

**TESTIMONY OF
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UNITED STATES DEPARTMENT OF THE INTERIOR
TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ON
S. 2842, THE JOHNSON-O'MALLEY SUPPLEMENTAL
INDIAN EDUCATION PROGRAM MODERNIZATION ACT**

MAY 11, 2016

Good afternoon Chairman Barrasso, Vice Chairman Tester, and members of the Committee. My name is Mike Black. I am the Director for the Bureau of Indian Affairs at the Department of the Interior (Department). I am here today to provide the Department's position on S. 2842, the Johnson-O'Malley Supplemental Indian Education Program Modernization Act.

The Department supports the goals of S. 2842 but recommends some technical changes.

Background

The Johnson-O'Malley (JOM) Program is authorized by the Johnson-O'Malley Act of 1934, and the implementing regulations are provided in Part 273 of Title 25 of the Code of Federal Regulations. As amended, this Act authorizes contracts for the education of eligible American Indian and Alaska Native students who are not enrolled in Bureau or secretarian operated schools. A local JOM program operates under an educational plan that the Bureau of Indian Education (BIE) approves. These plans contain educational objectives addressing the needs of eligible students, offering various opportunities including cultural enrichment, tribal language, academics, and dropout prevention programs.

Tribal organizations, Indian corporations, school districts, and States may receive funds once they establish an Indian Education Committee to approve supplementary support programs. American Indian and Alaska Native students are eligible if they are members of a federally recognized tribe, or certify that they are at least one-fourth or more degree of Indian blood and descendant of a member of a federally recognized Indian tribe eligible for services from the Bureau. In addition, children must be between age 3 through grade 12.

In Fiscal Years (FYs) 2012 and 2014, the BIE performed a student count as required by Congress. After formal consultations with representatives from Tribes, public schools, tribal organizations, and parents, a total of 448 entities submitted student count data. The FY 2012 JOM count identified 321,273 eligible Indian students as compared to the last count in 1995, which identified 271,884 eligible Indian students. The FY 2014 count resulted in a final student count of 341,495 for the 399 JOM contractors that submitted data. It should be noted that not all current JOM contractors submitted a student count.

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The Department supports the goals of the bill to strengthen the JOM program and ensure that more eligible students are receiving the support that they need to be successful. Indian students have unique educational needs, which include learning about their languages, cultures, and histories. Indian students often enter public schools with an academic skills deficit, or are in need of more services to overcome the stressors they face compared to their peers. The JOM program is one tool to ensure that Indian students thrive in an environment suited to their strengths which acknowledges their challenges.

However, the Department has the following concerns with S. 2842. The Department is concerned that section 7(a)(3)(A) of S. 2842, by defining “eligible Indian student” as an individual who “attends public school,” would unintentionally eliminate the current allowance for “Previously Private Schools,” currently funded under the program. The BIE currently funds 41 Previously Private Schools with a total count of 5,209 eligible JOM Indian students, and we want to ensure that they continue to benefit from this program.

The Department appreciates the legislation’s clarification that JOM funds may be used for Science, Technology, Engineering and Mathematics (STEM) instruction and counseling services. However, we want to work with the bill’s sponsors on a mechanism to ensure that JOM funds supplement, but not replace, standard instruction and services in public schools.

The Department seeks clarification from the bill’s sponsor regarding language in section 7(c)(1)(D), which states, “activities that were available to Indian students under contracts entered into under this Act before October 1, 2012.” While the Department supports the interest to hold entities harmless under this new legislation, we are concerned that this provision unduly limits the Secretary’s discretion to reduce funding for other reasons (i.e. misuse).

The Department understands that there are concerns with how the student count affects how many students are able to benefit from the program. The bill directs the Department to cross-check student count data with data from the U.S. Bureau of Census, the U.S. National Center for Education Statistics and the U.S. Department of Education’s Office of Indian Education (OIE). We assume that the bill is referring to the student count used for OIE formula grant payments under Title VI of the ESEA (formerly Title VII). If that is the case, it should be noted that that the Title VI formula grants are based on student eligibility that is broader than the JOM eligibility, as OIE’s count includes members of State-recognized tribes, and children and grandchildren of members of federally recognized tribes without regard to blood. The Department is concerned that U.S. Census Bureau data will include self-identified individuals who may not be eligible for services from the Department of the Interior’s BIA or BIE, because our jurisdiction extends only to members of federally recognized tribes or students who are identified as eligible in the Act. We will work with the bill’s sponsors to clarify and develop a process to ensure the accurate identification of Indian students.

The Department is also concerned that S. 2842 would change existing language referring to contractors and the collection of a student count. The BIE currently relies on the Indian Education Committee to determine how it will collect and verify student data. Additionally, the

Indian Education Committee participates in negotiations concerning all contracts under this part. The Department therefore seeks clarification of the term “significant” as it is used in section 7(d)(2)(C)(ii)(II) and in section 7(e)(2)(A) of S. 2842. Section 7(d)(2)(C)(ii)(II) refers to “eligible entities that may potentially enter into contracts under subsection (b) with a *significant* number of eligible Indian students but that have not previously entered into a contract under this Act.” The Department also seeks clarification of the term “significant” in section 7(e)(2)(A) of S. 2842, concerning increased participation, in relation to populations.

The Department also notes that one provision of S. 2842 raises constitutional concerns under the Recommendations Clause. We believe this concern could be easily ameliorated, and we will work with the Committee and sponsors to do so.

This concludes my statement. The Department is committed to working with the Committee and the sponsors of S. 2482 to discuss changes to S. 2842.