



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

JUL 23 2001

Mr. David Dickman
Special Education Coordinator
Salt River Pima-Maricopa Indian Community
10005 East Osborn Road
Scottsdale, Arizona 85256-9722

Dear Mr. Dickman:

This is in response to your letter to Kenneth R. Warlick, former Director of the Office of Special Education Programs (OSEP), requesting clarification of the distribution of Part B funds under the Individuals with Disabilities Education Act (IDEA) from the Office of Indian Education Programs located in the Bureau of Indian Affairs (BIA) under the U.S. Department of the Interior. More specifically, you ask eight questions regarding the distribution of funds under Part B of the IDEA that are provided to the Secretary of the Interior for assistance for the education of Indian children with disabilities on reservations. The Department of the Interior administers funds provided by the Secretary of Education under the IDEA through the Office of Indian Education Programs located within the Bureau of Indian Affairs (BIA).

By way of background it is important to outline the broad IDEA statutory requirements with respect to the requirements of providing special education and related services under the IDEA to children with disabilities in general and to Indian children on reservations. Part B of the IDEA requires States that accept Part B funds to make available a free appropriate public education (FAPE) to eligible children with disabilities beginning at age 3 and possibly lasting to the 22nd birthday depending on State law and practice. See, 20 U.S.C. §1412 and 34 C.F.R. Part 300. The Secretary of the Interior provides services through the BIA in the Office of Indian Education Programs, to children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. 20 U.S.C. §1411(i)(1)(A). In the case of Indian students aged 3 to 5, inclusive, the BIA remains responsible for those children enrolled in programs affiliated with BIA schools that are required by the States in which such schools are located to attain or maintain State accreditation and which schools have been accredited prior to October 7, 1991. 20 U.S.C. §1411(i)(1)(B). With respect to all other children aged 3 to 21, inclusive, on reservations, the State educational agency must be responsible for ensuring that all of the requirements of Part B are implemented. 20 U.S.C. §1411(i)(1)(C).

Q1. Can the Office of Indian Education Programs use more than 5% of its Part B funds for Administrative costs?

Response:

Under Part B of the IDEA, the Secretary of Education reserves 1.226 percent of funds under the Assistance to States for the Education of Children with Disabilities program to provide assistance to the Secretary of the Interior. 20 U.S.C. §1411(c). Eighty percent of this appropriated amount must be used by the BIA to ensure that FAPE is made available to all children with disabilities on reservations aged 5 through 21 who are enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. 20 U.S.C. §1411(i)(1)(A). The Secretary of Interior may use five percent of this eighty percent or \$500,000, whichever is greater, for administrative costs. 34 CFR §300.262(a). Of the reserved 1.226 percent, twenty percent of these funds must be provided by the Secretary of the Interior to the BIA to be distributed to tribes and tribal organizations or consortia of those tribes or tribal organizations (“tribal entities”) to provide for the coordination of assistance for special education and related services for children with disabilities aged 3 through 5 on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. 20 U.S.C. §1411(i)(3)(A). None of these funds may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance. 20 U.S.C. §1411(i)(3)(F)

Q2. Can the Office of Indian Education Programs use any Part B funds beyond the 5% for Administrative costs for providing any other services such as training?

Response:

As the response provided to question one above explains, the Department of the Interior may use five percent, or \$500,000, whichever is greater of the eighty percent of the amount allocated to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. Not more than this allotted amount may be used for administrative costs.

However, we do not interpret administrative costs to include training that will address the identified needs for in-service preparation to ensure that personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide services such as special education, regular education, and related services). Preparation of general and special education personnel with the content knowledge and collaborative skills needed to meet the needs of children with disabilities is an important component to meet the need for assistance of Indian children with disabilities on reservations.

Q3. If the Office of Indian Education Programs can use only 5% of its Part B funds for administrative costs, does this also include funding for Special Education Coordinators at the 23 different Agency Offices around the country? The Special Education Coordinators are Bureau of Indian Affairs Administrative employees who monitor schools within its Agency and provide technical assistance and training to those schools.

Response:

The BIA has informed the OSEP that the duties of special education coordinators include monitoring the schools, providing technical assistance, and reviewing school applications in regard to compliance with the requirements of Part B. Special education coordinators also assist the schools in finding services for children who have low incidence disabilities. In addition, in some instances, special education coordinators recruit, hire, and supervise related services staff. OSEP has confirmed during monitoring activities that the special education coordinators perform these functions.

Therefore, because the main work of the BIA special education coordinators is to ensure that FAPE is provided to those children for whom the field Agency is responsible, OSEP believes that the Department of the Interior may pay the salaries of special education coordinators from the eighty percent portion of its Part B funds which must be used in accordance with 34 CFR §300.715(b). However, if the special education coordinators are performing some activities allowable only as administrative costs under 34 CFR §300.262(a) on behalf of the BIA central office, rather than solely for the schools in the Agency, then the BIA needs to pay for the portion of the salaries allocated to those activities with the amount set aside for administrative costs under 34 CFR §300.262(a).

Q4. Can the Office of Indian Education Programs provide Part B funds to Bureau of Indian Affairs (BIA) funded schools based only upon documented IEP needs and funding priorities established by the BIA or do they have to follow the current 25 CFR Part 39.3-39.12 regulations?

Response:

Regarding the eighty percent of Part B funds allocated to assist the Secretary of Interior, Part B of IDEA does not establish requirements for how the Secretary of the Interior must distribute those Part B funds to schools operated or funded by the Secretary of the Interior. The Secretary of Interior may determine how to distribute those Part B funds to schools operated or funded by the BIA as long as those funds are expended in accordance with the requirements of Part B of IDEA and its implementing regulations at 34 CFR Part 300. Therefore, it is not inconsistent with IDEA for the Office of Indian Education Programs to provide Part B funds to BIA funded schools based only upon documented IEP needs and funding priorities established by the BIA. Nor is it inconsistent with IDEA for the Office of Indian Education Programs to distribute Part B funds in accordance with the Indian School Equalization Formula at 25 CFR Part 39.3-39.12.

The Secretary of the Interior must distribute the twenty percent of the Part B funds allocated to provide for the coordination of assistance for special education and related services for children with disabilities aged three through five to each tribe or tribal organization based on the number of children with disabilities ages 3 through 5 residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations. See 20 U.S.C. 1411 (i)(3)(B) and 34 CFR §300.716.

Q5. *Does the current 25 CFR Part 39.3-39.12 regulations for funding Special Education violate 34 CFR Part 300 regulations? If these regulations do violate 34 CFR Part 300 regulations, what specifically needs to be changed for the Office of Indian Education Programs to be in compliance?*

Response:

The current regulations at 34 CFR Part 39.3-39.12 do not violate the regulations implementing IDEA at 34 CFR Part 300. As noted above, IDEA does not establish requirements for how the Secretary of Interior is required to distribute the eighty percent of Part B funds allocated to the Secretary of Interior to schools operated or funded by the BIA. As you know, the Indian School Equalization Formula calculates per pupil allocations and uses a weighted student unit formula. Children eligible for special education and related services receive additional weights and funding based on whether they are assigned service levels that are "high" (15 hours or more special education per week) or "moderate" (less than 15 hours special education per week). Section 612(a)(5)(B) of IDEA requires that if a State, in this case the BIA, uses a funding mechanism by which it distributes funds on the basis of the type of setting in which a child is served, the funding mechanism may not result in placements that violate the least restrictive environment requirements and that if the BIA's policies and procedures do not ensure compliance, the funding mechanism must be revised as soon as feasible to ensure that it does not result in such placements. Based on the BIA's Improvement Plan dated September 12, 2000, and the BIA's Eligibility Documents dated July 2000, submitted to OSEP, the BIA is in the process of revising its funding mechanism to meet the requirement of section 612(a)(5)(B).

Q6. *Can the Office of Indian Education Programs require all Bureau of Indian Affairs funded Schools to submit an application to justify additional Part B funding, and then distribute Part B funds subjectively based on what Office of Indian Education Programs sees as an unmet Special Education need or must they distribute Part B funds based on an objective formula in order to meet the requirements of 25 CFR Part 32.4?*

Response:

OSEP is responsible for ensuring that the BIA meets the requirements of Part B of IDEA and its implementing regulations at 34 CFR Part 300. The Department of Interior issued the regulations at 25 CFR Part 32 titled Indian Education Policies. 25 CFR §32.4 sets out the policies that the Assistant Secretary for Indian Affairs in the Department of Interior must follow in carrying out its education mission. The Department of Education is not responsible for ensuring that the requirements of 25 CFR Part 32 are met.

Q7. *If the Office of Indian Education Programs changes how they distribute Part B funds according to the 25 CFR Part 39.10-12. What is the correct process for the Office of Indian Education Programs to change the current regulations that they have in place?*

Response:

The regulations at 25 CFR Part 39 were issued by the Department of Interior. If the Office of Indian Education Programs changes how it distributes Part B funds to BIA funded schools according to 25 CFR §39.10-12, it must follow its own procedures for making regulatory changes.

Q8. Who is responsible to ensure that the Office of Indian Education Programs complies with the Funding requirements in the 34 CFR Part 300 and 25 CFR Part 39.3-39.12?

Response:

The Department of Education is ultimately responsible to ensure that the Department of the Interior complies with all of the requirements of the IDEA that apply to the Department of the Interior for the purposes of providing special education and related services to Indian children with disabilities. The Secretary of the Interior must provide the Secretary of Education information that meets the requirements of sections 612(a)(1), (3)-(9), (10(B), (C), (11)-(12), (14)-(17), (20), (21) and (22) of the IDEA (including monitoring and evaluation activities). The Secretary of the Interior must also provide information that meets the requirements of section 612(b) and (e); and section 613(a)(1), (2)(A)(i), (6), and (7) of the IDEA as well as the regulatory requirements that implement these sections of the IDEA. See §§300.260 through 300.267. The Department of Education is not responsible for ensuring that the requirements of 25 CFR Part 39 are met.

Because some of your questions concern requirements established by the Department of Interior, you may want to direct your inquiry to:

Dr. Angelita Felix
Bureau of Indian Affairs
Office of Indian Education Programs
Human Resources Office
201 3rd Street NW, Suite 310
Albuquerque, New Mexico 87102

We hope that you find this explanation helpful. If you need further assistance, please call Ms. Sarah Willis at 202-205-8658 or Mr. Troy Justesen at 202-205-9053.

Sincerely,



Patricia J. Guard
Acting Director
Office of Special Education Programs

cc: Dr. Angelita Felix