

## **Bureau of Indian Education Part B 2009 Verification Visit Letter Enclosure**

### **Background:**

Under section 611(h)(1)(A) of the Individuals with Disabilities Education Act (IDEA), the Secretary of the Department of Education (Secretary or Department) provides funds to the Secretary of the Interior for the education of children with disabilities on reservations ages 5 through 21 enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. The Bureau of Indian Education (BIE) is a component of the U.S. Department of Interior (DOI). IDEA section 611(h)(2)(A) specifies that in order to be eligible for funds under IDEA section 611(h)(1)(A), DOI must meet the appropriate requirements, as determined by the Secretary of Education, of sections 612 (including monitoring and evaluation activities) and 613 that apply generally to State educational agencies (SEAs) and local educational agencies (LEAs), respectively. Accordingly, IDEA Part B regulations at 34 CFR §§300.707 through 300.716 establish the requirements that apply to the BIE and BIE-funded schools and, except as specifically identified, have the BIE and BIE-funded schools assume responsibilities and programmatic requirements of an SEA and LEA, respectively.

While it is part of a Federal agency, for the purposes of the IDEA, the BIE is responsible for carrying out most of the functions of an SEA. Prior to 2006, the BIE was part of the Bureau of Indian Affairs (BIA) and was called the Office of Indian Education Programs (OIEP). In 2006, the DOI went through a restructuring and created the BIE as an independent bureau under the Office of Indian Affairs, which also includes the BIA. The BIA and the BIE continue to share certain functions, including fiscal and information systems. The BIE staff responsible for administering IDEA work in the Division of Performance and Accountability (DPA), located in the Albuquerque Service Center (ASC). To help administer the instructional programs and provide technical assistance, the BIE maintains 21 Educational Line Offices (ELOs) across the 23 States with BIE-funded schools. ELOs work with local schools by providing technical assistance, fiscal and administrative oversight and instructional leadership. Finally, the BIE's Administrative Services office has responsibility for fiscal matters within the BIE and all BIE-funded schools.

The BIE funds 173 schools with academic programs and 12 residential facilities which are called schools by the BIE, but have no academic programs. The BIE allocates funds under Part B of the IDEA to all BIE-funded schools with academic programs. For the SY 2008-09, of the 173 schools and 12 residential facilities, 126 were tribally-controlled schools and 59 were BIE-operated schools. Tribally-controlled schools are funded through grants issued under the Tribally Controlled Schools Act (TCSA) or through contracts issued under the Indian Self-Determination Education Assistance Act (ISDEAA). BIE-operated schools are operated directly by the BIE. Although there are some differences in the relationship between tribally-controlled schools and the BIE on the one hand, and BIE-operated schools and the BIE on the other, all BIE-funded schools are responsible for meeting the requirements of IDEA Part B and are under the general supervisory authority of the BIE.

Because the BIE only has responsibility to ensure a free appropriate public education (FAPE) for children with disabilities on reservations ages 5 through 21 enrolled in elementary schools and

secondary schools for Indian children operated or funded by the Secretary of the Interior, OSEP limited its examination of the BIE's systems for general supervision and the collection of BIE-reported data as those systems relate to the school-aged programs in BIE-funded schools (under IDEA Part B). OSEP also reviewed the BIE's system for ensuring the appropriate use of Part B funds for school-aged children, which are authorized under IDEA section 611(h)(1)(A). Finally, OSEP examined the BIE's systems for ensuring the timely obligation and liquidation, and distribution of all IDEA funds that the BIE receives from the Department (including the IDEA Part B funds for school-aged children, as well as both the IDEA Part C and IDEA Part B funds the Department distributes to BIE and which the BIE must distribute to tribes and tribal entities for the coordination of assistance in the provision of IDEA services to infants and toddlers with disabilities and their families, and preschool children with disabilities respectively).

## **I. General Supervision**

### ***Critical Element 1: Identification of Noncompliance***

*Does the BIE have a general supervision system that is reasonably designed to identify noncompliance in a timely manner using its different components?*

### **Verification Visit Details and Analysis**

Since the last verification visit conducted by the Office of Special Education Programs (OSEP) in 2005, the BIE has been developing a new monitoring system called the Special Education Integrated Monitoring Process (SEIMP) for ensuring that BIE-funded schools are in compliance with the requirements of Part B of the IDEA. SEIMP is currently designed to include five components: (1) Annual BIE State Performance Plan (SPP)/Annual Performance Report (APR) determinations for each BIE-funded school; (2) Special Education Self Assessment; (3) Compliance Monitoring – formerly 2<sup>nd</sup> tier monitoring; (4) Fiscal Accountability; and (5) Other (Due Process, Complaints). At the time of the verification visit, not all of these components were being used to identify noncompliance with the requirements of Part B of the IDEA.<sup>1</sup> The first component, determinations for BIE-funded schools, will be addressed in this section under Critical Element 5. Procedures for fiscal accountability are currently being developed and will be addressed more fully in Fiscal Systems (FS), Critical Element 3.

### **Special Education Self-Assessment- Part 2 Special Education School Summary**

As part of its Self-Assessment, all BIE-funded schools are required to complete the Special Education School Summary (SESS) by June 15th of each year. The SESS collects information on a variety of topics including: student and staff demographics; child find; special education policies and procedures; the special education instructional program; the local Levels of Determination made by the BIE in accordance with IDEA section 616; dispute resolution; previously identified noncompliance and correction; and suspensions and expulsions. Almost all of the data included in the SESS are also collected or generated through other processes or tools, such as the Native American Student Information System (NASIS), the Annual Report and the SPP/APR determination process.

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<sup>1</sup> Following the verification visit, the BIE, after consulting with the Data Accountability Center (DAC) and Mountain Plains Regional Resource Center (MPRRC), informed OSEP of its intention to modify SEIMP and its components. The analysis contained in this enclosure addresses the system as described during the verification visit.

The SESS was piloted in school year (SY) 2008-09. At the time of OSEP's verification visit, all schools had submitted the self assessment, but the BIE had not yet provided responses to the schools. The BIE informed OSEP during the visit that it intends to issue findings of noncompliance based on the SESS beginning with the SESS submitted on June 15, 2010. As described by the BIE, schools would be informed of any noncompliance identified through the SESS and given 30 days to make the appropriate corrections. If the corrections were not made at this time, the BIE would issue formal findings of noncompliance, adding these items to the school's Corrective Action Plan (CAP) and requiring correction as soon as possible, and in no case later than one year from the time of the BIE's identification of the noncompliance.

### Compliance Monitoring

Compliance Monitoring is the core component in the BIE's general supervision system designed to identify and correct noncompliance. During the course of the verification process, OSEP reviewed six monitoring files for findings made from monitoring visits conducted in FFY 2007 and seven files from visits conducted in FFY 2008, and interviewed DPA, ELO and school staff. In addition, during OSEP's visit, the BIE demonstrated the tools used for conducting Compliance Monitoring.

In the spring (March-June) of each year, the BIE conducts on-site monitoring reviews for all of the BIE-funded schools (both BIE-operated and tribally-controlled) with academic programs.<sup>2</sup> While on site, the BIE utilizes a monitoring tool to review school and student records. The tool provides a record review protocol divided into 10-12 categories (the number of categories has changed between FFY 2007 and FFY 2009) and multiple items within each category. For each category the reviewer indicates the level of compliance and whether or not there is noncompliance. During interviews, the BIE explained that if there are 10 or fewer students with individualized education programs (IEPs) in the school, 100% of the records are reviewed. If there are more than ten students with IEPs, 20% of the records are reviewed.

The BIE's current compliance monitoring procedures consist solely of file reviews and do not include interviews with school staff to further investigate school policies, practices or procedures. Although the BIE has the discretion to determine the specific methods it uses to identify noncompliance, in the context of its ongoing review of monitoring procedures, OSEP recommends that the BIE consider the addition of staff interviews as a method of discovering noncompliant practices, as well as the root causes of noncompliance, as discussed in the next section on the correction of noncompliance.

Based on a review of monitoring files from visits conducted in FFY 2007, OSEP found that the BIE did not make findings of noncompliance, and therefore did not require correction of noncompliance, if the level of compliance was 95% or better. A finding of noncompliance was only made in categories with data demonstrating a level of compliance below 95%. The letters note that there are "items within each category at 95% or higher that is considered an acceptable rating, however all categories should be at 100% compliance." This corresponds to information contained in the BIE's FFY 2007 APR, submitted on February 1, 2009. In the response table attached to OSEP's determination letter issued on June 1, 2009, OSEP stated that "While the BIE may take into account the extent of the noncompliance in determining what corrective action is

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<sup>2</sup> During the verification visit and pre-visit calls, the BIE stated its intention to move up the dates of the monitoring visits to January-March, to allow for the correction of noncompliance before the end of the school year. The BIE intends to make this change with the monitoring visits to be conducted in FFY 2009 (winter of 2010).

needed, the BIE must ensure the correction of any noncompliance, notwithstanding the extent of the noncompliance.” A review of monitoring files from visits made in FFY 2008 demonstrates that BIE now considers all items below 100% to be noncompliant, and issues findings on that basis. OSEP appreciates the BIE’s attention to this matter.

BIE reported that it notifies schools of noncompliance identified during the visits through letters and/or Compliance Monitoring Reports (CMRs). If there are any findings, the letters and CMRs include the BIE’s conclusion that the school is in noncompliance. The CMR includes an analysis section in the form of a chart which lists the monitoring category (e.g., eligibility), the number of items in the category, the category average percentage of compliance, and the specific item numbers in and out of compliance. Neither the letter nor the CMR includes the statutory or regulatory citation that is the basis for the finding of noncompliance.<sup>3</sup>

In visits conducted prior to the spring of 2009, letters notifying the schools of findings of noncompliance were issued during the months of December and January following the visits (7-10 months after the visit). CMRs were attached to the letters. Written notification of findings needs to occur as soon as possible after the State concludes that the school has noncompliance. Generally, we would expect written findings to be issued less than three months from discovery.<sup>4</sup>

Beginning in FFY 2008, with visits conducted in the spring of 2009, the BIE utilized a new application that allowed the monitoring team to print out the CMR at the end of the visit documenting the noncompliance discovered during the visit. DPA reported that they considered the one-year timeline to begin when the school was handed the CMR documenting noncompliance. In interviews during the verification visit, DPA staff, ELOs and school level staff (principals and special education coordinators) indicated that, due to technical issues, BIE was not consistently able to provide schools with CMRs during the visits conducted in the spring of 2009. In addition, although follow up letters specifying identified noncompliance were also issued, the dating of the letters revealed further inconsistencies. During the course of the review of the monitoring files from visits conducted in 2009, OSEP found four letters notifying schools of noncompliance identified during the monitoring visit with a date of March 24, 2009, although the visits occurred after March 24<sup>th</sup>. One file contained a letter with no date, and two did not have any letters. These inconsistencies make it difficult to determine if written findings were issued less than three months from discovery.<sup>4</sup>

In interviews during the verification visit, the BIE stated that the one-year timeline for the correction of noncompliance began when the findings were issued. They further clarified that, in cases where the CMRs were generated during the compliance monitoring visit, the reports constituted the written notification of a finding and that the timeline for correction began at that time. If CMRs were not generated while on site, the timeline began on the date the letter was issued. Because the one-year timeline begins when the State informs an LEA in writing that it has concluded that the LEA is in noncompliance, the inconsistencies in the timing of issuing CMRs and letters result in a lack of clarity as to which document constitutes the written

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<sup>3</sup> See question 1 of OSEP’s Frequently Asked Questions Regarding Identification and Correction of Noncompliance and Reporting on Correction in the SPP and APR, dated September 3, 2008 (OSEP’s Sept. 3, 2008 FAQ’s) at <http://spp-apr-calendar.rfcnetwork.org/explorer/view/id/530>.

<sup>4</sup> See question 7 of OSEP’s Sept 3, 2008 FAQ’s.

notification from the BIE to a school that contains the BIE's conclusion that the school is in noncompliance and when the one-year timeline for correction begins.<sup>5</sup>

The BIE was unable to describe how it reports data for Indicator 15 of the APR on the number of findings of noncompliance identified. Each CMR lists the number of categories with noncompliance. However, in interviews during the verification visit, the BIE was unable to clarify how the number of instances of noncompliance translated into the number of findings reported in the FFY 2007 APR on Indicator 15. A State may determine how it will count monitoring findings in order to provide a clear picture of its effectiveness in ensuring the timely correction of noncompliance. A State may choose to group individual instances in an LEA involving the same legal requirement or standard together as one finding (except for findings identified through State Complaints and due process hearings; each of those findings *must* be counted as a finding), or it may choose to report each of the individual instances of noncompliance as a separate finding.<sup>6</sup> While the BIE may determine how it will count monitoring findings, it is obligated to provide clarity on how it is doing so, in order to be transparent with its schools and stakeholders, and to provide valid and reliable data in Indicator 15 of the APR. In the FFY 2008 APR, submitted on February 1, 2010, the BIE reported that it grouped individual instances in a school involving the same legal requirement or standard together as one finding. OSEP appreciates this clarification.

One of the barriers to the implementation of an effective monitoring system that DPA staff identified was that compliance monitoring visits are conducted by both DPA staff and ELOs. As designed, the monitoring is to be conducted by current DPA staff and new monitoring staff. However, the monitoring positions have not been filled and there are not enough DPA staff to conduct the annual monitoring of all 173 schools with academic programs. DPA staff noted that ELOs conducting the monitoring have varied levels of knowledge about IDEA requirements. In phone interviews conducted by OSEP during the verification visit, ELOs and school level officials also noted the variance in knowledge of IDEA requirements. Some of the ELOs previously had been special education coordinators at the Line Office level and felt very comfortable with the regulations and requirements. Others had limited experience with IDEA regulations and were less confident in their understanding of the requirements. But all the ELOs expressed a need for clearer and more consistent guidance from DPA on the monitoring process. DPA is aware of this need and described steps they are taking to address it.

During the verification visit, DPA shared with OSEP a draft of a new monitoring manual, which it reported will be used for training purposes in the future. Subsequent to the visit, DPA informed OSEP that they are planning further changes in SEIMP and the monitoring manual will be revised accordingly. DPA staff acknowledged some of the inconsistencies noted above and are in the process of revising the BIE's procedures for identifying and tracking noncompliance, in consultation with the Data Accountability Center (DAC) and the Mountain Plains Regional Resource Center (MPRRC). OSEP looks forward to reviewing future versions of the manual and related materials.

#### *Indian Student Equalization Program (ISEP) Verification Process*

The ISEP verification process is the procedure the DOI uses to verify that each BIE-funded school is receiving the appropriate amount of ISEP funds. Under 25 CFR §39.403, the BIE is

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<sup>5</sup> See question 10 of OSEP's Sept 3, 2008 FAQ's.

<sup>6</sup> See question 2 of OSEP's Sept 3, 2008 FAQ's

required to certify and verify files for all students receiving basic and supplemental services. As part of this procedure, the BIE must verify that each student receiving special education and related services has a current and complete IEP and is receiving the services required on his or her IEP. To accomplish this, ELOs conduct an annual ISEP audit. The audits are not conducted under the authority of DPA, but rather the Administrative Services office. However, on November 19, 2009, DPA staff conducted WebEx training detailing the requirements for reviewing IEPs to determine if they meet IDEA requirements. In addition, the training informed ELOs of new requirements for schools to correct any noncompliance identified in the certification process within 30 days and for ELOs to refer any uncorrected noncompliance to DPA, which is then responsible for issuing a finding of noncompliance. While the BIE has conducted ISEP audits in previous years, this is the first year they have developed a process for identifying and correcting noncompliance discovered through the audits.

### Database

The BIE has not utilized a database to identify noncompliance. As described in further detail in the data section below, the BIE has been developing its system-wide database, the NASIS, for several years. An IEP module was piloted in SY 2008-09 and fully implemented in SY 2009-10. This module provides the BIE access to information on potential noncompliance for Indicators 11 (initial evaluation) and 13 (secondary transition) and related requirements. In interviews during the verification visit, the BIE reported that it is currently using information from NASIS to confirm information from other sources.

With the addition of the IEP Module, OSEP would like to emphasize the importance of making findings of noncompliance on the basis of information from the database. A State must account for all noncompliance, whether collected through the State's on-site monitoring system, other monitoring processes such as self-assessment or desk review of records, data system, or statewide representative sample or 618 data. If a State examines data through its database and determines that they show noncompliance with the requirements of the IDEA, the State must make a finding and require correction as soon as possible, and in no case later than one year after the State's identification (the State's written notification to the LEA of the finding of noncompliance).<sup>7</sup>

### Dispute Resolution

OSEP's review of State complaint files and interviews with BIE staff confirmed that when investigations lead to findings of noncompliance, appropriate corrective actions are required of the relevant party and verified by the BIE. However, BIE staff was unable to demonstrate that it examines every due process hearing decision to determine if the decision identifies any procedural and/or substantive violations of IDEA in a specific school, and if it reports those findings in Indicator 15 of the APR. A State must examine every due process hearing decision to determine if the decision identifies any procedural and/or substantive violations of IDEA in an LEA.<sup>8</sup>

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<sup>7</sup> See question 8 of OSEP's Sept 3, 2008 FAQ's and OSEP memorandum 09-02 dated October 17, 2008 (OSEP Memo 09-02) entitled Reporting on Correction of Noncompliance in the Annual Performance Report under sections 616 and 642 of the IDEA at <http://www.ed.gov/policy/speced/guid/idea/letters/2008-4/correction-noncompliance101708apr4q2008.pdf>.

<sup>8</sup> See question 6 of OSEP's Sept 3, 2008 FAQ's.

## **OSEP Conclusions**

In order to effectively monitor implementation of Part B of the IDEA, as required by IDEA sections 611(h)(2)(A) and (F), 612(a)(11) and 616; 34 CFR §§300.149, 300.600, 300.708 and 300.716; 20 U.S.C. 1232d(b)(3)(E); and OSEP's Sept. 3, 2008 FAQs and OSEP Memo 09-02, the BIE must monitor the improvement of educational results and functional outcomes for all children with disabilities, and must ensure compliance with the IDEA, Part B requirements. The BIE must also identify noncompliance by issuing findings of noncompliance when the BIE obtains data reflecting noncompliance with Part B requirements.

Based on the review of documents, analysis of data and interviews with BIE personnel, OSEP cannot determine if the BIE has a general supervision system that is reasonably designed to identify noncompliance in a timely manner using its different components. The BIE is currently revising its monitoring procedures under SEIMP and has just implemented significant changes, including the addition of the IEP module to NASIS and new procedures to identify and correct noncompliance through the SESS and the ISEP audit. The BIE, as it moves forward in implementing its revised SEIMP procedures, must ensure that it: (1) clarifies which document constitutes the written notification from the BIE to the school of the noncompliance so it is clear when the one-year timeline for correction begins; and (2) uses data it receives through the SESS, the ISEP verification process, its database, and due process decisions to identify findings of noncompliance.

## **Required Actions/Next Steps**

With its FFY 2009 APR, due February 1, 2011, the BIE must provide documentation that demonstrates:

- 1) The BIE has clarified which document constitutes the written notification from BIE to the school of the noncompliance so it is clear when the one-year timeline for correction begins.
- 2) The BIE uses data it receives through the SESS, the ISEP verification process, its database, and due process decisions to identify findings of noncompliance.

## ***Critical Element 2: Correction of Noncompliance***

*Does the BIE have a general supervision system that is reasonably designed to ensure correction of identified noncompliance in a timely manner?*

## **Verification Visit Details and Analysis**

### *Compliance Monitoring*

The Part B regulations at 34 CFR §300.600(e) require that in exercising its monitoring responsibilities under 34 CFR §300.600(d), the State must ensure that when it identifies noncompliance with the requirements of Part B of the IDEA by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance. As explained in OSEP Memo 09-02, and previously noted in OSEP's monitoring reports and verification letters, in order to demonstrate that previously identified noncompliance has been corrected, a State must verify that each LEA with noncompliance: (1) has corrected each individual case of noncompliance, unless the child is no longer in the jurisdiction of the LEA; and (2) is correctly implementing the specific regulatory requirement. A State's conclusion that an LEA is correctly implementing the specific regulatory requirement that formed the basis of the noncompliance must be based on the State's review of updated data, such

as data from subsequent on-site monitoring or data collected through the data system. In order to ensure that the noncompliance has been corrected, the State must also identify the root causes of the noncompliance, and if needed, change, or require each LEA to change, its policies, procedures, and/or practices that contributed to or resulted in noncompliance.

The letters and CMRs state that noncompliance items need to be corrected as soon as possible. The CMRs further clarify that any noncompliance related to FAPE items must be corrected within 45 days of the receipt of the report. The reports do not provide a clear deadline for the correction of items not related to FAPE, beyond the requirement to correct them as soon as possible. If the BIE finds noncompliance with any requirement of Part B of the IDEA, even if the noncompliance is not specifically related to FAPE, the BIE must explicitly inform the school that noncompliance with a requirement of Part B of the IDEA must be corrected as soon as possible, and in no case later than one year from the BIE's identification of the noncompliance.

When the BIE issues CMRs to schools that have been monitored, they include a CAP template. During the verification visit, the BIE explained that schools are required to complete the CAP and return it to the ELO within 45 days. The CAP includes information on the nature of the noncompliance, the actions required to correct the noncompliance and the personnel responsible for correction. The BIE reported that it required schools to maintain evidence that the actions identified in the CAP were completed.

In interviews, the BIE described the procedures it uses for verifying correction of noncompliance. The BIE reported that through FFY 2008, correction was verified by ELOs, who were responsible for examining the body of evidence. In further discussion, the BIE explained that the body of evidence was documentation provided by the school that the actions identified in the CAP were completed. Once ELOs verified correction, they provided information on the correction to the BIE for tracking purposes.

Based on its review of 13 monitoring reports from visits conducted in FFY 2007 and FFY 2008, and interviews with DPA staff, ELOs and school personnel, OSEP has determined that the corrective actions in the CAPs require schools to provide evidence of the correction of noncompliance identified in individual student files. While the BIE routinely reviewed updated data as part of its annual on-site monitoring review, its process for verifying that a school corrected previously identified noncompliance did not include a procedure for verifying that the school is correctly implementing the specific regulatory requirement based on a review of updated data, such as data from subsequent on-site monitoring or data collected through the data system. Beginning with the monitoring visits to be conducted in the winter and spring of 2010 (FFY 2009), the BIE stated that they intend to verify correction of noncompliance in the previous year (FFY 2008) by examining updated data to ensure that the school is correctly implementing the specific regulatory requirement. The BIE indicated that its revised monitoring procedures for verifying correction of noncompliance would reflect this change.

Interviews with DPA staff and ELOs during the verification visit suggest that root cause analyses were sometimes conducted by knowledgeable monitoring and school staff as a matter of good practice, but this is not part of the specified monitoring and CAP procedures outlined in the draft monitoring manual, nor is it reflected in the CAPs. The current monitoring protocols, as reflected in the draft monitoring manual, the compliance monitoring tool, and the monitoring files reviewed by OSEP do not include procedures for: (1) determining the root cause of the

noncompliance; and (2) if needed, changing, or requiring a school to change its policies, procedures and/or practices that contributed to or resulted in the noncompliance.

Self-Assessment, ISEP Verification Process, Database, and Due Process Decisions

As discussed in the GS-1 section above, the BIE has just begun to implement a system for identifying and correcting noncompliance discovered through the self-assessment, ISEP audits, database, and due process decisions. For this reason, OSEP was unable to determine the effectiveness of its system to correct noncompliance identified through these components of its general supervision system.

**OSEP Conclusions**

In order to effectively monitor implementation of Part B of the IDEA, as required by IDEA sections 611(h)(2)(A) and (F), 612(a)(11) and 616; 34 CFR §§300.149, 300.600, 300.708, and 300.716; 20 U.S.C. 1232d(b)(3)(E); and OSEP's September 3, 2008 FAQs and OSEP Memo 09-02, the BIE must ensure that identified noncompliance is corrected in a timely manner. Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP finds that the BIE does not have a general supervision system that is reasonably designed to ensure correction of identified noncompliance in a timely manner using its different components. Specifically, the BIE does not explicitly inform a school that noncompliance with a requirement of Part B of the IDEA, including a requirement not related to FAPE, must be corrected as soon as possible, and in no case later than one year from the State's identification of the noncompliance. The BIE's current procedures for verifying correction of noncompliance do not include procedures for: (1) reviewing updated data such as data from subsequent on-site monitoring or data collected through the data system to ensure the school is correctly implementing the specific regulatory requirements; (2) determining the root cause of the noncompliance; and (3) if needed, changing, or requiring a school to change its policies, procedures and/or practices that contributed to or resulted in the noncompliance.

**Required Actions/Next Steps**

With its FFY 2009 APR, due February 1, 2011, the BIE must provide documentation that demonstrates:

- 1) The BIE explicitly informs a school that noncompliance with any requirement of Part B of the IDEA, including a requirement not related to FAPE, must be corrected as soon as possible, and in no case later than one year from the State's identification of the noncompliance.
- 2) The BIE has revised its written policies and procedures for verifying that previously identified noncompliance has been corrected to include procedures for: (a) reviewing updated data such as data from subsequent on-site monitoring or data collected through the data system to ensure the school is correctly implementing the specific regulatory requirements; (b) determining the root cause of the noncompliance; and (c) if needed, changing, or requiring a school to change its policies, procedures and/or practices that contributed to or resulted in the noncompliance.
- 3) The BIE ensures that findings of noncompliance identified through the self-assessment, ISEP verification process, database, and due process decisions are corrected in a manner consistent with OSEP's Sept. 3, 2008 FAQs and OSEP Memo 09-02.

***Critical Element 3: Dispute Resolution***

*Does the BIE have procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA?*

**Verification Visit Details and Analysis**

The BIE contracts with Utah State University to provide complaint investigators, mediators, and due process hearing officers as needed across the 23 States with BIE-funded schools. Under the contract, Utah State University maintains a roster of trained investigators, mediators and due process hearing officers and is responsible for training these personnel in accordance with BIE procedures and IDEA requirements. In order to ensure timeline requirements are met, when the BIE is notified of a complaint or a request for mediation or a due process hearing, it contacts the University to request that it select an appropriate trained individual to serve in the capacity required at the same time that it processes a requisition for the contracting of the necessary services. Investigators, mediators and due process hearing officers are selected from the roster of trained personnel by Utah State University on a rotating basis. Throughout the process, the BIE is kept informed and maintains oversight of the process.

*State Complaint System*

The data reported in the State's FFY 2007 APR and Table 7 indicate that there were two signed complaints; one resulted in a written report with findings and one was resolved in the subsequent year through a due process hearing. The report with findings was issued within 60 days of the filing of the complaint. There were no extensions for exceptional circumstances. During the verification visit, OSEP reviewed the State complaint logs for FFY 2007 and FFY 2008 and a total of five complaint files. In all files it reviewed, OSEP found that the State investigated and reached a conclusion on each allegation in the complaint that was set forth in a written decision to all the parties, including the complainant and the school. Based on the review of the logs, Table 7 and the APR, it appears that complaints are being resolved within the 60-day timeline, as required by 34 CFR §300.152(a).

The Part B regulations at 34 CFR §300.509(a) require each SEA to develop model forms to assist parents and other parties in filing a State complaint under 34 CFR §§300.151 through 300.153. BIE has a model State complaint form posted on its website as an appendix to the Complaint Investigator's Manual. The BIE reported in interviews that it had shared the form with schools and line offices through a webinar and made hard copies available to schools. OSEP notes that the BIE may wish to consider making the model form more readily accessible on its website and to consider alternate methods of dissemination, such as through parent centers. The model complaint form does not include a statement that a public agency has violated a requirement of Part B of IDEA, as required by 34 CFR §300.153(b)(1). OSEP also notes that the form asks for information not required by IDEA, including the date of the last IEP and the next scheduled IEP. The BIE may request information not required by IDEA, but must ensure that the failure to provide the additional information does not delay the investigation of the complaint. Finally, the BIE does not indicate, in accordance with 34 CFR §300.509(a) and (b), that use of the model form is not required and that parents and other parties may use another form or document, as long as it meets the content requirements in 34 CFR §300.153(b) for filing a State complaint.

Due Process Hearings

The BIE has few due process hearing requests that are fully adjudicated. The BIE's FFY 2007 APR and Table 7 documented one fully adjudicated hearing request, which was completed within a properly extended timeline. During the verification visit, OSEP reviewed the due process complaint logs for FFY 2006 and FFY 2007 and five due process complaint files from both years.

The Part B regulations at 34 CFR §300.509(a) require each SEA to develop model forms to assist parents and public agencies in filing a due process complaint in accordance with 34 CFR §§300.507(a) and 300.508(a) through (c). On its website, the BIE has posted a model form entitled "Request for Mediation/Resolution Session/Due Process Hearing." OSEP notes that this encompasses three separate procedures, which may be requested at different times under different circumstances. BIE may wish to consider developing separate forms for all three. The model due process form does not include a section for the description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem, as required by 34 CFR §300.508(b)(5). Finally, the Due Process Hearing Officer Manual includes a statement that "educational professionals, parents, or students filing for due process are required to complete the Due Process Hearing form." This is inconsistent with 34 CFR §300.509(a) and (b), which states that use of the model form is not required and that parents and public agencies may use another form or document, as long as it meets the content requirements in 34 CFR §300.508(b) for filing a due process complaint.

During the verification visit, the BIE reported that it places due process hearing decisions on the agenda of the BIE advisory panel each year. When questioned during the verification visit, BIE indicated to OSEP that it does not transmit the findings and decisions in due process hearings, with the deletion of personally identifiable information, to the BIE advisory panel, or make them available to the public, as required by 34 CFR §300.513(d).

As part of the verification process, OSEP reviewed three other related documents: (1) *Procedures for the Investigation and Resolution of Special Education Complaints: Complaint Investigator's Manual*; (2) *Resolution Session and Due Process Hearing Procedures in Special Education: Due Process Hearing Officer Manual*; and (3) *Special Education Procedural Safeguards for Parents of Children with Disabilities*. OSEP found the following inconsistencies with 34 CFR §§300.151(b)(2), 300.506, 300.507, 300.510, and 300.515(a).

*Complaint Investigator's Manual:*

- 1) On page 5 of the manual, Section VI, B, 3 (Corrective Actions) lists the "appropriate future provision of the services for all students with disabilities who are subjects in the complaint" as one of the required corrective actions where the BIE has found a failure to provide appropriate services. However, 34 CFR §300.151(b)(2) requires the remedy for the denial of services to include the broader measure of appropriate future provision of services for all children with disabilities.

*Due Process Hearing Officer Manual:*

- 1) Section 4 A (Timelines) of the Manual, on page 2, states that “The BIE shall ensure that no later than **45 calendar days** after the receipt of an Application for Due Process Hearing, a final decision is reached in the hearing.” This is not consistent with the timelines described in 34 CFR §300.515(a), which states that the public agency must ensure that a final decision is reached, and a copy of the decision is mailed to each of the parties, not later than 45 days **after the expiration of the 30 day period** under §300.510(b), **or the adjusted time periods described in §300.510(c)**.
- 2) Section 8 (Scheduling of Resolution Session and Hearing) on page 3 of the Manual, confuses the resolution process described in 34 CFR §300.510, with the mediation process described in 34 CFR §300.506. For example, the statements that “resolution session is voluntary” and that “[t]he participation of the parties in a resolution session or the refusal of the parties to meet will not delay or replace the due process procedures or timelines,” apply to mediation, not to resolution sessions.
- 3) Section 9 (Scope of Hearing) on page 4 of the Manual states that: “A hearing shall be conducted for the purpose of deciding whether or not a student with a disability (or student suspected of having a disability) has been denied one or more aspects of a free appropriate public education guaranteed under Part B of the IDEA-2004.” This definition of the scope of a due process hearing is not fully aligned with 34 CFR §300.507, which specifies that a parent or public agency may file a complaint on any the matters described in 300.503(a)(1) and (2) relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.

*Procedural Safeguards Brochure:*

- 1) Page 19 of the brochure states that, “The BIE shall ensure that a final hearing decision is reached and mailed to the parties within 45 days after the receipt of a request for a hearing unless the hearing officer grants a specific extension at the request of either party.” This is not aligned with the requirement in 34 CFR §300.515(a) that the public agency must ensure that a final decision is reached not later than 45 days after the expiration of the 30 day period under §300.510(b), or the adjusted time periods described in §300.510(c).

**OSEP Conclusions**

The BIE must have in place policies and procedures to implement the dispute resolution requirements under Part B of the IDEA, as set forth in section 615 and 34 CFR §§300.151 through 300.153 and 300.500 through 300.536. See IDEA section 611(h)(2)(A), and 34 CFR §§300.708 and 300.716. Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP determined the BIE has not demonstrated that it has procedures and practices that are reasonably designed to implement all dispute resolution requirements of IDEA. Specifically, OSEP finds that, while the BIE has procedures in place to ensure the timely resolution of State complaints and due process hearings in accordance with IDEA requirements, the BIE has failed to demonstrate compliance with requirements regarding: (1) the development of model forms for due process complaints in accordance with §§300.507(a) and 300.508(a) through (c) and for State complaints under §§300.151-300.153 (34 CFR §300.509(a)); (2) the voluntary use of the State’s model complaint and due process hearing forms (34 CFR §300.509(a) and (b)); (3) the transmittal of findings and decisions to the State advisory panel and

making findings and decisions available to the public (34 CFR §300.513(d)). In addition, OSEP's review of the Complaint Investigator's Manual, the Due Process Hearing Officer's Manual, and the Procedural Safeguards Brochure all demonstrated that the documents are not fully aligned with IDEA section 615 and 34 CFR §§300.151 through 300.153 and 300.500 through 300.536.

### **Required Actions/Next Steps**

- 1) Within 60 days of the date of this letter, the BIE must provide documentation that the BIE has developed and made publicly available model forms for due process complaints in accordance with §§300.507(a) and 300.508(a) through (c) and for State complaints under §§300.151-300.153 (34 CFR §300.509(a)).
- 2) Within 60 days of the date of this letter, the BIE must provide documentation that neither parents nor schools are required to use the model form to file a due process complaint or State complaint.
- 3) Within 60 days of the date of this letter, the BIE must provide a written assurance that the State has established procedures to transmit the findings and decisions to the State advisory panel and to make the findings and decisions available to the public, as required by 34 CFR §300.513(d).
- 4) With its FFY 2009 APR, due February 1, 2011, the BIE must submit documentation demonstrating that its manuals for dispute resolution (State complaints, due process hearings, and mediation) and its procedural safeguards notice are all consistent with IDEA section 615 and the Part B regulations at 34 CFR §§300.151 through 300.153 and 300.500 through 300.536.

### ***Critical Element 4: Improving Educational Results***

*Does the BIE have procedures and practices that are reasonably designed to improve educational results and functional outcomes for all children with disabilities?*

### **Verification Visit Details and Analysis**

The geographic expanse and remoteness of many of its schools create particular challenges for the BIE in developing systematic procedures and practices designed to improve educational results and functional outcomes for all children with disabilities. Additional challenges include low general rates of employment and limited opportunities in many of the tribal communities. As discussed below, the BIE is addressing these challenges through cooperation with States, tribal governments and technology, such as webinars.

To address issues of increasing graduation rates, reducing dropout rates and improving post-school outcomes, the BIE has offered general and break out sessions in its last three Special Education Academies, held each fall. The BIE funds 60 high school programs in the 23 States in which it operates. The Secondary Transition Team has contacted the few high schools that have not attended the Academies, to ensure they have access to the same information. The BIE has also produced a series of webinars addressing secondary transition. The Secondary Transition Team also produces a semi-annual newsletter showcasing exemplary programs. Finally, since 2003, school spending plans include a line item for transition specialists.

The BIE local determinations under section 616 of IDEA consider high schools' performance on Indicator 13, secondary transition. In interviews during the verification visit, the BIE explained

to OSEP that this has helped focus the attention of high schools on the importance of quality secondary transition activities. The Secondary Transition Team has provided support to schools that have struggled with this indicator. In particular, four high schools were given a determination of Needs Substantial Intervention, in part because of low levels compliance in Indicator 13 (secondary transition). The Team provided intensive guidance on developing and enhancing a transition program and the role of a transition specialist.

In addition, the BIE reported that it had been tracking post-secondary outcomes prior to the requirement to do so for Indicator 14. To assist schools in improving outcomes, the BIE has fostered links with initiatives developed by communities, tribes and State agencies. The BIE commented that in New Mexico, Arizona and South Dakota, staff from BIE-funded schools are able to participate in State-sponsored training initiatives regarding improving postsecondary outcomes.

During the verification visit, the BIE described the BIE Reads (which developed out of a Reading First Grant) and Math Counts initiatives. These programs are aimed at the general population, but have a potentially large impact on the performance and assessment results of students with disabilities. BIE staff also review the assessment data and results with each school annually. In addition to helping verify the accuracy of the data, this allows BIE staff to assist school staff in targeting programs, funding and resources where they are needed, based on the needs of the school.

In its FFY 2008 APR, the BIE reported that 69.48% of students with disabilities were educated in the regular classroom for at least 80% of the day. The BIE stated that the reading, math, response to intervention (RTI) and behavioral initiatives all help with efforts to place students in the least restrictive environment (LRE). Indicator 5 (LRE) is used as a factor in local determinations, and compliance with LRE requirements in IDEA is monitored through the compliance monitoring tool.

### **OSEP Conclusions**

Based on the review of documents, analysis of data, and interviews with BIE and local personnel, OSEP determined that the BIE has procedures and practices that are reasonably designed to improve educational results and functional outcomes for all children with disabilities.

### **Required Actions/Next Steps**

No further action is required.

### ***Critical Element 5: Implementation of Grant Assurances***

*Does the BIE have procedures and practices that are reasonably designed to implement selected grant assurances (i.e., monitoring and enforcement, CEIS, NIMAS and assessment)?*

### **Verification Visit Details and Analysis**

The BIE reported that it uses its grant application process and monitoring to ensure the implementation of grant assurances. However, during the course of its review of the selected grant assurances applicable to the BIE, OSEP identified a number of issues.

Public Reporting and Determinations

As a part of its monitoring and enforcement responsibilities under IDEA section 616 and 34 CFR §§300.600(a) and 300.602(b)(1)(i)(A), each State must annually report to the public on the performance of each LEA against the State's SPP/APR targets and must make an annual determination for each LEA. Under the Part B regulations at 34 CFR §300.708(d), BIE must meet the requirements of IDEA section 616 that apply to States and references to LEAs in section 616 must be read as references to elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. Under 34 CFR §300.716, BIE must comply with the requirements in 34 CFR §§300.600(a) and 300.602.

Public Reporting

Under 34 CFR §300.602(b)(1)(i)(B), each State must make publicly available the following three items: 1) the State's SPP; 2) the State's APR; and 3) the State's annual report on the performance of each LEA located in the State on the targets in the SPP. In addition, effective December 31, 2008, 34 CFR §300.602(b)(1)(i)(A) requires that the annual report to the public on the performance of each LEA located in the State on the targets in the SPP be made available as soon as practicable but no later than 120 days following the State's submission of its APR to OSEP.

BIE meets the public reporting requirement by posting its SPP, APR and local performance reports on its website. The version of the SPP currently posted on the website does not include targets and improvement activities that cover the full six years of the SPP. BIE has its most recent APR available on the website. BIE posted its most recent local performance reports, based on the FFY 2007 APR submitted on February 2, 2009, at the end of October, nearly four months beyond the 120-day timeline required in 34 CFR §300.602(b)(1)(i)(A).

OSEP reviewed the FFY 2007 local performance data on the website at the time of the verification visit and found:

- 1) The data posted by the BIE on local performance do not include Indicator 3B, 3C or 5C.
- 2) For Indicators 8 and 14, the reports provide data on whether or not the school returned the surveys, rather than the required measurement for the Indicators.
- 3) The reports do not clearly indicate the State (BIE) targets for Indicators 8, 11, 13, 14 and 20.

Local Determination Criteria

Under 34 CFR §300.600(a)(2), each State must make determinations annually about the performance of each LEA based on the categories that OSEP uses when it makes annual determinations on the performance of each State. The BIE uses these categories in making its local determinations.

As described in interviews during the verification visit and confirmed by a review of the BIE's documentation, including the BIE determination criteria, enforcement rubric and sample determination letters, the BIE, in consultation with its stakeholders, has developed criteria for making local determinations. Stakeholders, including the BIE Advisory Board for Exceptional Children, review the criteria annually at the BIE Data Summit, held in March. The BIE reported that it makes local determinations based on a scoring rubric that considers: 1) correction of noncompliance within one year; 2) the targets for Indicators 3B, 4, 5, and 8; 3) Indicator 11 for all schools; 4) Indicator 13 for high schools and; 5) the submission of valid, reliable and timely

data. The BIE reported that it made local determinations based on the FFY 2007 APR by August 2009 and sent determination letters to school principals and ELOs.

Consistent with IDEA sections 616(a) and (e), a State's annual determination process must, at a minimum, include consideration of the following factors: (1) an LEA's performance on all SPP/APR compliance indicators; (2) whether an LEA submitted valid and reliable data for each indicator; (3) LEA-specific audit findings; and (4) any uncorrected noncompliance from any source.<sup>9</sup> The BIE's determination criteria, describe above, do not currently include consideration of audit findings, as required in the referenced OSEP guidance document.

#### Local Determination Enforcement

Under the Part B regulations at 34 CFR §300.600(a), a State must enforce 34 CFR Part 300, consistent with §300.604, using appropriate enforcement mechanisms, which must include, if applicable, specified enforcement mechanisms identified in §300.604. The BIE has developed a rubric for rewards and enforcement actions by determination level (see Special Education Levels of Determination, April 2009), which it developed to comply with the requirements of 34 CFR §300.600(a) and to encourage improved performance. After reviewing the rubric, OSEP notes the following:

- 1) For a school in Needs Assistance (NA) for two or more consecutive years, the BIE must take one of the following enforcement actions: (1) advise the school of available sources of technical assistance that may help the school address the areas in which it needs assistance and require the school to work with appropriate entities; or (2) identify the school as a high risk grantee and impose special conditions. See 34 CFR §§300.600(a)(3) and 300.604(a)(1). Although the BIE advises the school of available sources of technical assistance, it does not require the school to work with appropriate entities. The BIE reported that the determination letters require schools to document that they accessed technical assistance but the rubric does not make this clear. In the sample letters reviewed by OSEP, the BIE does state that schools in NA for two or more consecutive years should document the technical assistance the school accessed and the actions the school took as a result of the technical assistance. However, the rubric does not make clear that technical assistance is required, and the letters also do not state the requirement directly.
- 2) For a school in Needs Intervention (NI) for three or more consecutive years, the BIE must take one or more of the following enforcement actions: (1) require the school to prepare a corrective action plan or improvement plan if the BIE determines that the school should be able to correct the problem within one year or; (2) withhold in whole or in part, further payments to the school under Part B of IDEA. See 34 CFR §§300.600(a)(3) and 300.604(b)(2). The BIE requires all schools to develop a Local School Performance Plan (LSPP). All schools that are placed into NI for one or more years, must with the assistance and guidance of the ELO, demonstrate that all areas of noncompliance can be corrected as soon as possible and no later than one year from the date of identification. The LSPP may be considered a corrective action plan. However, the rubric does not address situations in which the BIE does not believe the problem can be corrected within one year, and does not include as an enforcement action, if appropriate, the withholding in whole or in part, further payments to the school under Part B of IDEA.

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<sup>9</sup> See Questions and Answers on Monitoring, Technical Assistance, and Enforcement (revised June 2009) <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C4%2C>.

- 3) For a school in Need of Substantial Intervention (NSI), the BIE must withhold, in whole or in part, any further payments to the school under Part B of the IDEA. See 34 CFR §§300.600(a)(3) and 300.604(c)(2). The BIE includes the following provision for tribally-controlled schools: “In the case of a tribally-controlled school failing to correct noncompliance that significantly affects the provision of FAPE, the BIE can provide notice to the grantee of its intent to rescind the special education portion of the grant and assume or reassume control of the program if the grantee does not take corrective action as prescribed by the BIE (25 U.S.C. §2507(a)(12)).” This provision also applies to tribally-controlled schools operating under a contract issued through the ISDEAA (25 U.S.C. §450m). We suggest that the rubric clearly state that this enforcement action applies to tribally-controlled schools operating under a contract issued through the ISDEAA. The prescribed action against tribally-controlled schools meets the requirements of 34 CFR §300.600(a)(3). However, the BIE has not included a withholding enforcement action for BIE-operated schools in need of substantial intervention.
- 4) OSEP also notes that the BIE includes specific criteria for being placed in NSI, based on the scoring rubric. However, the rubric states that enforcement actions *may* be applied “if a school demonstrates a consistent pattern of failure to correct issue(s) of noncompliance within one year, substantial failure to comply with any of the core requirements of IDEA, or informs the BIE that it is unwilling to comply.” The BIE has the authority to include these issues in the criteria used to make the determination of NSI. However, if the determination of NSI is made, the BIE *must* then apply the enforcement actions specified in 34 CFR §300.604(c)(2).

### CEIS

Under 34 CFR §300.711, the Secretary of the Interior may allow each elementary and secondary school for Indian children operated or funded by the Secretary of the Interior to use not more than 15% of the amount the school receives under 34 CFR §300.707(b) for any fiscal year for comprehensive early intervening services (CEIS), in accordance with IDEA section 613(f) and 34 CFR §300.226. Each school that develops and maintains CEIS must annually report to the Secretary of the Interior in accordance with section 613(f) of the IDEA. Because the BIE is not required to collect data, pursuant to 34 CFR §300.646, on significant disproportionality based on race and ethnicity, no schools are required to reserve 15% of IDEA Part B funds for CEIS. However, in interviews during the verification visit, the BIE reported that substantial numbers of schools are voluntarily using up to 15% of the IDEA Part B funds for CEIS.

Schools that wish to use funds for CEIS indicate their intention to do so in their Part B application. Schools provide more details on the amount of funds budgeted in specific spending categories for CEIS. The BIE reported that it reviewed the spending plans and provided feedback on the amount of money designated for CEIS, and whether it was within the maximum amount of up to 15% of IDEA Part B funds.

The BIE acknowledged that up until this time, it has not monitored to ensure appropriate use of the CEIS funds for allowable purposes under 34 CFR §300.226. The BIE informed OSEP that it intends to include this item in the fiscal monitoring tool currently under development. The BIE has provided training through webinars and conference presentations on appropriate use of funds. The BIE reported that, prior to the verification visit, it was providing guidance to schools and ELOs that CEIS funds could be used for students identified with reading-related disabilities,

if the funds were used for mathematics initiatives, or visa-versa. Under 34 CFR §§300.226(a) and 300.711(a), only students who have not been identified with any disability may receive CEIS.

Beginning in SY 2009-2010, the BIE is able to use NASIS to track schools using CEIS funds. Schools report annually to the BIE on: (1) the number of children served who received CEIS; and (2) the number of children served who received CEIS and subsequently receive special education and related services under Part B of the Act during the preceding two year period, as required by IDEA section 613(f)(4) and 34 CFR §§300.226(d) and 300.711(b). The BIE conducted a survey this fall to collect this information for SYs 2007-2008 and 2008-2009.

### NIMAS

The BIE has adopted the National Instructional Materials Accessibility Standards (NIMAS), but has chosen not to coordinate with the National Instructional Materials Access Center (NIMAC). The BIE provided an assurance in its FFY 2009 IDEA Part B Grant application that it will provide instructional materials to blind persons or other persons with print disabilities in a timely manner. In interviews during the verification visit, the BIE reported to OSEP that they identified 16 schools that serve students with visual impairments. In the fall of 2009, the BIE surveyed the 16 schools about whether they are complying with NIMAS and have the resources needed to comply. Based on the survey results, the BIE has developed an action plan that calls for systematic compliance with NIMAS requirements by April 2010. To achieve compliance, the BIE is developing training and guidance materials, as well as webinar and conference presentations. The BIE is adding a section on NIMAS in the SESS requiring the school to provide information on whether the School Special Education Committee reviews library and media resources for compliance with NIMAS. The BIE reports that, considering the regional diversity and remote location of many BIE-funded schools, a key component to achieving compliance with NIMAS is to develop partnerships with State agencies for the blind and visually impaired. Towards this end, the BIE is compiling a Blind and Visual Impairment Resource Guide. In addition, the BIE reports that it intends to use the Coordinated Services Plan (CSP) to formalize agreements with State agencies.

### Assessments

The BIE funds schools located in 23 different states. As a result of negotiated rule making authorized under the Elementary and Secondary Education Act (ESEA), BIE-funded schools follow the Consolidated State Application Accountability Workbook of the State in which the school is located. OSEP recognizes that this creates significant challenges for the BIE in meeting its assessment-related responsibilities under IDEA.

### Assessment Program and Accommodations

Because the BIE-funded schools use the assessment system of the State in which they are located, providing effective guidance to schools and monitoring the schools' compliance with assessment requirements in IDEA section 612(a)(16) and 34 CFR §300.160 is dependent upon cooperation with the appropriate SEAs. The BIE has pursued developing Memoranda of Understanding (MOU) with SEAs regarding the participation of BIE-funded schools in State assessment systems and the provision of the required assessment related data to the BIE. During the verification visit, the BIE reported that they had completed MOUs with 11 States. As a result of these agreements, three States directly provide the BIE with schools' assessment data. In the

remainder of the States the information goes to the school and then the school reports the information to the BIE. The BIE conducts annual meetings with each school to verify assessment and adequate yearly progress data. The BIE reported that the level of participation the BIE schools have in the training provided by SEAs on the State's assessment system, accommodations, alternate assessments, and test security and protocols varies widely from State to State.

### Public Assessment Reporting

The BIE's website reports assessment results for all children at the Bureau-wide and school levels. However, Bureau-wide and school level data on the participation and performance of students with disabilities on statewide assessments are not made available to the public and reported to the public as required under the Part B regulations. The Part B regulations at 34 CFR §§300.160(f) and 300.716 require the BIE to make available to the public and report to the public with the same frequency and in the same detail that it reports on the assessment of nondisabled children, information regarding the participation and performance of children with disabilities on assessments. This includes the number of children with disabilities participating in regular assessments and the number of those children who were provided accommodations (that did not result in an invalid score) in order to participate in those assessments and the number of children participating in alternate assessments, as described in 34 CFR §300.160(f)(2)-(4). With respect to performance, the BIE must report to the public on the performance of children with disabilities on regular assessments, as compared with the achievement of all children, and on alternate assessments described in 34 CFR §300.160(f)(5), if the number of children participating in those assessments is sufficient to yield statistically reliable information, and reporting that information will not yield personally identifiable information about an individual student participating on those assessments.

### **OSEP Conclusions**

Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP finds the BIE does not have procedures and practices that are reasonably designed to implement all selected grant assurances (i.e., monitoring and enforcement, CEIS, NIMAS, and assessment). See IDEA section 611(h)(2) and 34 CFR §§300.708 and 300.716. Specifically, the BIE did not: (1) make a current SPP available through public means, as required by 34 CFR §300.602(b)(1)(i)(B); (2) report to the public on the performance of each BIE-funded school no later than 120 days after the submission of the APR, as required by 34 CFR §300.602(b)(1)(A); (3) provide all the information required on the performance of each school against the BIE's SPP/APR targets, as required by 34 CFR §300.602(b)(1)(A); (4) consider LEA-specific audit findings when making local determinations, as required by sections 616(a) and (e) of IDEA and Question C-9 of *Questions and Answers on Monitoring, Technical Assistance, and Enforcement* (revised June 2009); (5) include in its determinations rubric the appropriate enforcement mechanisms to address each determination level, as required by 34 CFR §§300.600(a)(3) and 300.604; (6) inform schools that only students who have not been identified with disabilities are eligible for CEIS funds, as required by 34 CFR §§300.226(a) and 300.711(a); and (7) report publicly on the participation and performance of children with disabilities on statewide assessments at the district and school level with the same frequency and in the same detail as it reports on the assessments of nondisabled children, as required by 34 CFR §300.160(f). The BIE reported that subsequent to the verification visit, BIE is: (1) requiring schools voluntarily reserving funds for CEIS to report on the number of children served who received CEIS and the

number of children who received CEIS and subsequently receive special education and related services under Part B of IDEA in the preceding two years, as required by 34 CFR §§300.226(d) and 300.711(b); and (2) as of April 2010, providing instructional materials to blind persons or other persons with print disabilities in a timely manner, as required by 34 CFR §300.172(b)(2).

**Required Actions/Next Steps**

Within 60 days of the date of this letter, the BIE must provide:

- 1) Documentation that it is making a current SPP available through public means.
- 2) Documentation that it is reporting to the public on the performance of each BIE-funded school in FFY 2008 within 120 days of the submission of the FFY 2008 APR, due on February 1, 2010, and in accordance with 34 CFR §300.602(b)(1)(A).
- 3) An assurance that BIE is: (a) requiring schools voluntarily reserving funds for CEIS to report on the number of children served who received CEIS and the number of children who received CEIS and subsequently receive special education and related services under Part B of IDEA in the preceding two years, as required by 34 CFR §§300.226(d) and 300.711(b); and (b) providing instructional materials to blind persons or other persons with print disabilities in a timely manner, as required by 34 CFR §300.172(b)(2).

In addition, with its FFY 2009 APR, due February 1, 2011, the BIE must provide documentation that demonstrates:

- 1) The BIE's determination criteria include consideration of school-specific audit findings in its annual local determination process.
- 2) The BIE's rubric of enforcement action based on determination level conforms with the requirements of 34 CFR §§300.600(a)(3) and 300.604.
- 3) The BIE has informed schools that it does not consider any student identified with disabilities to be eligible for CEIS funds.
- 4) The BIE has made available to the public and has reported to the public on the Statewide assessments of children with disabilities at the Bureau and school level with the same frequency and in the same detail as it reports on the assessments of nondisabled children, the following:
  - a) the number of children with disabilities participating in regular assessments, and the number of those who were provided accommodations (that did not result in an invalid score) in order to participate in those assessments;
  - b) the number of children with disabilities, if any, participating in alternate assessments based on grade-level academic achievement standards;
  - c) the number of children with disabilities, if any, participating in alternate assessments based on modified academic achievement standards;
  - d) the number of children with disabilities, if any, participating in alternate assessments based on alternate academic achievement standards; and
  - e) compared with the achievement of all children, including children with disabilities, the performance results of children with disabilities on regular assessments, alternate

assessments based on grade-level academic achievement standards and alternate assessments based on alternate academic achievement standards.

## **II. Data System**

### ***Critical Element 1: Collecting and Reporting Valid and Reliable Data***

*Does the BIE have a data system that is reasonably designed to collect and report valid and reliable data and information to the Department and the public in a timely manner?*

#### **Verification Visit Details and Analysis**

The BIE reported that it uses three major systems to collect and report data and information to the Department and the public in a timely manner. The Annual Report, which has been in place since 2001, is a BIE-developed web-based system for schools to enter data. The NASIS is a web-based real time student information system. Finally, the Compliance Monitoring Tool, discussed in detail in General Supervision, Critical Element 1 (GS-1), is used to collect and document findings of noncompliance discovered through on-site monitoring visits.

The Annual Report is used to collect and report data on adequate yearly progress (AYP), assessments, staff and students. Schools are responsible for entering the data, including child count information on students with disabilities. Because of concerns with the validity and reliability of the information in prior years, since 2007-2008, BIE/DPA staff members have met with each school annually to verify the data. With the continued development of NASIS, increasing amounts of the data in the Annual Report are exported from NASIS to the Annual Report and verified by school personnel.

NASIS is a commercially-developed real-time web-based system that has been customized to meet the BIE's needs. NASIS utilizes a unique identifier for each student. School personnel are responsible for entering information into NASIS and only school staff can correct or edit the data.

All schools are required to use NASIS to qualify for BIE (ISEP) funding. With the addition of the IEP module, piloted in 2008-2009 and fully implemented in 2009-2010, NASIS collects most of the special education data, with the exception of graduation, assessment and AYP. The goal is to generate the Annual Report directly from NASIS in the future. However, in 20 of the 23 States with BIE-funded schools, graduation, AYP and assessment data are reported by the schools to the BIE, rather than directly from the States to the BIE. Schools report these data through the Annual Report and it cannot be generated from NASIS unless all States report the data directly to the BIE.

NASIS is designed to utilize drop-down menus to ensure appropriate entries of data, but has limited hard edit controls, or business rules that would prevent inappropriate entries. The BIE demonstrated NASIS during the verification visit. As an example of the lack of business rules preventing invalid entries of data, during the demonstration, data were successfully entered in the 3-5 year old setting for a child enrolled in eighth grade.

As part of its contract, the NASIS vendor operates a NASIS help desk to provide technical support to schools. During interviews, the BIE told OSEP that, in addition to fulfilling the traditional role of responding to customer questions, Help Desk personnel routinely perform data audits to identify anomalies or errors. If the audits identify any concerns with local data, the school is contacted, either directly by the Help Desk, or through BIE staff. ELOs also verify all

special education related NASIS data during the annual ISEP audit discussed in the GS-1 section above.

The BIE reported that they provide a variety of data training and technical support. Data issues are addressed at both the Data Summit and the Special Education Academy, held annually in the spring and fall respectively. NASIS training is offered for new staff and on an ongoing basis through monthly regional conference calls and webinars offered on a regular basis on specific topics. The BIE also reported that a number of ELOs and school personnel have been certified as NASIS trainers and are available to offer assistance to schools in their region. Individual assistance is also offered to all schools on the Annual Report when the BIE data staff meet with them to verify the data each year.

Despite the amount of training offered, the BIE acknowledged that the level of knowledge and proficiency in entering the data properly varies from school to school, based upon the size of the school and the tenure of the staff person responsible for entering the data. In interviews with OSEP, school personnel and ELOs also noted a continued need for additional training on data. They also highlighted a need for consistent data definitions. This last point corresponds to a finding made in a monitoring report on the Title I, Part A program authorized by the Elementary and Secondary Education Act of 1965 (ESEA) issued by the U.S. Department of Education's (ED) Student Achievement and School Accountability Programs (SASA) in May 2008. On page five of the report, SASA finds that "the accuracy of data within the NASIS system will require the creation and universal use of a data manual," and requires the BIE to "provide ED with a description of the procedures it will adopt to address this requirement and a timeline for implementation." During the verification visit, the BIE discussed plans for creating a "Resource Manual," that will provide common data definitions, data entry instructions and guidance on how to maneuver within NASIS. The Manual is intended for both general education and special education purposes. The BIE reported that completion of the Manual is awaiting the allocation of appropriate funding for the project.

As a part of the verification process, OSEP specifically inquired into the BIE's guidance and data collection methodology for SPP/APR Indicators 4A, 8, 11, 13, and 14. The BIE provided information demonstrating that the data it collected for these indicators were consistent with the required measurements.

Final regulations published on January 25, 2007 under 72 FR 3698 require that SEAs use the *EDFacts* reporting system for submission of all data collected by *EDFacts* beginning with data collected for SY 2008-2009. Subsequent to the verification visit, the BIE submitted its 2009-2010 Child Count and Educational Environments data through both *EDFacts* and OSEP's Data Analysis System (DANS), as agreed to with the Department. Submitting through both systems allowed the Department to conduct a congruency analysis, which has been completed. The Department has asked the BIE to resubmit the revised data based upon the initial congruency analysis. The BIE and the Department will continue to work towards full approval for submission of all IDEA, Part B data through *EDFacts*.

### **OSEP Conclusions**

Based on the review of documents, analysis of data and interviews with BIE personnel, OSEP cannot determine if the BIE has a data system that is reasonably designed to collect and report valid and reliable data and information to the Department and the public in a timely manner. OSEP notes that the NASIS system has been evolving in a promising direction, but that the

implementation of the IEP module this year makes it too soon to determine the effectiveness of the system. In addition, OSEP recommends the consideration of additional hard edits and/or business rules into NASIS, to help ensure the accuracy of data entry on the front end, rather than the reliance on audits and verifications to catch anomalies and errors. OSEP also remains concerned about the lack of common written data definitions and a data manual. OSEP will continue to review the data's validity and reliability through the review of the APR.

### **Required Actions/Next Steps**

With its FFY 2009 APR, due February 1, 2011, the BIE must provide updated information on the steps the BIE has taken to ensure valid and reliable data to the Department and the public in a timely manner.

### ***Critical Element 2: Data Reflect Actual Practice and Performance***

*Does the BIE have procedures that are reasonably designed to verify that the data collected and reported reflect actual practice and performance?*

### **Verification Visit Details and Analysis**

The BIE works to ensure that the data it collects and reports reflect actual practice and performance by using a system of Bureau-wide and regional trainings of all personnel involved in data collection and reporting. Annual data reviews by BIE/ASC staff and ISEP audits by ELOs further verify that the data reflect actual practice and performance. NASIS allows access to real-time student-level data. The addition of the IEP Module to NASIS provides further access to student-level data reflecting actual practice.

### **OSEP Conclusions**

Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP cannot determine if the BIE has procedures that are reasonably designed to verify that the data collected and reported reflect actual practice and performance. As referenced in Data Systems Critical Element 1, NASIS is continuing to undergo substantial changes that may have an impact on the ability of the BIE to ensure that the data it collects and reports on reflect actual practice and performance.

### **Required Actions/Next Steps**

No further action is required.

### ***Critical Element 3: Integrating Data Across Systems to Improve Compliance and Results***

*Does the BIE compile and integrate data across systems and use the data to inform and focus its improvement activities?*

### **Verification Visit Details and Analysis**

In interviews with OSEP, the BIE identified a variety of means it uses to compile and integrate data across systems and use the data to inform and focus its improvement activities. All schools are required to submit and update Local School Performance Plans (LSPP) on an annual basis. In the LSPP, schools must develop improvement activities related to each SPP indicator, based upon the performance for the school determined by the BIE in the previous APR. Schools that receive determination levels of NA-2 and NI-3 are also required to include information on the technical assistance the school has accessed. During both the Data Summit and the Special

Education Academy, stakeholders examine SPP/APR, NASIS and Annual Report Data to identify trends, develop improvement strategies and select training priorities.

However, during the verification visit, the BIE acknowledged that there is room for progress in integrating its different data sources and in analyzing them to inform and focus its improvement activities. Towards this end, the BIE described the beginnings of a conceptual model intended to integrate data collected from the compliance monitoring tool, CAPs, the Annual Report, NASIS and the LSPP. OSEP looks forward to hearing more about the progress in this project. In interviews, the BIE also recognized that to date, it has focused most of its resources on collecting valid and reliable data, with less focus on analyzing the data at the Bureau, ELO and school levels. The BIE believes that its collaboration with DAC and MPRRC will help it to both integrate data and use the data to affect positive change in outcomes for children with disabilities.

### **OSEP Conclusions**

Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP cannot determine if the BIE has procedures that are reasonably designed to compile and integrate data across systems and use the data to inform and focus its improvement activities. As described by the BIE, it is in the early stages of developing a conceptual model for integrating data across systems. In addition, the BIE has just begun intensive work with DAC, which will include a review of data systems to ensure their integration and use to inform monitoring and improvement activities.

### **Required Actions/Next Steps**

With its FFY 2009 APR, due February 1, 2011, the BIE must report on the progress it is making in integrating data and using it to focus its improvement activities.

## **III. Fiscal System**

### ***Critical Element 1: Timely Obligation and Liquidation of Funds***

*Does the BIE have procedures that are reasonably designed to ensure the timely obligation and liquidation of IDEA funds?*

### **Verification Visit Details and Analysis**

The DOI/BIE must have procedures to ensure the timely obligation and liquidation of the IDEA Part B and Part C funds it receives from the Department under IDEA sections 611(h)(1)(A), 611(h)(4) and 643(b). The BIE must ensure that all of the IDEA Part B and Part C funds are obligated by the BIE within the 27-month timeline in 20 U.S.C. 1225(b) and 34 CFR §76.709 and liquidated by the BIE within the timeline specified in 34 CFR §80.23 or an extension of that timeline authorized by the Department. During FFYs 2004 through FFY 2007, the BIE had large balances of unexpended IDEA funds in the U.S. Department of Education's Grants Administration and Payments System (GAPS), which raises questions about whether the DOI/BIE has procedures to ensure the timely obligation and liquidation of funds.

The BIE distributes IDEA Part B and Part C funds under three separate funding authorities<sup>10</sup> to the following three different entities: (1) BIE-operated schools; (2) tribally-controlled schools;

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<sup>10</sup> Under IDEA section 611(h)(1)(A) and 34 CFR §300.707(b), the Department provides eighty percent of the Part B funds allotted under IDEA section 611(b)(2) to DOI for the education of children with disabilities on reservations

and (3) tribes, tribal organizations or consortia of tribes or tribal organizations. Except for funds reserved for administration by the BIE under 34 CFR §300.710, the BIE must distribute IDEA Part B funds provided under IDEA section 611(h)(1)(A) to: (1) BIE-operated schools; and (2) tribally-controlled schools. The BIE must distribute IDEA Part B and Part C funds provided under IDEA sections 611(h)(4) and 643(b) to tribes, tribal organizations or consortia of tribes or tribal organizations (“tribal entities”). BIE staff reported that IDEA Part B funds distributed by the BIE to tribally-operated schools under IDEA section 611(h)(1)(A) and IDEA Part B and Part C funds distributed by the BIE under IDEA sections 611(h)(4) and 643(b) to tribal entities are provided by the BIE through a grant issued under the TCSA or a contract issued under the ISDEAA.

The BIE staff reported that when the BIE distributes all IDEA funds, the funds are tracked through the Federal Funds System (FFS), which is utilized throughout DOI. However, while the FFS functions as an accounting system for tracking IDEA funds distributed by the BIE, it performs an additional function for the IDEA Part B funds that the BIE must distribute to BIE-operated schools. IDEA funds that the BIE distributes to BIE-operated schools remain within the FFS system in the school’s “location account” in FFS until expended by the BIE-operated school. Using FFS, the BIE can track both the obligation and expenditure of funds on a real-time basis for BIE-operated schools. In a presentation on the fiscal systems, BIE staff explained that the Administrative Services office monitors the BIE-operated schools’ obligations and expenditures through financial reviews and monthly calls with principals, business managers and administrative staff. In addition, BIE staff reported that the Office of the Chief Financial Officer from the BIA, which ultimately authorizes all obligations and expenditures, provides additional oversight.

By contrast, BIE staff reported that IDEA Part B funds distributed to tribally-controlled schools and tribes, and IDEA Part C funds distributed to tribes, with one exception,<sup>11</sup> are obligated and transferred directly from GAPS into tribal accounts only after the following six steps are taken. First, the BIE staff prepare and send to each tribally-controlled school and tribal entity a grant or contract document that identifies the tribally-controlled school’s and the tribal entity’s specific IDEA allocation amount. Second, the tribal official signs and submits to the BIE/BIA the grant or contract document. Third, the DOI Awarding Official signs the grant or contract document. Fourth, the BIE/BIA provides a document authorizing the BIA to draw down the tribal funds out of GAPS. Fifth, each tribal official signs the draw down document and returns it to BIE/BIA. Sixth, the BIA draws down on a monthly basis the specific amount of IDEA funds for the tribally-controlled school and tribal entity and transfers the funds to the tribal accounts. Once the funds are drawn down out of GAPS, they are also zeroed out in FFS.

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aged five through 21 enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. Under IDEA section 611(h)(4) and 34 CFR §300.712, the Department provides twenty percent of the Part B funds allotted under IDEA section 611(b)(2) to DOI to be distributed to tribes for the coordination of assistance for special education and related services for children with disabilities aged three through five living on reservations served by elementary and secondary schools for Indian children operated or funded by DOI. Under IDEA section 643(b) and 34 CFR §303.180, the Department provides Part C funds to DOI to be distributed to tribes for the coordination of and other assistance in the provision of early intervention services by the States to infants and toddlers with disabilities and their families living on reservations served by elementary and secondary schools for Indian children operated or funded by DOI.

<sup>11</sup> Tribally-controlled schools that have not had an A-133 Audit conducted as required are placed on a series of increasing sanctions that limit their ability to draw down IDEA funds.

It is critical to note that in order for the BIE to meet its 27-month obligation timeline for the IDEA funds it distributes to tribally-controlled schools and tribal entities under IDEA sections 611(h)(1)(A), 611(h)(4) and 643(b), the BIE must draw down these IDEA funds out of the GAPS system within 27 months from when they become available to the Department for obligation or request a late liquidation, provided that an appropriate obligation had already occurred within the 27-month timeline with respect to these tribally-operated schools and tribal entities. Equally important to note is that once these IDEA funds are drawn down out of GAPS and placed into tribal accounts by the BIA (step 6 above), these IDEA funds become “no-year funds” for tribally-operated schools and tribal entities under 25 U.S.C. 2507(a)(11) of the TCSA and 4501(a) and (c) of the ISDEAA. For these tribally-controlled schools and tribal entities, no-year funds are “funds [that] remain available until expended, and with respect to such funds, no further approval by the Secretary [of the Interior], or justifying documentation shall be required prior to the expenditure of such funds.” (See 25 U.S.C. 2507(a)(11) and 4501(a) and (c).) However, the funds under IDEA sections 611(h)(1)(A), 611(h)(4) and 643(b) do not become no-year funds until they are transferred out of GAPS and into the specific tribal account under a grant or contract.

The BIE reported that in most cases the tribally-controlled schools and tribal entities sign and submit the draw down document immediately, and the IDEA funds are transferred and drawn down out of GAPS accordingly. However, in interviews during the verification visit, BIE staff acknowledged that in a small minority of cases, the tribally-operated schools and tribal entities do not authorize the draw down immediately and the funds remain in GAPS. The BIE Administrative staff stated that they work with the BIA to ensure that all the tribal funds are drawn down into tribal accounts under the appropriate grants or contracts.

However, large balances of IDEA funds provided to the BIE are reflected as unexpended in GAPS. According to GAPS, IDEA FFYs 2004, 2005, 2006 and 2007 funds provided to the BIE remain unexpended. GAPS records as of February 3, 2010 indicate that the following funds remain: \$6,233,148 of FFY 2004 IDEA Part B funds; \$1,932,524 of FFY 2005 IDEA Part B funds; \$173,604 of FFY 2006 IDEA Part B funds; \$3,826,425 of FFY 2007 IDEA Part B funds; and \$73,464 of FFY 2007 IDEA Part C funds. The following funds the Department distributed to the BIE are no longer available for obligation or liquidation: \$6,233,148 of FFY 2004 funds, \$1,932,524 of FFY 2005 IDEA Part B funds, and \$173,604 of FFY 2006 IDEA Part B funds. It is unclear whether these unexpended funds are those that would be expended by BIE-operated schools, tribally-controlled schools or tribal entities under IDEA sections 611(h)(1)(A), 611(h)(4) or 643(b).

OSEP received from the BIE a late liquidation request for \$5,040,000 from the FFY 2004 BIE Part B funds, which OSEP granted in September of 2007. OSEP received from BIE a late liquidation request for FFY 2007 BIE Part B funds on March 19, 2010. OSEP will respond under separate cover to this request.<sup>12</sup>

## **OSEP Conclusions**

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<sup>12</sup> The BIE must obligate its IDEA funds within 27 months from when they are first available to the Department for obligation. The final dates by which the BIE could submit late liquidation requests (assuming the funds were obligated within 27 months) for its FFY 2005 and 2006 IDEA funds that remain unexpended were respectively March 31, 2009 and March 31, 2010. See Policy Memorandum on Extension of Liquidation Periods and Related Accounting Adjustments for Grantees under Department of Education State-Administered Programs, dated June 5, 2007, at <http://www2.ed.gov/policy/fund/guid/gposbul/lateliquidationmemos.html>.

Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP cannot determine whether the BIE has procedures and practices that are reasonably designed to ensure the timely obligation and liquidation of these IDEA Part B and Part C funds because the GAPS reports reflect large balances of unexpended funds for FFYs 2004 through 2007.

However, large portions of its FFYs 2004, 2005, and 2006 IDEA Part B funds are no longer available for obligation or liquidation, and it appears that the BIE may not have clear written procedures that explain the timelines by which IDEA funds must be obligated and liquidated.

### **Required Actions/Next Steps**

Within 60 days from the date of this letter, the BIE must develop written distribution procedures for all of its IDEA funds to ensure that all BIE/BIA staff and all recipients of IDEA funds from the BIE are informed in writing of the specific time periods by which the recipient must complete all actions in order to ensure the timely obligation and liquidation of IDEA funds. Upon completing its review, BIE must provide to OSEP within 75 days from the date of this letter, a copy of its distribution procedures for IDEA funds (including any model grant or contract documents for IDEA funds) to ensure that all BIE/BIA staff and all recipients of IDEA funds from the BIE are informed in writing of the specific time periods by which the recipient must complete all actions in order to ensure the timely obligation and liquidation of IDEA funds. OSEP remains available to provide technical assistance and to review draft documents.

### ***Critical Element 2: Appropriate Distribution of IDEA Funds***

*Does the BIE have procedures that are reasonably designed to ensure appropriate distribution of IDEA funds?*

### **Verification Visit Details and Analysis**

#### **Part B, 611 Funds**

The BIE reported during the verification visit that each fiscal year, after reserving funds for administration under 34 CFR §300.710, it allocates eighty percent of funds provided under IDEA section 611(h)(1)(A) and 34 CFR §300.707(b) to BIE-funded schools by July 1<sup>st</sup> and twenty percent of those funds to such schools by September 30<sup>th</sup>, as required by IDEA section 611(h)(1)(A). IDEA does not specify a formula for distributing these Part B section 611(h)(1)(A) funds to BIE-funded schools. During the verification visit, the BIE described the formula it uses for distributing these funds, which includes four steps: (1) distribution based on weighted student count, based on disability category (July 1); (2) supplemental distribution for schools with small populations of students with disabilities (July 1); (3) distribution to meet unmet needs based on supplemental application (September 30); and (4) distribution of any remaining section 611 funds on a percentage pro-rata basis (September 30).

The BIE reported that the funds provided under IDEA section 611(h)(4) and 34 CFR §300.712 are distributed to tribes in accordance with the formula in IDEA section 611(h)(4)(B). These funds are placed in the tribal accounts according to the procedures described in Fiscal Systems Critical Element 1 (FS-1).

#### **Part C Funds**

The BIE reported that the funds provided under IDEA section 643(b) and 34 CFR §303.180 are distributed to tribes in accordance with the formula in IDEA section 643(b)(2). All of these funds are placed in the tribal accounts according to the procedures described in FS-1. Under 34

CFR §303.180(c), the BIE must provide a report to the Department within 90 days after the end of each fiscal year on the name of each tribal entity that received a payment of IDEA Part C funds and the date and amount of each payment. The BIE provided the required report under 34 CFR §303.180(c) on December 11, 2010.

### **OSEP Conclusions**

Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP concludes that the BIE has procedures and practices that are reasonably designed to ensure the appropriate distribution of IDEA Part B and Part C funds to all BIE-funded schools, and tribal entities.

### **Required Actions/Next Steps**

No further action is required.

### ***Critical Element 3: Appropriate Use of IDEA Funds***

*Does the BIE have procedures that are reasonably designed to ensure appropriate use of IDEA funds?*

### **Verification Visit Details and Analysis**

The BIE reported that responsibility to ensure the appropriate use of IDEA Part B funds allocated under IDEA section 611(h)(1)(A) for the education of children with disabilities enrolled in BIE-funded schools is shared between the DPA and the Administrative Services office.<sup>13</sup> In interviews during the verification visit, both offices described the development of procedures to share information and improve their joint ability to ensure the appropriate use of funds. Administrative Services conducts regular conferences on fiscal issues with DPA and ELOs. The two offices have conducted joint trainings at conferences. In recognition of the need to improve communications, they have recently begun monthly meetings between DPA and Administrative Services.

Using the FFS, each program (e.g., IDEA section 611) has a distinct program code, which is further broken down by ELO and school by location and school identifiers. This ensures that the BIE can clearly delineate IDEA funds from other funds. As discussed in FS Critical Element 1, Administrative Services has real-time access to fiscal and accounting information for all BIE-operated schools through FFS. During the verification visit, Administrative Services described how they utilize this access to conduct periodic financial reviews of all programs, including IDEA Part B, for BIE-operated schools. BIE-operated schools are also required to submit quarterly reconciliation statements on their annual budgets.

By contrast, BIE staff reported that tribally-controlled schools do not utilize FFS, and the BIE does not have regular access to their fiscal systems. Tribally-controlled schools operating under

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<sup>13</sup> The scope of our review for FS-3 was the appropriate use of funds allocated under IDEA section 611(h)(1)(A) for the education of children with disabilities on reservations aged five through 21 enrolled in elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior. Our review did not include the use of funds provided under IDEA sections 643(b) and 611(h)(4) that the BIE distributes to tribal entities to provide for the coordination of, and assistance in, the provision of IDEA services to infants and toddlers with disabilities and their families, and preschool children with disabilities on reservations served by elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior, respectively.

grants issued under the TCSA must submit an annual financial summary statement to the ELO. Tribally-controlled schools operating under contracts issued under the ISDEAA must submit annual budget and budget narratives to the awarding official. Beyond this, Administrative Services relies largely upon OMB Circular A-133 Audits for ensuring the appropriate use of funds. However, a review of selected audits of tribally-controlled schools<sup>14</sup> indicated that audits covering IDEA funds are not conducted every year and do not systematically examine appropriate use of IDEA funds. During interviews with ELOs, at least one ELO indicated that she regularly examines expenditures from tribally-controlled schools in her region to ensure the appropriate use of funds. However, this is not a systematic practice.

DPA reviews all the annual Part B applications from BIE-operated and tribally-controlled schools, including spending plans. After reviewing the applications, DPA provides written comments to the schools, on such issues as reserving no more than 15 percent of IDEA Part B funds for CEIS. DPA, however, does not have an approval process for applications. IDEA funds are distributed to all BIE-funded schools that have submitted a complete application. In addition, although DPA reviews the IDEA spending plans, and Administrative Services conducts fiscal reviews that examine actual expenditure for the BIE-operated schools, neither office looks at the spending plan in conjunction with actual expenditures of IDEA funds. During the verification visit, DPA presented information to OSEP on a proposed fiscal monitoring protocol that is intended to be integrated into the compliance monitoring conducted each year.

Finally, on March 28, 2007, the Office of the Inspector General (OIG) issued a final audit report (ED-OIG A06-F0019) summarizing the results of five audits of IDEA, Part B requirements at schools under the supervision of the BIA.<sup>15</sup> In a Program Determination Letter (PDL) issued on October 26, 2009, the Department sustained OIG's findings that: 1) procedures were not in place at the audited schools to ensure that special education and related services were provided in accordance with students' IEPs; IDEA, Part B funds expended at these schools may not have been expended for allowable special education and related services, and these problems may be systemic throughout BIA-funded schools; and 2) that BIA did not properly account for IDEA, Part B funds allocated under IDEA section 611(h)(1)(A) and may have improperly accounted for other funds it received from the Department. In the PDL, the Department required the BIA to provide additional documentation in order to resolve and close the audit. The Department is in receipt of this documentation and will respond under separate cover.

### **OSEP Conclusions**

Based on the review of documents, analysis of data, and interviews with BIE personnel, OSEP finds that the BIE does not have procedures that are reasonably designed to ensure appropriate use of Part B IDEA funds allocated under IDEA section 611(h)(1)(A) for the education of children with disabilities enrolled in BIE-operated and tribally-controlled schools.

### **Required Actions/Next Steps**

With its FFY 2009 APR, due February 1, 2011, the BIE must submit documentation that demonstrates it has developed and implemented fiscal monitoring procedures to ensure that BIE-

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<sup>14</sup> OSEP reviewed audits for six schools in three different ELO's from FFY's 2005-2008.

<sup>15</sup> As explained in the Background section above, during the time the audits were conducted, the BIE was a part of the BIA called OIEP. For this reason, the audit and subsequent correspondence related to it, refer to the BIA, rather than the BIE.

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operated schools and tribally-operated schools are ensuring the appropriate use of Part B funds allocated under IDEA section 611(h)(1)(A).