Indian students.

*Response:* JOM funding may be used only to provide educational benefits to eligible Indian students for the programs, activities, and equipment set out in § 273.113; it is not general funding.

*Comment:* Although we fully support the attempt to not reduce funds for contracting parties, BIE should be engaged in extensive Tribal consultation on how best to update the formula while holding Tribes harmless.

*Response:* BIE has conducted six webinars and two full-day, in-person consultation sessions on this topic.

## 2. “Hold Harmless” Provision

*Comment:* How does the hold harmless provision affect schools with 50 percent or more Native students?

*Response:* The hold harmless provision does not depend upon the percentage of eligible Indian students a contractor has.

*Comment:* Clarify how the funding formula will impact smaller Tribes once the four-year “hold harmless” period expires.

*Response:* Depending on Congressional appropriations, Tribal organizations who contract under JOM to meet the specialized and unique educational needs of eligible Indian students may see a change in the amount of JOM funding received once the four-year “hold harmless” period expires. The funding formula requires multiplication of the number of eligible Indian students by a weight factor so, to some extent, the number of eligible Indian students a Tribal organization serves will affect how much funding is allocated to that Tribal organization.

*Comment:* After the four-year “hold harmless” period expires, funding may decrease and smaller Tribes may be at a significant disadvantage. Consider closely any plan that would result in less money for small Tribal communities or smaller eligible Indian student counts.

*Response:* Congress decides the level at which JOM is funded. The funding formula affects allocation of that funding. The funding formula reflects the formula used since 1988.

## 3. Availability of Funding

*Comment:* Many commented on the need for the JOM program to be fully funded or requested an increase in JOM funding, including:

- The Tribe’s JOM program has always been underfunded, and has never received funding to recover from the additional decreases made during sequestration. Adequate funding is needed.

- We should be expanding the program to provide more services, so the formula should not result in less funding. Revisit the funding formula to make sure equal or greater funding is available for eligible Indian students. Funding must follow the students.

- Any reductions to already meager JOM funding is categorically unacceptable. The updated count required by the Act will demonstrate an explosion of funding need in FY20 and beyond. Before the increased student count begins reducing funds per-awardee below the FY17 level, overall JOM program funding increases must be in place.

- Tribes should receive no reductions in funding; if the treaty and trust obligations were fully honored, Tribes would be fully funded. Decreasing funds to Tribal JOM contractors is inconsistent with fulfillment of trust and treaty obligations to provide for Indian education.

- The current weight factor (1.3) should be increased to an amount that is consistent with the needs of Native students and funding per students should be increased at least to the level established in 1994.

- Public schools should receive no reductions in funding if they consult with area Tribes for their consent on use of funds for academic, social, and cultural enrichment.

- BIE has a responsibility to determine the amount necessary to fully serve this need, and then passionately advocate for it during the federal budget development cycle, ensuring Federal appropriators are aware of the negative consequences for Indian Country.

- BIE plays a critical role in ensuring the availability of funds. It is incumbent on BIE to request the funds needed to adequately support the JOM program.

*Response:* Congress decides the level at which JOM is funded, but BIE will consider this comment in preparing its annual report to Congress. As stated in § 273.201, BIE will recommend appropriate funding levels for the program based on the most recent determination of the number of eligible Indian students served by each contracting party.

*Comment:* If a contractor fails to submit their student count, they may not receive funds for the next school year, but will that failure affect appropriations? Are appropriations tied to the annual student count reported?

*Response:* Congress determines the amount of appropriations. BIE is unable to speculate on whether Congress considers the annual student count.

*Comment:* If additional schools apply for JOM funds, there is no assurance the funding will increase to accommodate the programs. Funding to existing programs could decrease. Without funding, we cannot meet the specialized and unique needs of eligible Indian students.

*Response:* The rule provides that “subject to the availability of appropriations,” eligible entities who have not previously entered into a contract for JOM may submit a proposal. See § 273.125.

## 4. Use of JOM Funding

*Comment:* In the past, JOM funding has been used to support culture and language programs, but the proposed

reference in § 273.113(b) to “culturally sensitive dropout prevention activities” does not appear to encompass those. Revise to include cultural activities.

*Response:* The final rule deletes proposed § 273.113(b) because the language at § 273.113(a)(1), allowing for cultural programs, is more encompassing and would include language programs.

*Comment:* JOM has historically funded more than academics, to include social services. Retain social services as a component of JOM, as social emotional learning is gaining popularity in schools and the trauma index of our children is skyrocketing.

*Response:* JOM funds are to be used to provide educational benefits only and the final rule clarifies that any counseling funded through JOM is limited to academic, career and college-readiness counseling. See § 273.113.

*Comment:* Keep community-based programs, as they are best able to meet the needs of their children.

*Response:* The Indian Education Committee may choose to develop community-based programs to meet the unique educational needs of eligible Indian students. See §§ 273.115 and 273.117.

*Comment:* Ensure that JOM funding can continue to be used for food for children who go without unless school is in session and for Tribal cultural gatherings.

*Response:* As in the current rule, the final rule provides that education plans may provide for free school lunches for eligible Indian students who do not qualify for free U.S. Department of Agriculture lunches. See § 273.143(c).

*Comment:* Ensure that JOM funding can be used for school supplies, sports equipment, and similar items that boost self-esteem, increase participation, and contribute to school spirit, as well as dues, fees, registration, summer school, shoes, clothes, eyeglasses, technology, facility rentals, academic incentives, parental involvement incentives, student direct services, sports fees, leadership camps, sports camps, substance abuse, hygiene items.

*Response:* The final rule allows JOM funds to be used for important needs, such as school supplies and items that enable recipients to participate in curricular and extra-curricular activities. See § 273.113(a)(3).

*Comment:* JOM funding should be available to train members of the Indian Education Committee so that members understand their duties, roles, and responsibilities, and to allow stipend and travel costs where internet is not available to meet remotely.

*Response:* As in the current regulation, the final rule allows a JOM contract to include funding to support the duties of the Indian Education Committee, including members' attendance at meetings (such as stipend and travel costs) and training sessions, as the Committee deems appropriate. See § 273.127.

#### *G. Comments on Reporting Requirements*

*Comment:* When are reports due and who do we send them to?

*Response:* The final rule provides that the annual report is due on or before September 15 (see § 273.152) and should be sent to the awarding official, Indian Education Committee(s) and Tribe(s) (see § 273.153).

*Comment:* Consider that May and June are busy for schools when setting reporting deadlines.

*Response:* The final rule provides that the annual report is due on or before September 15, to allow sufficient time following schools' busy seasons to prepare. See § 273.152.

*Comment:* If a contractor fails to meet the reporting requirements, what will BIE do with the funds it withholds?

*Response:* Funds that are withheld for failure to meet reporting requirements will be allocated among the other JOM contractors.

*Comment:* Have you modernized the application and reporting process?

*Response:* BIE accepts applications and reports electronically through email and is open to suggestions as to how to further modernize these processes.

*Comment:* Clarify what reporting requirements apply to self-governance compact Tribes.

*Response:* The final rule adds a provision to § 273.111 to clarify what reporting requirements self-governance compact Tribes are subject to.

*Comment:* Add an exception to the annual reporting requirements in subpart G to follow the 477 reporting requirements when applicable because the reporting requirements in §§ 273.151 and 273.152, to report by a certain date and to include specific data, conflict with existing law under P.L. 102-477.

*Response:* BIE has not added the requested exception because the JOM Modernization Act establishes a reporting framework that requires all JOM contractors to report on the same schedule. Specifically, the Act requires each contracting party to submit a report for each academic year, and provides that a failure to report will result in the contracting party receiving no amounts for the following academic year. BIE is also required to submit an annual report with the most recent determination of

the number of eligible Indian students served by each contracting party. 25 U.S.C. 5348(c).

*Comment:* Make reporting and eligibility requirements consistent and uniform for all JOM contracts, whether the contractor is a Tribe, a public school, or other contractor, to place them in the same calendar year and be more uniform with other programs or contracts.

*Response:* The final rule provides for a consistent schedule for reporting: annual reports are due September 15 of each year, regardless of who the contracting party is or the vehicle through which they receive their funds (e.g., 477 plan, self-determination contract, or self-governance contract or compact). See § 273.152. Eligibility requirements are consistent for all Indian students, as specified in § 273.112.

*Comment:* I oppose withholding funds for the next school year if a contractor fails to comply with the reporting requirements.

*Response:* Under § 273.156, BIE will provide technical assistance and training to assist existing contractors in complying with the reporting requirements.

#### *H. Agency Administration of JOM*

*Comment:* Clarify who the Regional Director is. We believe it should be someone in BIE, as most BIA Regional Directors are not experts in education matters.

*Response:* The final rule replaces the term "Regional Director" with "BIE Director" to reflect that BIE is administering JOM.

*Comment:* Allow the Regional Office to receive funding to provide technical assistance because Regional Offices are closer to Tribes.

*Response:* BIE is responsible for providing technical assistance and will work with BIA Regions to provide the technical assistance to Tribes.

*Comment:* As part of the current proposed rule, the BIE requested comment on a proposal to shift responsibility for approving JOM program contracts from the BIA to the BIE. Due to budgetary processes and capacity, the BIA has historically processed JOM contracts on behalf of the BIE. In early 2019, the BIE 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, we support the proposal to shift JOM contract administration from the BIA to the BIE.

*Response:* BIE is continuing to build capacity and is exploring options to streamline the management of education contracts.

*Comment:* We request that administration of contracts remain with BIA instead of BIE because there is no BIE presence in Alaska, and that could negatively affect efficiency here. Additionally, because many Tribal organizations operate their JOM through a 477 plan, retaining administration with BIA will better align the programs.

*Response:* BIE is working with BIA to ensure management of education contracts is as efficient as possible.

#### *I. Participation in Rulemaking and Implementation*

*Comment:* We request that BIE not move forward with JOM modernization without better engaging program participants to enhance the rulemaking process with a working group including Tribal representatives.

*Response:* BIE engaged in Tribal consultation and reached out to stakeholders in developing this regulation and will continue to engage with JOM contractors and Tribes as it implements the JOM program.

*Comment:* Update the JOM guideline booklet to set out what Tribal contractors can do versus public school contractors.

*Response:* BIE will be updating the JOM handbook to reflect the changes made by this final rule.

*Comment:* Some Tribes and contractors would have participated in the meetings and consultation sessions on the proposed rule but were off for the summer.

*Response:* BIE scheduled the meetings in order to allow it to meet the statutory deadline for a final rule and so as not to interfere with scheduled school activities. BIE offered webinars to allow for easier access regardless of location.

*Comment:* In implementing these changes, BIE should regularly meet with Tribal stakeholders to evaluate opportunities to improve the rule and the program.

*Response:* BIE welcomes Tribal input on best practices and other improvements in implementing the JOM program.

*Comment:* Insert regulatory text that requires formal Tribal consultation to

expand geographic coverage and enhance Tribal participation.

*Response:* The final rule adds that BIE will consult with Tribes in implementing § 273.104.

*Comment:* Require BIE to conduct consultation with area Tribes prior to any cancellation to allow the Tribes to take over administration of the funds.

*Response:* If a contract is cancelled for cause, the Bureau will attempt to perform the work by another contract, which may be the Tribe. See § 273.195(d).

*Comment:* Parents are the second most important key stakeholder after children in this process.

*Response:* The public meetings on the proposed rule included parents.

#### J. Miscellaneous Comments

*Comment:* Will existing contractors need to reapply?

*Response:* Existing contractors will not need to reapply.

*Comment:* Proposed § 273.126 refers to minimum State standards or requirements, but some schools work with standards set by their accrediting agency, rather than the State.

*Response:* The final rule addresses this comment by changing “State standards or requirements” to “State or other applicable standards or requirements.”

*Comment:* Requiring a public school district to establish in its proposal to contract that it has at least 70 percent eligible Indian students enrolled is unreasonable. Lower the figure to 50 percent.

*Response:* The final rule changes the required percentage to 50 percent because 50 percent more accurately reflects the enrollment numbers at public school districts that meet the remaining requirements of § 273.126.

*Comment:* We support having payments be made in advance for schools.

*Response:* As in the current rule, the final rule allows for advance payments. See § 273.142.

*Comment:* Clarify in section 273.192(a) whether the new Tribal resolution that is required if the current one has expired or its terms do not address renewal is required annually on some other time schedule.

*Response:* Section 273.192(a) requires the new Tribal resolution only upon renewal of the contract.

#### IV. Summary of Final Rule and Changes From Proposed Rule to Final Rule

This final rule amends part 273 as a whole to implement the JOM Modernization Act and make other

changes necessary to update the rule as described below. An edit made throughout the rule was to replace “Regional Director” with “BIE Director” to reflect that BIE, rather than BIA, will be primarily implementing part 273.

##### A. General Provisions and Definitions (Subpart A)

Final subpart A updates each of the existing sections (purpose and scope, definitions, revision or amendment of regulations, and policy of maximum Indian participation). For example, the final rule splits the purpose and scope section into several sections; adds, revises, and removes definitions; and changes requirements for revising or amending the regulations to provide that the Bureau will follow the Administrative Procedure Act. The final rule adds a section on how the Secretary will ensure full geographic coverage and full participation to address a requirement in the JOM Modernization Act that the Secretary consult with eligible entities that have not previously participated in the JOM program.

Changes from the proposed rule to final rule in this subpart include:

- Adding a sentence to indicate that the Secretary will consult with Tribes (and contact State educational agencies, local educational agencies, and Alaska Native organizations that have not previously entered into a contract) in ensuring geographic coverage and the full participation of all federally recognized Tribes and school districts to better reflect the statutory requirement for consultation. See § 273.104.
- Adding a definition for “BIE Director” as this term replaced the proposal to include “Regional Director.” See § 273.106.
- Adding a definition for “Bureau-funded school” to clarify what schools are included, as this term is used in the description of who is an “eligible Indian student.” See § 273.106.
- Adding clarification in the definition of “contract” to distinguish JOM contracts from Indian Self-Determination and Education Assistance Act contracts and compacts. See § 273.106.
- Deleting reference to BIA in the definition of “Director.” See § 273.106.
- Adding a definition of “parent,” as this term is used throughout the part. See § 273.106.
- Adding a definition of “sectarian school,” as this term is used in the description of who is an “eligible Indian student.” See § 273.106.
- Adding to the definition of “Tribal organization” the statutory requirement for each Tribe’s approval of a contract

to perform services benefitting more than one Tribe. See § 273.106.

##### B. Program Eligibility & Applicability (Subpart B)

Final subpart B addresses the same topics of eligible applicants (but updates the term to refer to “eligible entities” to reflect the language of the JOM Modernization Act) and eligible students as the current subpart B, but moves the other subpart B topics to subparts C, D and E. Subpart B also addresses what funds may be used under JOM contracts and what programs may be contracted under the JOM Act. The final rule revises the criteria for “eligible Indian students” and adds examples of how JOM contract funds can be used. The final rule also clarifies which provisions Tribal organizations are subject to (see proposed § 273.111).

Changes from the proposed rule to final rule in this subpart include:

- Revising § 273.111 to provide that Tribal organizations are subject to the § 273.113 restrictions on what JOM funds may be used for.
- Clarifying in § 273.111 that Tribal organizations are subject to reporting requirements for JOM. See § 273.111.
- Clarifying that the Indian Education Committee has the authority only to recommend cancellation or suspension of contracts, rather than authority to revoke them. See § 273.111(b)(8).
- Adding reference to self-governance regulations at 25 CFR 1000 for contract proposals, clarifying that education plans must be submitted to the BIE Director, and clarifying that redesign and reallocation under Title I contracts or Title IV compacts must comply with another regulatory provision. See § 273.111(c).
- Clarifying an exception for students enrolled in previously private schools that may be eligible Indian students. See § 273.112(b).
- Referring to the definition of “Indian Tribe” rather than repeating “federally recognized.” See § 273.112(c).
- Clarifying that “counseling” refers to academic, career and college-readiness counseling. See § 273.113(a)(1).
- Deleting reference to culturally sensitive dropout prevention activities and instead add “establish” to the broader description of programs. See § 273.113(a).
- Changing the recipient of annual reports from the awarding official to the BIE Director. See § 273.152, § 273.153.

##### C. Indian Education Committee (Subpart C)

Final subpart C addresses the Indian Education Committee, which is in

current subpart B. The final rule revises the description of “Indian Education Committee” to include a preference in committee membership for parents and guardians of children enrolled in a school. The rule also removes a requirement to report to the Bureau regarding who will serve on the Indian Education Committee. The rule adds that organizational papers and by-laws of the Indian Education Committee may include additional powers and duties that would permit the Committee to, among other things, establish policy and procedures for hearing grievances.

Changes from the proposed rule to final rule in this subpart include:

- Adding the statutory allowance for the Tribe(s) to specify the Local Indian Committee(s) or Indian Advisory School Board(s) as the Indian Education Committee if the Indian Education Committee was established prior to 1975. *See* § 273.115.
- Adding a cross-reference in the list of powers and duties of the Indian Education Committee to § 273.194, which more fully sets out how an Indian Education Committee could recommend cancellation or suspension of a contract. *See* § 273.117(d).

#### *D. Education Plan (Subpart D)*

Final subpart D addresses the contents of the education plan (currently addressed in subpart B) and adds a section specifying that an education plan will be approved by a the BIE Director, under 25 U.S.C. 5345.

No substantive changes from the proposed rule to final rule, beyond changing “Regional Director” references to “BIE Director” were made in this subpart.

#### *E. Contract Proposal, Review, and Approval (Subpart E)*

The final rule moves provisions that are in the current subpart B regarding applications and requests to contract, contract review, and approval, to a new subpart E. This new subpart includes a section regarding how eligible entities who have not participated in the program in the past should submit a contract proposal. The final rule changes the contract approval period from 60 days to 90 days. The change from 60 to 90 days aligns JOM contract approval with the statutory 90-day approval period for both Public Law 93–638 contracts and Public Law 102–477 plans. The subpart also includes updates to outdated statutory and regulatory citations. Since the BIE is responsible for administering Indian education programming for the Department, the final rule reflects that

BIE is the primary agency administering JOM.

Changes from the proposed rule to final rule in this subpart include:

- Revising two requirements for a public school district to establish to contract for operational support: that the funds are needed to meet “other applicable standards” if State standards do not apply; and lowering the percentage of eligible Indian enrollment in the school district from 70 to 50. *See* § 273.126(b)(1).
- Adding that a Tribal resolution is needed in support of a contract proposal if the contractor is a Tribal organization. *See* § 273.130.
- Adding in the option of first refusal that is in the current regulation for Tribes who would like to enter into a contract to notify the BIE no later than February 1 preceding the school year for the contract, and only after that date will the BIE Director seek to contract with the State, public school district, or Indian corporation. *See* § 273.131(b).

#### *F. Funding Provisions (Subpart F)*

Final subpart F includes provisions that are in current subpart C. This new subpart F revises the funding formula to reflect current practice, with the four-year “hold harmless” and phased decrease approach provided by the JOM Modernization Act. This subpart also moves the section on advance payments from current subpart D and revises the section on advance payments to comply with 25 U.S.C. 5324(b).

No substantive changes were made to this subpart from the proposed rule to final rule, beyond changing “Regional Director” references to “BIE Director” and updating the fiscal year references from 2017 to 2018.

#### *G. Annual Reporting Requirements (Subpart G)*

Final subpart G revises reporting requirements to reflect the annual student count reporting requirements of the JOM Modernization Act. As such, this subpart adds sections requiring an annual report, describing what must be included in the annual report, describing what will happen if a contractor fails to submit an annual report, and identifying who will notify a contractor that they have failed to submit an annual report. This subpart also includes a section explaining that the Bureau is required to provide technical assistance and training, and describing the process to request assistance to meet annual reporting requirements. An additional new section describes how a decrease in the reported student count will affect future funding. The subpart includes language

reflective of the JOM Modernization Act defining a “contracting party” as an entity that has a contract through a program authorized under this Act.

No substantive changes were made in this subpart from the proposed rule to final rule, beyond changing “Regional Director” references to “BIE Director” and, in § 273.155, changing “awarding official” to “BIE Director.”

#### *H. General Contract Requirements (Subpart H)*

Final subpart H addresses many of the same topics as current subpart D. In addition to updating outdated statutory and regulatory citations, this subpart updates records requirements now that contract files are to be filed under the Department Records Schedule. This subpart also revises a contractor’s responsibility for penalties under the Privacy Act requirements, and revises who will investigate a complaint received of a Civil Rights Act violation in State school districts and provides that such investigations will be performed by the Department of Education and removes references to the Department of Justice.

Changes to this subpart from the proposed rule to final rule included changing “Regional Director” references to “BIE Director” and adding a new paragraph (d) to § 273.170 to address requirements for Self-Governance Tribes to submit their education plans to the BIE Director.

#### *I. Contract Renewal, Revisions, and Cancellations (Subpart I)*

Final subpart I addresses the topics in current subpart E, and also includes new provisions adding a contract renewal process.

No substantive changes from the proposed rule to final rule, beyond changing “Regional Director” references to “BIE Director” were made in this subpart.

#### *J. Responsibility and Accountability (Subpart J)*

This final subpart addresses requirements in the JOM Modernization Act which, among other things, requires the Secretary to provide an annual report to Congressional committees and subcommittees to include a determination on the number of eligible students served by each contracting party, recommendations on appropriate funding levels for the program based upon such determination, and an assessment of the contracts under JOM.

No changes from the proposed rule to final rule were made in this subpart.

### K. Appeals (Subpart K)

Final subpart K includes provisions that are currently at subpart F and encourages the use of an Alternate Dispute Resolution (ADR) process that has been established by the Department of the Interior prior to filing a formal appeal. The subpart would also refer to the Contracts Dispute Act of 1978, 41 U.S.C. 7101–7109, which created the Civilian Board of Contract Appeals (CBCA). The CBCA is an independent tribunal with its own formal appeal process. Additional information on the CBCA can be found at: <https://www.dbca.gov/index.html>. Tribes and Tribal organizations may bring appeals involving Self-Determination Act contracts before the CBCA under 25 U.S.C. 5331(d)-(e).

The only change from the proposed rule to final rule in this subpart was to add a reference to 25 CFR part 1000 as an avenue to request an appeal, as applicable.

## V. Procedural Requirements

### A. Regulatory Planning and Review (E.O. 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The BIE has developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

### B. Reducing Regulations and Controlling Regulatory Costs (E.O. 13771)

E.O. 13771 of January 30, 2017, directs Federal agencies to reduce the regulatory burden on regulated entities

and control regulatory costs. E.O. 13771, however, applies only to significant regulatory actions, as defined in Section 3(f) of E.O. 12866. Therefore, E.O. 13771 does not apply to this rule.

### C. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

### D. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(a) Does not have an annual effect on the economy of \$100 million or more because the funding available through JOM does not approach this amount.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, Tribal or local government agencies, or geographic regions because this rule affects only certain education contracts.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects only certain education contracts.

### E. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

### F. Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630 because this rule does not affect individual property rights protected by the Fifth Amendment or involve a compensable "taking." A takings implication assessment is not required.

### G. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement because the rule affects only

individuals' eligibility under certain education contracts. A federalism summary impact statement is not required.

### H. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

### I. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has substantial direct effects on federally recognized Indian Tribes because one portion of the criteria for eligibility of Indian students is Tribal membership. The proposed rule was published on June 27, 2019. *See* 84 FR 30647. During the 60-day public comment period, BIE held four consultations sessions directly with the Tribes and four consultation sessions with eligible entities and interested parties: July 16, 2019, in Tahlequah, OK; July 19, 2019, in Bismarck, ND; July 23, 2019, via webinar; and July 25, 2019, via webinar. *See* 84 FR 30647. The public comment period on the proposed rule ended on August 26, 2019.

### J. Paperwork Reduction Act

This rule contains information collections requiring approval under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* The Department is seeking approval for a new OMB Control Number.

OMB Control Number: 1076–0193.

*Brief Description of Collection:* The regulations at 25 CFR 273, Subpart E, implement in section 7(c) Contracting Party Student Count Reporting Compliance, of the Johnson-O'Malley Supplemental Indian Education Program Modernization Act (Pub. L. 115–404), enacted December 31, 2018. These regulations require the BIE to implement an annual reporting requirement for existing JOM

contractors to report a student count served by each contracting party, and an accounting of the amounts and purposes for which the contract funds were expended. The information received from the annual reporting requirements of the contractor will allow the Secretary to provide an annual report, including the most recent determination of the number of eligible Indian students served by each contracting party, recommendation on appropriate funding levels, and an assessment of the contracts receiving JOM contracts, to the appropriate Committee and Subcommittees in the Senate and of the House of Representatives. The JOM Modernization Act indicates a “contracting party” is an entity that has a contract through a program authorized under this Act. It does not exclude Tribal organizations from the annual reporting requirements. The Department is seeking approval for a new OMB Control Number.

*Title of Collection:* Johnson O'Malley Student Count Annual Report.

*Type of Review:* New collection.

*Respondents/Affected Public:* Tribal organizations, States, public school districts, Indian corporations.

*Total Estimated Number of Annual Respondents:* 312.

*Total Estimated Number of Annual Responses:* 1,197.

*Estimated Completion Time per Response:* Ranges from 2 to 80 hours.

*Total Estimated Number of Annual Burden Hours:* 11,450.

*Respondent's Obligation:* Required to Obtain a Benefit.

*Frequency of Collection:* Annually.

*Total Estimated Annual Non-hour Burden Cost:* \$0.

#### K. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because these are “regulations . . . whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 CFR 46.210(i). The BIE has also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

#### L. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive

Order 13211. A Statement of Energy Effects is not required.

#### List of Subjects in 25 CFR Part 273

Elementary and secondary education, Grant programs-Indians, Indians-education, Schools.

For the reasons set forth in the preamble, the Department of the Interior, Bureau of Indian Affairs, revises 25 CFR part 273 to read as follows:

### PART 273—EDUCATION CONTRACTS UNDER JOHNSON-O'MALLEY ACT

#### Subpart A—General Provisions and Definitions

Sec.

- 273.101 What is the purpose and scope of this part?
- 273.102 How will revisions or amendments be made to this part?
- 273.103 What is the Secretary's policy of maximum Indian participation?
- 273.104 How will the Secretary extend geographic coverage and enhance participation under the Johnson-O'Malley Act?
- 273.105 How do these regulations affect existing Tribal rights?
- 273.106 What key terms do I need to know?

#### Subpart B—Program Eligibility & Applicability

- 273.110 Who is eligible to request contracts under the Johnson-O'Malley Act?
- 273.111 How do the requirements for Tribal organizations differ from those for other eligible entities?
- 273.112 Who is an eligible Indian student under the Johnson-O'Malley Act?
- 273.113 How can the funds be used under the Johnson-O'Malley Act?
- 273.114 What programs may be contracted under the Johnson-O'Malley Act?

#### Subpart C—Indian Education Committee

- 273.115 Who determines the unique educational needs of eligible Indian students?
- 273.116 Does an Indian Education Committee need to establish procedures and report to the BIE Director?
- 273.117 What are the powers and duties of the Indian Education Committee?
- 273.118 Are there additional authorities an Indian Education Committee can exercise?

#### Subpart D—Education Plan

- 273.119 What is an education plan and what must it include?
- 273.120 Does an education plan need to be approved by the BIE Director?
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**Authority:** Secs. 201–203, Pub. L. 93–638, 88 Stat. 2203, 2213–2214 (25 U.S.C. 455–457), unless otherwise noted.

#### **Subpart A—General Provisions and Definitions**

##### **§ 273.101 What is the purpose and scope of this part?**

The purpose of this part is to set forth the process by which the Secretary will enter into contracts for the education of Indian students under the Johnson-O'Malley Act. Such contracts are for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible

Indian students, including supplemental programs and school operational support, where such support is necessary to maintain established State educational standards.

##### **§ 273.102 How will revision or amendments be made to this part?**

Prior to making any substantive revisions or amendments to this part, the Secretary will consult with Indian Tribes and national and regional Indian organizations to the extent practicable about the need for revision or amendment and will consider their views in preparing the proposed revision or amendment. Nothing in this section precludes Indian Tribes or national or regional Indian organizations from initiating a request for revisions or amendments.

##### **§ 273.103 What is the Secretary's policy of maximum Indian participation?**

The meaningful participation in all aspects of educational program development and implementation by those affected by such programs is an essential requisite for success. Such participation not only enhances program responsiveness to the needs of those served, but also provides them with the opportunity to determine and affect the desired level of educational achievement and satisfaction which education can and should provide. Consistent with this concept, maximum Indian participation in the development, approval, and implementation of all programs contracted under this part is required.

##### **§ 273.104 How will the Secretary extend geographic coverage and enhance participation under the Johnson-O'Malley Act?**

The Secretary will, to the extent practicable, and subject to the availability of appropriations, ensure full geographic coverage and the full participation of all federally recognized Tribes and school districts, regardless of whether the school districts or Tribal organizations had entered into a contract under the Johnson-O'Malley Act before fiscal year 1995. To the maximum extent practicable, the Secretary will consult with Indian Tribes and contact State educational agencies, local educational agencies, and Alaska Native organizations that have not previously entered into a contract in the implementation of this section.

##### **§ 273.105 How do these regulations affect existing Tribal rights?**

Nothing in these regulations may be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian Tribe;

(b) Authorizing or requiring the termination, waiving, modifying, or reducing of any existing trust responsibility of the United States with respect to the Indian people;

(c) Permitting significant reduction in services to Indian people as a result of this part; or

(d) Mandating an Indian Tribe to request a contract or contracts. Such requests are strictly voluntary.

##### **§ 273.106 What key terms do I need to know?**

Terms used in this part:

*Academic year* means the period of the year during which students attend an educational institution.

*Appeal* means a request for an administrative review of an adverse Agency decision.

*Approving official* means the BIE Director, or Agency Superintendents (for Tribes assigned under their management), has the responsibility and duties to review, approve or decline the contract in accordance with the Act.

*Awarding official* means any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto. This person can be a contracting officer or other authorized Federal official.

*BIE Director* means the Bureau of Indian Education Director or his or her designee.

*Bureau* or *BIE* means the Bureau of Indian Education.

*Bureau-funded school* means a Bureau-operated elementary or secondary day or boarding school; or a Bureau-operated dormitory for students attending a school other than a Bureau school; or a Tribally controlled elementary school, secondary school, or dormitory that receives financial assistance for its operation under a contract, grant, or agreement with the Bureau under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act, as amended.

*Calendar year* means the period of 365 days (or 366 days in leap years) starting from January 1.

*Capital outlay* means money spent to acquire, maintain, repair, or upgrade capital asset. Capital assets, also known as fixed assets, may include machinery, land, facilities, or other business necessities that are not expended during normal use.

*Contract* means to transfer the funds in support of the efforts designed to meet the specialized and unique educational needs of Indian students in the Johnson-O'Malley program from the Federal Government to the contractor. Tribes availing themselves of Public Law 93-638, the Indian Self-Determination and Education Assistance Act, may receive funds under Title I contracts or Title IV contracts.

*Contracting party* means an entity that has a contract through a program authorized under the Johnson-O'Malley Act.

*Contractor* means any Tribal organization, State, school district, or Indian corporation to which a contract has been awarded.

*Days* means calendar days; except where a date specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period will carry over to the next business day.

*Debt retirement* means the act of paying off debt completely to a lender.

*Director* means the Director of the Bureau of Indian Education.

*Economic enterprise* means any commercial, industrial, agricultural, or business activity that is at least 51 percent Indian owned, established or organized for the purpose of profit.

*Education plan* means a comprehensive plan for the programmatic and fiscal services of and accountability by a contractor for the education of eligible Indian students.

*Eligible entity* means a Tribal organization, State, public school district, or Indian corporation is eligible to request a contract for a supplemental or operational support program under this Act. For purposes of this part, previously private schools are considered Tribal organizations.

*Existing contracting party* means a contracting party that has a contract under this Act that is in effect on the date of the JOM Modernization Act (Pub. L. 115-404), enacted December 31, 2018.

*Fiscal year* means the period used by the Bureau for accounting and budget purposes. The Bureau's fiscal year begins October 1 and ends September 30.

*Indian* means a person who is a member of an Indian Tribe.

*Indian Advisory School Board* means an Indian advisory school board established pursuant to 25 U.S.C. 5342-5347 prior to January 4, 1975.

*Indian corporation* means a legally established organization of Indians chartered under State or Federal law and which is not included within the definition of "Tribal organization".

*Indian Education Committee* means one of the entities specified by § 273.115.

*Indian Tribe* means any Indian Tribe, band, nation, rancheria, pueblo, colony or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is federally recognized as eligible by the U.S. Government through the Secretary for the special programs and services provided by the Secretary to Indians because of their status as Indians.

*Initial contract proposal and contract proposal* means a proposal for education contracts under the Johnson-O'Malley Act for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible Indian students, including programs supplemental to the regular school program and school operational support, where such support is necessary to maintain established State educational standards.

*Johnson-O'Malley Act* means the Act of April 16, 1934 (48 Stat. 596), as amended by the Act of June 4, 1936 (49 Stat. 1458, 25 U.S.C. 452-456), and by the Act of January 4, 1975 (88 Stat. 2203), and further amended by the Johnson-O'Malley Supplemental Indian Education Program Modernization Act (Pub. L. 115-404), enacted December 31, 2018 (JOM Modernization Act).

*Local Indian Committee* means any committee established pursuant to 20 U.S.C. 7424(c)(4), which provides that the committee must be composed of and selected by parents and family members of Indian children; representatives of Indian Tribes on Indian lands located within fifty miles; teachers in the schools; and if appropriate, Indian students attending secondary schools.

*New contracting party* means an entity that enters into a contract under this Act after the date of enactment of the JOM Modernization Act (Pub. L. 115-404), enacted December 31, 2018.

*Operational support* means those expenditures for school operational costs in order to meet established State educational standards or Statewide requirements and as specified in § 273.126.

*Parent* means the lawful father or mother of someone, and may include:

- (1) Either the natural father or the natural mother of a child;
- (2) The adoptive father or adoptive mother of a child;
- (3) A child's putative blood parent who has expressly acknowledged paternity;

(4) An individual or agency whose status as guardian has been established by judicial decree.

*Previously private school* means a school (other than a Federal school formerly operated by the Bureau) that is operated primarily for Indian students from age 3 years through grades 12; and, which at the time of application is controlled, sanctioned, or chartered by the government body(s) of an Indian Tribe(s).

*Public school district* means a State-funded school district that:

- (1) Serves public elementary schools or public secondary schools; and
- (b) Has established or will establish local committees or is using a committee or Indian advisory school board to approve supplementary or operational support programs beneficial to Indian students.

*Reservation or Indian reservation* means any Indian Tribe's reservation, pueblo, colony, or rancheria, including former reservations in Oklahoma, Alaska Natives regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

*School district or local education agency* means that subdivision of the State which contains the public elementary and secondary educational institutions providing educational services and is controlled by a duly elected board, commission, or similarly constituted assembly.

*Scope of work* means a framework document that will outline the work that will be performed under a contract and detail the expectations for the Johnson-O'Malley program.

*Secretary* means the Secretary of the Interior.

*Sectarian school* means a school sponsored or supported, at least in part, by a religious denomination; also commonly known as a parochial school.

*State* means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and each of the outlying areas, or any political subdivision of the 50 States.

*School official or school administrator* means a person employed by the school in an administration, supervisory, academic, or support staff position.

*Supplemental program* means a program designed to meet the specialized and unique educational needs of eligible Indian students that may have resulted from socio-economic conditions of the parents, from cultural or language differences or other factors. Programs may also provide academic assistance to Indian students for the improvement of student learning,

increase the quality of instruction, and as provided by § 273.143(b).

*System of record* means a system of record that contains information that is retrieved by an individual name or other unique identifiers.

*Tribal government, Tribal governing body and Tribal Council* means the recognized governing body of an Indian Tribe.

*Tribal organization* means the recognized governing body of any Indian Tribe or any legally established organization of Indians or Tribes which is controlled, sanctioned, or chartered by such governing body or bodies, or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided that in any case where a contract is let to an organization to perform services benefitting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting of the contract.

## **Subpart B—Program Eligibility & Applicability**

### **§ 273.110 Who is eligible to request contracts under the Johnson-O'Malley Act?**

The following entities are eligible to enter into an education contract under the Johnson-O'Malley Act for the purpose of financially assisting efforts designed to meet the specialized and unique educational needs of eligible Indian students, including supplemental programs and school operational support, where such support is necessary to maintain established State educational standards:

- (a) Tribal organizations;
- (b) States;
- (c) Public school districts that:
  - (1) Serve public elementary schools or public secondary schools; and
  - (2) Have a local school board composed of a majority of Indians or have established or will establish an Indian Education Committee, as described in § 273.115 to approve supplementary or operational support programs beneficial to Indian students; and
- (d) Indian corporations.

### **§ 273.111 How do the requirements for Tribal organizations differ from those for other eligible entities?**

(a) States, public school districts, or Indian corporations must comply with the requirements in this part.

(b) The requirements of this part apply to Tribal organizations (including but not limited to provisions regarding how funds can be used under the

Johnson-O'Malley Act and reporting requirements), except that Tribal organizations do not need to comply with:

(1) Sections 273.120—273.121, regarding approval of an education plan by the Director;

(2) Section 273.125, regarding entering into a contract as a new contracting party;

(3) Sections 273.132—273.135, regarding review, approval, and negotiation of the contract;

(4) Section 273.142, regarding advance payments;

(5) Any section in subpart H (other than the following sections, which still apply: § 273.170, regarding special program provisions to be included in a contract, § 273.172, regarding State employees' access to Tribal lands, reservations or allotments, and § 273.182, regarding penalties for misusing funds or property);

(6) Any section in subpart I (other than § 273.194, regarding the Indian Education Committee's authority to recommend cancellation or suspension of contracts, which still applies);

(7) Any section in subpart K (other than § 273.208).

(c) The contract proposal submitted by the Tribal organization must meet the requirements in part 900 or 1000 of this chapter, in addition to those in § 273.130 except that education plans must be submitted to the BIE Director for approval in accordance with § 273.170. The requirements in part 900 or 1000 of this chapter apply to contracts and compacts with Tribal organizations, except for the provisions in §§ 900.240 through 900.256, 1000.300, and 1000.330 of this chapter concerning retrocession and reassumption of programs. If a Tribal organization retrocedes a contract, the Bureau will then contract with a State, public school district, or Indian corporation for the supplemental programs or operational support. Redesign and reallocation under either Title I contracts or Title IV compacts must be done with approval in accordance with § 900.8(g)(6) of this chapter.

### **§ 273.112 Who is an eligible Indian student under the Johnson-O'Malley Act?**

An Indian student is eligible for benefits provided by a Johnson O'Malley contract if the student is:

(a) From age three (3) years through grade(s) twelve (12);

(b) Not enrolled in a Bureau-funded school or sectarian school (except the student is eligible if enrolled in a previously private school controlled by

an Indian Tribe or Tribal organization); and

(c) Is either:

(1) At least one-fourth (¼) degree Indian blood descendant of a member of an Indian Tribe as defined in § 273.106; or

(2) A member of an Indian Tribe as defined in § 273.106.

### **§ 273.113 How can the funds be used under the Johnson-O'Malley Act?**

An eligible entity may use the funds available under the contract to provide educational benefits to eligible Indian students to:

(a) Establish, carry out programs or expand programs in existence before the contract period that provide:

(1) Remedial instruction, career, academic, and college-readiness counseling, and cultural programs;

(2) Selected courses related to the academic and professional disciplines; or

(3) Important needs, such as school supplies and items that enable recipients to participate in curricular and extra-curricular programs; and

(b) Purchase equipment to facilitate training for professional trade skills and intensified college preparation programs.

### **§ 273.114 What programs may be contracted under the Johnson-O'Malley Act?**

All programs contracted under this part must:

(a) Be developed and approved in full compliance with the powers and duties of the Indian Education Committee and as may be contained in the Committee's organizational documents and bylaws.

(b) Be included as a part of the education plan.

## **Subpart C—Indian Education Committee**

### **§ 273.115 Who determines the unique educational needs of eligible Indian students?**

(a) When a school district to be affected by a contract(s) for the education of Indians has a local school board composed of a majority of Indians, the local school board may act as the Indian Education Committee; otherwise, the parents of Indian children may elect an Indian Education Committee from among their number or a Tribal governing body(ies) of the Indian Tribe(s) affected by the contract(s) may specify one of the following entities to serve as the Indian Education Committee:

(1) A Local Indian Committee or Committees; or

(2) An Indian Advisory School Board or Boards.

(b) The Tribal governing body(ies) of the Indian Tribe(s) affected by the contract(s) may specify one of the entities in paragraph (a)(1) or (2) of this section at its discretion if the Indian Education Committee was established prior to January 4, 1975.

**§ 273.116 Does an Indian Education Committee need to establish procedures and report to the BIE Director?**

The Indian Education Committee and its members must establish procedures under which the Committee serves. Such procedures must be set forth in the Committee's organizational documents and by-laws.

(a) Each Committee must file a copy of its organizational documents and by-laws with the BIE Director, together with a list of its officers and members.

(b) The existence of an Indian Education Committee may not limit the continuing participation of the rest of the Indian community in all aspects of programs contracted under this part.

**§ 273.117 What are the powers and duties of the Indian Education Committee?**

Consistent with the purpose of the Indian Education Committee, each such Committee is vested with the authority to undertake the activities in paragraphs (a) through (d) of this section.

(a) Participate fully in the planning, development, implementation, and evaluation of all programs, including both supplemental and operational support, conducted under a contract or contracts pursuant to this part. Such participation includes further authority to:

(1) Recommend curricula, including texts, materials, and teaching methods to be used in the contracted program or programs;

(2) Approve budget preparation and execution;

(3) Recommend criteria for employment in the program;

(4) Nominate a reasonable number of qualified prospective educational programmatic staff members from which the contractor would be required to select; and

(5) Evaluate staff performance and program results and recommend appropriate action to the contractor.

(b) Approve and disapprove all programs to be contracted under this part. All programs contracted require the prior approval of the appropriate Indian Education Committee.

(c) Secure a copy of the negotiated contract(s) that includes the program(s) approved by the Indian Education Committee.

(d) Recommend cancellation or suspension of a contract(s) under § 273.194.

**§ 273.118 Are there additional authorities an Indian Education Committee can exercise?**

The organizational papers and by-laws of the Indian Education Committee may include additional powers and duties that would permit the Committee to:

(a) Participate in negotiations concerning all contracts;

(b) Make an annual assessment of the learning needs of Indian children in the community affected;

(c) Have access to all reports, evaluations, surveys, and other program and budget related documents determined necessary by the Committee to carry out its responsibilities, subject only to the provisions of § 273.180;

(d) Request periodic reports and evaluations regarding the Indian education program;

(e) Establish a local grievance policy and procedures related to programs in the education plan;

(f) Meet regularly with the professional staff serving Indian children and with the local education agency;

(g) Hold committee meetings on a regular basis which are open to the public; and

(h) Have such additional powers as are consistent with these regulations.

**Subpart D—Education Plan**

**§ 273.119 What is an education plan and what must it include?**

A prospective contractor in consultation with its Indian Education Committee(s) must formulate an education plan that contains educational objectives that adequately address the educational needs of the Indian students and assures that the contract is capable of meeting such objectives. The education plan must contain:

(a) The education programs developed and approved by the Indian Education Committee(s);

(b) Educational goals and objectives that adequately address the educational needs of the Indian students to be served by the contract;

(c) Procedures for addressing hearing grievances from Indian students, parents, guardians, community members, and Tribal representatives relating to the program(s) contracted. Such procedures must provide for adequate advance notice of the hearing;

(d) Established State standards and requirements that must be maintained in operating the contracted programs and services;

(e) A description of how the State standards and requirements will be maintained;

(f) A requirement that the contractor comply in full with the requirements concerning meaningful participation by the Indian Education Committee;

(g) A requirement that education facilities receiving funds be open to visits and consultations by the Indian Education Committee(s), Tribal representatives, Indian parents and guardians in the community, and by duly authorized representatives of the Federal and State Governments;

(h) An outline of administrative and fiscal management procedures to be used by the contractor;

(i) Justification for requesting funds for operational support. The public school district must establish in its justification that it meets the requirements given in § 273.126(b). The information given should include records of receipt of local, State, and Federal funds;

(j) Budget estimates and financial information needed to determine program costs to contract for services. This includes, but is not limited to, the following:

(1) State and district average operational cost per pupil;

(2) Other sources of Federal funding the applicant is receiving, the amount received from each, the programs being funded, and the number of eligible Indian students served by such funding;

(3) Administrative costs involved, total number of employees, and total number of Indian employees;

(4) Costs that parents normally are expected to pay for each school;

(5) Supplemental and operational funds outlined in a separate budget, by line item, to facilitate accountability; and

(6) Total number of employees for each special program and number of Indian employees for that program;

(k) The total enrollment of school or district, by age and grade level;

(l) The eligible Indian enrollment—total and classification by Tribal affiliation(s) and by age and grade level;

(m) The total number of school board members and number of Indian school board members;

(n) Government equipment needed to carry out the contract;

(o) The period of contract term requested;

(p) The signature of the authorized representative of applicant; and

(q) Written information regarding:

(1) Program goals and objectives related to the learning needs of potential target students;

(2) Procedures and methods to be used in achieving program objectives, including ways whereby parents, students and communities have been

involved in determining needs and priorities;

(3) Overall program implementation including staffing practices, parental and community involvement, evaluation of program results, and dissemination thereof; and

(4) Determination of staff and program effectiveness in meeting the stated needs of target students.

**§ 273.120 Does an education plan need to be approved by the BIE Director?**

The Secretary will not enter into any contract for the education of Indians unless:

(a) The contractor has submitted an education plan to the BIE Director; and

(b) The BIE Director has determined that the education plan contains educational objectives that adequately address the educational needs of the Indian students who are to be beneficiaries of the contract, and that the contract is capable of meeting such objectives.

**§ 273.121 When does the BIE Director approve the education plan?**

The BIE Director approves the education plan when a contractor submits a contract proposal for funding.

**Subpart E—Contract Proposal, Review, and Approval**

**§ 273.125 How may a new contracting party request a contract under the Johnson-O'Malley Act?**

Subject to the availability of appropriations, eligible entities who have not previously entered into a contract for the Johnson-O'Malley program may submit an initial contract proposal.

**§ 273.126 What proposals are eligible for contracts under the Johnson-O'Malley Act?**

(a) Any proposal to contract for funding a supplemental program will be considered an eligible proposal.

(b)(1) To contract for operational support, a public school district is required to establish in the proposal that it:

(i) Cannot meet the minimum State or other applicable standards or requirements without such funds;

(ii) Has made a reasonable tax effort with a mill levy at least equal to the State average in support of educational programs;

(iii) Has fully utilized all other sources of financial aid, including all forms of State aid and Public Law 874 payments, and the State aid contribution per pupil is at least equal to the State average;

(iv) Has at least 50 percent eligible Indian enrollment;

(v) Has clearly identified the educational needs of the students intended to benefit from the contract;

(vi) Has made a good faith effort in computing State and local contributions without regard to contract funds pursuant to this part; and

(vii) Will not budget or project a deficit by using contract funds pursuant to this part.

(2) The requirements given in paragraph (b)(1) of this section do not apply to previously private schools.

**§ 273.127 Can a contract include funds to support the duties of an Indian Education Committee?**

Programs developed or approved by the Indian Education Committee may, at the option of such Committee, include funds for the performance of Committee duties to include:

(a) Members' attendance at regular and special meetings, workshops and training sessions, as the Committee deems appropriate.

(b) Other reasonable expenses incurred by the Committee in performing its primary duties, including the planning, development, implementation and evaluation of the program.

**§ 273.128 How are contracts prioritized?**

Priority will be given to contracts:

(a) Which would serve Indian students on or near reservations; and

(b) Where a majority of the Indian students will be members of the Tribe(s) of those reservations.

**§ 273.129 May the BIE Director reimburse a public school district for educating non-resident Indian students?**

The BIE Director may consider a contract proposal to reimburse a public school district for the full per capita costs of educating Indian students who meet all of the following:

(a) Are members of recognized Indian Tribes;

(b) Do not normally reside in the State in which the school district is located; and

(c) Are residing in Federal boarding facilities for the purpose of attending public schools within the school district.

**§ 273.130 What is required in the contract proposal for funding?**

A contract proposal must be in writing and contain the following:

(a) Name, address, and telephone number of the proposed contractor;

(b) Name, address, and telephone number of the Tribe(s) to be served by the contract;

(c) Descriptive narrative of the contract proposal;

(d) The education plan approved by the Indian Education Committee;

(e) A separate budget outlining the Johnson-O'Malley funds for operational support and/or supplemental programs, by line item, to facilitate accountability;

(f) A clear identification of what educational needs the Johnson-O'Malley funds requested for operational support will address; and

(g) Documentation of the requirements for operational support in § 273.126(b)(1).

**§ 273.131 What is required for a Tribal request for a contract?**

(a) An Indian Tribal governing body that desires that a contract be entered into with a Tribal organization must notify the BIE Director no later than February 1 preceding the school year for the contract.

(b) If the BIE Director does not receive the Tribal governing body's notice by the date in paragraph (a) of this section, the BIE Director may contract with the State, public school district, or Indian corporation under this part.

(c) The Tribal governing body has the option to contract with the State, public school district, or Indian corporation.

**§ 273.132 Who will review and approve the contract proposal?**

Each approving official within each Bureau Region is authorized to approve the contract(s) submitted by the State, public school district, or Indian corporation to provide services to Indian children within that approving official's region.

**§ 273.133 What is the process for review and decision?**

Upon receiving a contract proposal, the approving official will:

(a) Notify the applicant in writing that the contract proposal has been received, within 14 days after receiving the contract proposal.

(b) Review the contract proposal for completeness and request, within 20 days after receiving the contract proposal, any additional information from the applicant which will be needed to reach a decision.

(c) On receiving the contract proposal for operational support, make a formal written determination and findings supporting the need for such funds. In arriving at such a determination, the approving official must be assured that each local education agency has made a good faith effort in computing State and local contributions without regard to funds requested.

(d) Assess the completed contract proposal to determine if the proposal is feasible and if the proposal complies

with the appropriate requirements of the Johnson-O'Malley Act and this part.

(e) Approve or disapprove the contract proposal after fully reviewing and assessing the application and any additional information submitted by the applicant.

(f) Promptly notify the applicant in writing of the decision to approve or disapprove the contract proposal.

(g) If the contract proposal is disapproved, the notice will give the reasons for disapproval and the applicant's right to appeal pursuant to subpart K of this part.

**§ 273.134 What is the timeframe for contract decision?**

The approving official will approve or disapprove the contract proposal within 90 days after the approving official receives the contract proposal and any additional information requested. The approving official may extend the 90-day deadline after obtaining the written consent of the applicant.

**§ 273.135 Who will negotiate the contract?**

After the approving official has approved the contract proposal, the awarding official, assisted by Bureau education personnel, will negotiate the contract.

**Subpart F—Funding Provisions**

**§ 273.140 What is the funding formula to distribute funds?**

Funds will be distributed to contractors based upon a funding formula. The funding formula is calculated using data obtained by the Department of Education from the previous year.

(a) The funding formula to determine the funding to be distributed to each contractor is the Weight Factor multiplied by the number of eligible Indian students, where the Weight Factor is:

(1) The State average cost per pupil count divided by the national average cost per pupil count; or

(2) A default weight factor of 1.3, if the calculation in paragraph (a)(1) of this section results in a weight factor of less than 1.3.

(b) Notwithstanding any other provisions of the law, Federal funds appropriated for the purpose will be allotted pro rata in accordance with the distribution method outlined in this formula.

(c) For four fiscal years following the date of enactment of the JOM Modernization Act (December 31, 2018):

(1) Existing contractors will not receive an amount that is less than the amount received for Fiscal Year 2018 (the fiscal year preceding the date of

enactment of the JOM Modernization Act), unless:

(i) The existing contractor fails to submit a complete annual report;

(ii) The Secretary has found that the existing contractor has violated the terms of a contract under this part; or

(iii) The number of eligible Indian students reported in the annual report has decreased below the number of eligible Indian students served by the existing contractor in Fiscal Year 2018 (the fiscal year preceding the date of enactment of the JOM Modernization Act).

(2) Paragraph (c)(1)(iii) of this section notwithstanding, no existing contractor will receive an amount of funding per eligible Indian student that is less than the amount of funding per eligible Indian student that the existing contractor received for Fiscal Year 2018 (the fiscal year preceding the enactment of the JOM Modernization Act).

(d) Beginning December 31, 2022 (4 years after the December 31, 2018, date of enactment of the JOM Modernization Act), no contracting party will receive for a fiscal year more than a 10 percent decrease in funding per eligible Indian student from the previous year.

**§ 273.141 Will funding be prorated?**

All monies provided by a contract may be expended only for the benefit of eligible Indian students. Where students other than eligible Indian students participate in programs contracted, money expended under the contract will be prorated to cover the participation of only the eligible Indian students, except where the participation of non-eligible students is so incidental as to be *de minimis*. Such *de minimis* participation must be approved by the Indian Education Committee.

**§ 273.142 Are advance payments on a contract allowed under the Johnson-O'Malley Act?**

Payments to States, public school districts and Indian corporations will be made in advance or by way of reimbursement and in such installments and on such conditions as the BIE Director deems necessary to carry out the purposes of the Act.

**§ 273.143 Must other Federal, State, and local funds be used?**

(a) Contract funds under this part supplement, and do not supplant, Federal, State and local funds. Each contract must require that the use of these contract funds will not result in a decrease in State, local, or Federal funds that would be made available for Indian students if there were no funds under this part.

(b) State, local and other Federal funds must be used to provide comparable services to non-Indian and Indian students prior to the use of contract funds.

(c) Except as hereinafter provided, the school lunch program of the United States Department of Agriculture (USDA) constitutes the only federally funded school lunch program for Indian students in public schools. Where Indian students do not qualify to receive free lunches under the National School Lunch Program of USDA because such students are non-needy and do not meet the family size and income guidelines for free USDA lunches, plans prepared pursuant to § 273.119 may provide, to the extent of funding available for Johnson-O'Malley programs, for free school lunches for those students who do not qualify for free USDA lunches but who are eligible Indian students under § 273.112.

**§ 273.144 Can Johnson-O'Malley funds be used for capital outlay or debt retirement?**

In no instance may contract funds provided under this part be used as payment for capital outlay or debt retirement expenses; except that, such costs are allowable if they are considered to be a part of the full per capita cost of educating eligible Indian students who reside in Federal boarding facilities for the purpose of attending public schools.

**§ 273.145 How can funds be used for subcontractors?**

The Bureau may make contract funds under the Johnson-O'Malley Act available directly only to Tribal organizations, States, public school districts, and Indian corporations. However, Tribal organizations, States, public school districts, and Indian corporations receiving funds may use the funds to subcontract for necessary services with any appropriate individual, organization, or corporation.

**§ 273.146 Can funds be used outside of schools?**

Nothing in this part prevents the BIE Director from contracting with Indian corporations who will expend all or part of the funds in places other than the public or private schools in the community affected.

**§ 273.147 Are there requirements of equal quality and standard of education?**

Contracts with State education agencies or public school districts receiving funds must provide educational opportunities to all Indian children within that school district on the same terms and under the same conditions that apply to all other

students as long as it will not affect the rights of eligible Indian children to receive benefits from the supplemental programs. Public school districts receiving funds must ensure that Indian children receive all aid from the State, and proper sources other than the Johnson-O'Malley contract, which other schools in the district and other school districts similarly situated in the State are entitled to receive. In no instance may there be discrimination against Indians or the schools enrolling Indians.

#### **Subpart G—Annual Reporting Requirements**

##### **§ 273.150 Does an existing contracting party need to submit any reports?**

Each existing contracting party must submit an annual report based on the JOM funding received and other contract-related reports as required by the BIE Director.

##### **§ 273.151 What information must the existing contracting party provide in the annual report?**

Existing contracting parties who receive Johnson-O'Malley funding must submit the following information in the annual report:

- (a) General information about the contractor;
- (b) General information about the number and names of the schools;
- (c) The number of eligible Indian students who were served using amounts allocated under the contract during the previous fiscal year;
- (d) An accounting of the amounts and purposes for which the contract funds were expended;
- (e) Information on the conduct of the program;
- (f) A quantitative evaluation of the effectiveness of the contract program in meeting the stated objectives contained in the educational plans; and
- (g) A complete accounting of actual receipts at the end of the fiscal year for which the contract funds were expended.

##### **§ 273.152 When is the annual report due?**

All existing contracting parties must submit the annual report to the BIE Director on or before September 15 of each year and covering the previous academic year.

##### **§ 273.153 Who else needs a copy of the annual report?**

All existing contracting parties must send copies of the annual reports to the Indian Education Committee(s) and to the Tribe(s) under the contract at the same time as the reports are sent to the BIE Director.

##### **§ 273.154 What will happen if the existing contracting party fails to submit an annual report?**

Any existing contracting party that fails to submit the annual report will receive no amounts under this Act for the fiscal year following the academic year for which the annual report should have been submitted.

##### **§ 273.155 How will the existing contracting party know when reports are due?**

The BIE Director will provide existing contracting parties with timely information relating to:

- (a) Initial and final reporting deadlines; and
- (b) The consequences of failure to comply.

##### **§ 273.156 Will technical assistance be available to comply with the annual reporting requirements?**

The Bureau will provide technical assistance and training on compliance with the reporting requirements to existing contracting parties. The Bureau will provide such technical assistance and training on an ongoing and timely basis.

##### **§ 273.157 What is the process for requesting technical assistance and/or training?**

- (a) Existing contracting parties may request technical assistance and/or training by addressing the request in writing to the BIE Director.
- (b) The BIE Director, or designee, will acknowledge receipt of a request for technical assistance and/or training.
- (c) No later than 30 days after receiving the original request, the BIE Director will identify a point of contact and begin the process of providing technical assistance and/or training. The BIE Director and requesting contracting party will work together to identify the form, substance, and timeline for the assistance.

##### **§ 273.158 When should the existing contracting party request technical assistance and/or training?**

The existing contracting party is encouraged to request technical assistance and/or training before annual reporting requirements are due in order to avoid the consequences for failure to comply.

##### **§ 273.159 If the existing contracting party reported a decrease of eligible Indian students, how will funding be reduced?**

Except as provided in § 273.140(c) and (d) of this part, for four fiscal years following the date of enactment of the JOM Modernization Act (December 31, 2018) an existing contracting party's funding will not be reduced to a level

that is less than the amount of funding per eligible Indian student that the existing contracting party received for Fiscal Year 2017 (the fiscal year preceding the date of enactment of the Johnson-O'Malley Modernization Act).

##### **§ 273.160 Can the Secretary apply a ratable reduction in Johnson-O'Malley program funding?**

If the funds available under the Johnson-O'Malley Act for a fiscal year are insufficient to pay the full amounts that all existing contracting parties are eligible to receive under for the fiscal year, the Secretary will ratably reduce those amounts for the fiscal year.

##### **§ 273.161 What is the maximum decrease in funding allowed?**

Beginning December 31, 2022 (4 years after the December 31, 2018, date of enactment of the JOM Modernization Act), no contracting party may receive for a fiscal year more than a 10 percent decrease in funding per eligible Indian student from the previous fiscal year.

#### **Subpart H—General Contract Requirements**

##### **§ 273.170 What special program provisions must be included in the contract?**

All contracts must contain the following:

- (a) The education plan containing the education programs approved by the Indian Education Committee(s);
  - (b) Any formal written determination and findings made by the BIE Director supporting the need for operational support as required by § 273.133(c); and
  - (c) A provision that State, local, and other Federal Funds will be used to provide comparable services to non-Indian and Indian students prior to the use of Johnson-O'Malley funds for the provision of supplementary program services to Indian children, as required in § 273.143(b).
- (d) Public Laws 102–477 and 93–638 Self-Governance Tribes must submit their education plan as required by paragraph (a) of this section to the BIE Director for review. The BIE Director will forward copies of the education plans to the 477 office or the Office of Tribal Self-Governance, as appropriate.

##### **§ 273.171 Can a contractor make changes to a program approved by an Indian Education Committee?**

No program contracted may be changed from the time of its original approval by the Indian Education Committee to the end of the contract period without the prior approval, in writing, of the Indian Education Committee.

**§ 273.172 May State employees enter Tribal lands, reservations, or allotments?**

In those States where Public Law 83–280 (18 U.S.C. 1162 and 28 U.S.C. 1360) do not confer civil jurisdiction, State employees may be permitted to enter upon Indian Tribal lands, reservations, or allotments in an official capacity in connection with a contract under this part if the duly constituted governing body of the Tribe adopts a resolution of consent for the following purposes:

(a) Inspecting school conditions in the public schools located on Indian Tribal lands, reservations, or allotments; or

(b) Enforcing State compulsory school attendance laws against Indian children, parents or persons standing in *loco parentis*.

**§ 273.173 What procurement requirements apply to contracts?**

States, public school districts, or Indian corporations wanting to contract with the Bureau must comply with the applicable requirements in the Federal Acquisition Regulations at 48 CFR part 1.

**§ 273.174 Are there any Indian preference requirements for contracts and subcontracts?**

(a) Any contract made with a State, public school district, or Indian corporation for the benefit of Indian students must require that the contractor, to the greatest extent feasible:

(1) Give preference in and opportunities for employment and training to Indians in connection with the administration of such contract(s); and

(2) Give preference in the award of subcontracts to Indian organizations and Indian-owned economic enterprises.

(b) All subcontractors employed by the contractor must, to the extent possible, give preference to Indians for employment and training and must include in their bid submission a plan to achieve maximum use of Indian personnel.

**§ 273.175 How will a Tribal governing body apply Indian preference requirements for contracts and subcontracts?**

A Tribal governing body may develop its own Indian preference requirements for its contracts and subcontracts.

**§ 273.176 May there be a use and transfer of Government property?**

(a) The use of Government-owned facilities for school purposes may be authorized when not needed for Government activities. Transfer of title to such facilities (except land) may be arranged under the provisions of the Act of June 4, 1953 (67 Stat. 41) subject to

the approval of the Tribal government if such property is located on a reservation.

(b) In carrying out a contract, the BIE Director may, with the approval of the Tribal government, permit a contractor to use existing buildings, facilities, and related equipment and other personal property owned by the Bureau within its jurisdiction under terms and conditions agreed upon for their use and maintenance. The property at the time of transfer must conform to the minimum standards established by the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651). Use of Government property is subject to the following conditions:

(1) When nonexpendable Government property is turned over to public school authorities or Indian corporations under a use permit, the permittee must insure such property against damage by flood, fire, rain, windstorm, vandalism, snow, and tornado in amounts and with companies satisfactory to the Federal officer in charge of the property. In case of damage or destruction of the property by flood, fire, rain, windstorm, vandalism, snow, or tornado, the insurance money collected may be expended only for repair or replacement of property. Otherwise, insurance proceeds must be paid to the Bureau.

(2) If the public school authority is self-insured and can present evidence of that fact to the BIE Director, insurance for lost or damaged property will not be required. However, the public school authority will be responsible for replacement of such lost or damaged property at no cost to the Government or for paying the Government enough to replace the property.

(3) The permittee will maintain the property in a reasonable state of repair consistent with the intended use and educational purposes.

(c) The contractor may have access to existing Bureau records needed to carry out a contract under this part, as follows:

(1) The Bureau will make the records available subject to the provisions of the Freedom of Information Act (5 U.S.C. 552), as amended by the Act of November 21, 1974 (Pub. L. 93–502, 88 Stat. 1561).

(2) The contractor may have access to needed Bureau records at the appropriate Bureau office for review and making copies of selected records.

(3) If the contractor needs a small volume of identifiable Bureau records, the Bureau will furnish the copies to the contractor.

**§ 273.177 Who will provide liability and motor vehicle insurance?**

(a) States, school districts, and Indian corporations must obtain public liability insurance under contracts entered into with the Bureau, unless the Bureau approving official determines that the risk of death, personal injury or property damage under the contract is small and that the time and cost of procuring the insurance is great in relation to the risk.

(b) Notwithstanding paragraph (a) of this section, any contract which requires or authorizes, either expressly or by implication, the use of motor vehicles must contain a provision requiring the State, school district, or Indian corporation to provide liability insurance, regardless of how small the risk.

(c) If the public school authority is self-insured and can present evidence of that fact to the approving official, liability and motor vehicle insurance will not be required.

**§ 273.178 Are there contract recordkeeping requirements?**

A contractor will be required to maintain a recordkeeping system that allows the Bureau to meet its legal records program requirements under the Federal Records Act (44 U.S.C. 3101 *et seq.*). Such a record system must:

(a) Fully reflect all financial transactions involving the receipt and expenditure of funds provided under the contract in a manner that will provide accurate, current and complete disclosure of financial status; correlation with budget or allowable cost schedules; and clear audit facilitating data;

(b) Reflect the amounts and sources of funds other than Bureau contract funds that may be included in the operation of the contract;

(c) Provide for the creation, maintenance, and safeguarding of records of lasting value, including those involving individual rights, such as permanent records and transcripts; and

(d) Provide for the orderly retirement of permanent records in accordance with Department Records Schedule (Bureau of Indian Affairs (075)), when there is no established system set up by the State, public school district, or Indian corporation.

**§ 273.179 Are there contract audit and inspection requirements?**

(a) During the term of a contract and for three (3) years after the project or undertaking is completed, the BIE Director, or any duly authorized representative, must have access, for audit and examination purposes, to any

of the contractor's books, documents, papers, and records that, in the BIE Director's or representative's opinion, may be related or pertinent to the contract or any subcontract.

(b) The contractor is responsible for maintaining invoices, purchase orders, canceled checks, balance sheets and all other documents relating to financial transactions in a manner that will facilitate auditing. The contractor is responsible for maintaining files of correspondence and other documents relating to the administration of the contract, properly separated from general records or cross-referenced to general files.

(c) The contractor receiving funds is responsible for contract compliance.

(d) The records involved in any claim or expenditure that has been questioned must be further maintained until a final determination is made on the questioned expenditures.

(e) The contractor and local school officials must make available to each member of the Indian Education Committee and to members of the public upon request: all contracts, non-confidential records concerning students served by the program, reports, budgets, budget estimates, plans, and other documents pertaining to administration of the contract program in the preceding and current years. The contractor or local school official must provide, free of charge, single copies of such documents upon request.

#### **§ 273.180 Are there disclosure requirements for contracts?**

(a) Unless otherwise required by law, the Bureau may not place restrictions on contractors that will limit public access to the contractor's records except when records must remain confidential.

(b) A contractor must make all reports and information concerning the contract available to the Indian people that the contract affects. Reports and information may be withheld from disclosure only when both of the following conditions exist:

(1) The reports and information fall within one of the following exempt categories:

(i) Specifically required by statute or Executive Order to be kept secret;

(ii) Commercial or financial information obtained from a person or firm on a privileged or confidential basis; or

(iii) Personnel, medical, social, psychological, academic achievement and similar files where disclosure would be a clearly unwarranted invasion of personal privacy; and

(2) Disclosure is prohibited by statute or Executive Order or sound grounds

exist for using the exemption given in paragraph (b)(1) of this section.

(c) A request to inspect or copy reports and information must be in writing and reasonably describe the reports and information requested. The request may be delivered or mailed to the contractor. Within 10 working days after receiving the request, the contractor must determine whether to grant or deny the request and immediately notify the request of the determination.

(d) The time limit for making a determination may be extended up to an additional 10 working days for good reason. The requester must be notified in writing of the extension, reasons for the extension, and date on which the determination is expected to be made.

#### **§ 273.181 Are there Privacy Act requirements for contracts?**

(a) When a contractor operates a system of records to accomplish a Bureau function, the contractor must comply with subpart K of 43 CFR part 2 which implements the Privacy Act (5 U.S.C. 552a). Examples of the contractor's responsibilities are:

(1) To continue maintaining systems of records declared by the Bureau to be subject to the Privacy Act;

(2) To make such records available to individuals involved;

(3) To disclose an individual's record to third parties only after receiving permission from the individual to whom the record pertains, and in accordance with the exceptions listed in 43 CFR 2.231;

(4) To establish a procedure to account for access, disclosures, denials, and amendments to records; and

(5) To provide safeguards for the protection of the records.

(b) The contractor may not, without prior approval of the Bureau:

(1) Discontinue or alter any established systems of records;

(2) Deny requests for notification or access of records; or

(3) Approve or deny requests for amendments of records.

(c) The contractor may not establish a new system of records without prior approval of the Department of Interior and the Office of Management and Budget.

(d) The contractor may not collect information about an individual unless it is relevant or necessary to accomplish a purpose of the Bureau as required by statute or Executive Order.

(e) The contractor is subject to 5 U.S.C. 552a(i)(1), which imposes criminal penalties for knowingly and willfully disclosing a record about an individual without the written request

or consent of that individual unless disclosure is permitted under one of the exceptions.

#### **§ 273.182 Are there penalties for misusing funds or property?**

If any officer, director, agent, or employee of, or connected with, any contractor or subcontractor under this part embezzles, willfully misapplies, steals, or obtains by fraud any of the funds or property connected with the contract or subcontract, he or she will be subject to the following penalties:

(a) If the amount involved does not exceed \$100, person(s) will be fined not more than \$1,000 or imprisoned not more than one (1) year, or both.

(b) If the amount involved exceeds \$100, person(s) will be fined not more than \$10,000 or imprisoned for not more than two (2) years, or both.

#### **§ 273.183 Can the Secretary investigate a potential Civil Rights Act violation?**

In no instance may there be discrimination against Indians or schools enrolling Indians. When informed by a complainant or through its own discovery that a possible violation of title VI of the Civil Rights Act of 1964 exists within a State school district receiving funds, the Secretary will, in accordance with Federal requirements, notify the Department of Education of the possible violation. The Department Education will conduct an investigation into the matters alleged. If the report of the investigation conducted by the Department of Education discloses a failure or threatened failure to comply with this part, and if the non-compliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to contract or to continue financial assistance under the Johnson-O'Malley Act or by any other means authorized by law.

#### **Subpart I—Contract Renewal, Revisions, and Cancellations**

#### **§ 273.191 How may a contract be renewed for Johnson-O'Malley funding?**

An awarding official will notify the existing contracting party in advance of the contract's expiration and ask if the existing contracting party wants to renew the contract. The renewal must be in writing from the existing contracting party and the awarding official.

#### **§ 273.192 What is required to renew a contract?**

(a) The existing contracting party seeking to renew a contract will submit to the awarding official:

(1) A written request to renew;  
 (2) The current education plan approved by the Indian Education Committee, if expired;

(3) A scope of work; and

(4) A budget outlining the Johnson-O'Malley funds for operational support and/or supplemental programs, by line item, to facilitate accountability.

(b) The awarding official will send the existing contracting party an acknowledgment letter and specify if any information is required to complete renewal package.

(c) The approving official will approve or disapprove a renewal within 90 days after the approving official receives the renewal and any additional information requested. The approving official may extend the 90-day deadline after obtaining the written consent of the existing contracting party.

**§ 273.193 May a contract be revised or amended?**

Any contract may be revised or amended as deemed necessary to carry out the purposes of the program being contracted.

(a) A contractor may submit a written request for a revision or amendment of a contract to the awarding official.

(b) The written approval of the Indian Education Committee is required if the contract revision or amendment will alter a program that has been approved by the Indian Education Committee.

**§ 273.194 Does the Indian Education Committee have authority to cancel contracts?**

The Indian Education Committee may recommend to the BIE Director, through the appropriate awarding official, cancellation or suspension of a contract(s) that contains the program(s) approved by the Indian Education Committee, if the contractor fails to permit such Committee to exercise its powers and duties.

**§ 273.195 May a contract be cancelled for cause?**

(a) Any contract may be cancelled for cause when the contractor fails to perform the work called for under the contract or fails to permit an Indian Education Committee to perform its duties.

(b) Before cancelling the contract, the BIE Director will provide the contractor with written notice, including:

(1) The reasons why the Bureau is considering cancelling the contract; and

(2) The contractor will be given an opportunity to bring its work up to an acceptable level.

(c) If the contractor does not overcome the deficiencies in its contract performance, the Bureau will cancel the contract for cause. The Bureau will notify the contractor, in writing, of the cancellation. The notice will give the reasons for the cancellation and the right of the contractor to appeal under subpart K of this part.

(d) When a contract is cancelled for cause, the Bureau will attempt to perform the work by another contract.

(e) Any contractor that has a contract cancelled for cause must demonstrate that the cause(s) that led to the cancellation have been remedied before it will be considered for another contract.

**Subpart J—Responsibility and Accountability**

**§ 273.201 What is required for the Secretary to meet his or her reporting responsibilities?**

(a) The Secretary has the following reporting responsibilities to the Committee on Indian Affairs in the Senate; the Subcommittee on Interior, Environment, and Related Agencies of the Committee on Appropriations of the Senate; the Subcommittee on Indian, Insular, and Alaska Native Affairs of the Committee on Natural Resources of the House of Representatives; and the Subcommittee on Interior, Environment, and Related Agencies of the Committee on Appropriations of the House of Representatives:

(1) In order to provide information about the Johnson-O'Malley Program, the Bureau must obtain from all existing contracting parties the most recent determination of the number of eligible Indian students served by each contracting party.

(2) The Bureau will make recommendations on appropriate funding levels for the program based on such determination.

(3) The Bureau will make an assessment of the contracts under this Act.

(b) The Bureau will make such reports as described in paragraph (a) of this section publically available.

**§ 273.202 Does this part include an information collection?**

The collections of information in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned OMB

Control Number 1076–0193. Responses is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

**Subpart K—Appeals**

**§ 273.206 May a contract be appealed?**

(a) A contractor may appeal:

(1) An adverse decision or action of the Bureau regarding a contract; or

(2) A decision to cancel a contract for cause.

(b) The Secretary encourages contractors to seek all means of dispute resolution before a formal appeal.

**§ 273.207 How does a contractor request dispute resolution?**

The contractor may request dispute resolution in writing to the BIE Director.

(a) The Bureau has in place an alternative dispute resolution (ADR) process.

(1) The ADR process is intended to be a supplement to, and not a replacement for, the normal appeal process.

(2) Participation as a complainant in the ADR process is voluntary.

(3) Should a contractor participate in an ADR process, the pre-complaint process may extend to 90 days.

(b) The ADR process may result in an informal resolution of the complaint;

(c) If the ADR process does not result in an informal resolution of the complaint, the contractor still has the right to continue to pursue an appeal.

**§ 273.208 How does a Tribal organization request an appeal?**

A Tribal organization may request an appeal pursuant to part 900 or 1000 of this chapter, as applicable.

**§ 273.209 How does a State, public school district, or an Indian corporation request an appeal?**

The State, public school district, or an Indian corporation may request an appeal by filing an appeal with the Civilian Board of Contract Appeals under the Contract Disputes Act, 41 U.S.C. 7101–7109, no later than 90 calendar days after the date the contractor receives the decision.

Dated: December 12, 2019.

**Tara Sweeney,**

*Assistant Secretary—Indian Affairs.*

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