

## **Topic: Overview of the Bureau of Indian Education’s Standards, Assessments, and Accountability System**

### **Introduction**

The purpose of this overview is to provide background information on the statutory requirements for standards, assessments, and accountability required under the Elementary and Secondary Education Act (ESEA). A brief history of the Elementary and Secondary Education Act (ESEA) of 1965 and subsequent reauthorizations is provided with respect to accountability issues. A focus will be the negotiated rulemaking activity conducted under the No Child Left Behind (NCLB) Act of 2001, which resulted in the current 25 CFR 30 regulations for accountability in Bureau-funded schools. Challenges with the current accountability system will be described, and, finally, opportunities will be explored that are made possible by the current negotiated rulemaking process.

### **Negotiated Rulemaking Requirement**

The Elementary and Secondary Education Act (ESEA) of 1965 was passed originally as part of the Lyndon B. Johnson administration’s War on Poverty campaign. The law sought to improve educational equity for students from lower-income families by providing federal funds to school districts serving poor students. ESEA has been reauthorized eight times since 1965, most recently in December 2015 when Congress passed the Every Student Succeeds Act (ESSA), which replaced the NCLB version of ESEA.<sup>1</sup>

Although ESEA, as amended, specifies certain requirements for the Bureau of Indian Education (BIE), it is important to remember that the BIE is not a state as defined in ESEA; the BIE is a federal agency. Consequently, not all provisions applicable to states similarly apply to the BIE. ESEA, as amended, must be read with this proviso in mind. Specific responsibilities of the BIE as a State Education Agency (SEA) historically, at least since NCLB, have been defined by an agreement between the Departments of the Interior and Education.<sup>2</sup> However, the responsibility of the Secretary of the Interior to define challenging state academic standards, academic assessments, and an accountability system for Bureau-funded schools is explicitly specified in ESEA, as amended by ESSA. The requirement to conduct negotiated rulemaking is a federal activity and applies to the Department of the Interior as a federal agency.

The Secretary of the Interior is required to develop regulations that will guide how the Secretary will define standards, assessments, and accountability system consistent with ESEA section 1111 for the schools funded by the Bureau of Indian Education. ESEA, as amended by ESSA, specifies:

...the Secretary of Interior, in consultation with the Secretary [of Education], if the Secretary of the Interior requests the consultation, using a negotiated rulemaking process to develop regulations for implementation no later than the 2017-2018 academic year, shall define the standards, assessments, and accountability system consistent with section 1111, for the schools funded by the Bureau of Indian Education on a national, regional, or tribal basis, as appropriate,

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<sup>1</sup> See “The ABC’s of ESEA, ESSA and No Child Left Behind,” at <http://educationpost.org/the-abcs-of-esea-essa-and-no-child-left-behind/>.

<sup>2</sup> Agreement Between the U.S. Department of the Interior – Bureau of Indian Education and the U.S. Department of Education Under Executive Order 13592 and Section 8204 of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (ESSA), 12/3/2012; as amended through the Amendment to Agreement Between the U.S. Department of Education (ED and the U.S. Department of the Interior (DOI) – Bureau of Indian Education (BIE), 7/7/2017 (hereinafter, BIE-ED agreement) . The BIE-ED agreement is primarily a mechanism to transfer ESEA funds from the U.S. Department of Education to the Bureau of Indian Education. For purposes of the BIE-ED agreement, BIE assumes the responsibility of a state educational agency (SEA) with respect to BIE funded schools.

taking into account the unique circumstances and needs of such schools and the students served by such schools.<sup>3</sup>

The timeline of “no later than the 2017-2018 academic year” has been extended by a memorandum of agreement to the 2018-2019 school year.<sup>4</sup> While that timeline has not been met, ESEA provides that:

In determining the assessments to be used by each school operated or funded by the Bureau of Indian Education receiving funds under this part, the following shall apply *until the requirements of section 8204(c) have been met.*<sup>5</sup> (Emphasis added)

Section 8204(c) refers to the completion of the required negotiated rulemaking process. In effect, the assessments (with aligned standards) currently used in BIE-funded schools are used until the completion of negotiated rulemaking and such time as the Secretary creates a new accountability system for BIE-funded schools.

### **Rulemaking under the No Child Left Behind Act: 25 CFR Part 30**

The NCLB required the Secretary of the Interior to use a negotiated rulemaking process to define “adequate yearly progress,” which under NCLB was the measure by which schools, districts, and states were held accountable for student performance. The NCLB rulemaking committee at the time recommended that Bureau-funded schools would use the accountability system of the states in which schools were located.<sup>6</sup> With schools in 23 states, this created, in effect, a 23-part accountability system for the Bureau. No other states have adopted a multipart accountability system. The BIE is the only school system in the United States with a multipart accountability system using different standards and assessments across schools.

The rulemaking committee made a recommendation to the Department and the Department adopted the recommendation. In an overview of the NCLB negotiated rulemaking process published as part of the Proposed Rule in the *Federal Register*, the proceedings of the committee’s deliberations were summarized.<sup>7</sup> The committee had a wide-ranging, ambitious agenda, of which accountability was one among several items. Limited committee resources required them to divide energies among several major tasks. They had been charged with the following topics for rulemaking.

- Part 30—Adequate Yearly Progress
- Part 37—Geographic Boundaries
- Part 39—The Indian School Equalization Program
- Part 42—Student Rights
- Part 44—Grants under the Tribally Controlled Schools Act
- Part 47—Uniform Direct Funding and Support

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<sup>3</sup> See ESEA section 8204(c), 20 U.S.C. 7824(c).

<sup>4</sup> Agreement Between the U.S. Department of the Interior – Bureau of Indian Education and the U.S. Department of Education Under Executive Order 13592 and Section 8204 of the Elementary and Secondary Education Act, 7/7/2017.

<sup>5</sup> See ESEA section 1111, 20 U.S.C. 6311(k) SPECIAL RULE WITH RESPECT TO BUREAU-FUNDED SCHOOLS.

<sup>6</sup> At the time (2001), the Bureau of Indian Education did not exist when NCLB was passed in 2001. The predecessor of the BIE in 2001 was the Office of Indian Education Programs (OIEP) under the Bureau of Indian Affairs. In 2008, the Bureau of Indian Education became a separate bureau under the Office the Assistant Secretary - Indian Affairs.

<sup>7</sup> “Implementation of the No Child Left Behind Act of 2001: A Proposed Rule by the Indian Affairs Bureau on 02/25/2004.” 69 *Federal Register* 8751 (25 February, 2004). pp. 8751-8791.

In regard to Adequate Yearly Progress, the committee had to first research concepts and practices in order to understand the task at hand. Again, the *Federal Register* account sheds light on the decision-making-process.

To define Adequate Yearly Progress (AYP) for Bureau-funded schools, the Committee first had to master an understanding of all of the components of Adequate Yearly Progress under the Act and how they interrelate with a final definition of AYP. While the workgroup had to look at the curriculum, standards, and assessments that Bureau-funded schools were using, the Committee did not negotiate these items. The negotiation was limited to the definition of AYP.<sup>8</sup>

The committee made a decision to limit the scope of its charge, with respect to AYP. The committee discovered that Bureau-funded schools at the time used different assessment systems, so aggregating the differing multi-state school assessment data was not possible for the Bureau to make AYP determinations for Bureau-funded schools. In addition, the collective assessments across states statistically did not meet the requirements of NCLB set forth in section 1111.<sup>9</sup> Further, the committee learned, that the Bureau allowed schools to align their assessments and curriculum with the state in which the school was located.

Following the fact-finding exploration, the committee defined options for possible action. It appeared to the committee that only two options were available to them:

- 1) Selecting a single State's system with one set of curriculum, standards, and assessments; or
- 2) Allowing each Bureau-funded school to follow the definition of the State in which it is located.<sup>10</sup>

The committee decided on the second option for Bureau-funded schools. Such a decision was consistent with the current practice in Bureau-funded schools: use of standards, assessments, and curricula of the state in which a school was located. A third option of developing BIE-specific standards and assessments apparently was not considered by the committee, at least such an option is not cited in the *Federal Register* account.

Interestingly, the Bureau of Indian Affairs had been pursuing another option to develop its own accountability system, encompassing content standards and assessments in English/language arts, and mathematics. Concurrent with the rulemaking committee formation, the Bureau solicited and awarded a contract to a major test vendor to develop criterion-referenced tests for use by Bureau-funded schools.<sup>11</sup> The contract was cancelled as the NCLB rulemaking committee's work was coming to a close, in 2003.<sup>12</sup> At that time, it likely was known by the agency that the committee would recommend to the Secretary that Bureau-funded schools follow states' accountability definitions. If the Bureau had developed standards and assessments for system-wide use, the Bureau would have taken a major step toward establishing a uniform accountability system for all schools and all students in the Bureau school system, consistent with ESEA section 1111 and analogous to states' systems.

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Measured Progress, "A Proposal to Develop a Series of Culturally Appropriate Criterion-Referenced Tests for Use by the Bureau of Indian Affairs in Bureau-Funded Schools (Grades 3-8 & 10)," August 2002.

<sup>12</sup> Memorandum from Aurene Martin, Acting Assistant Secretary – Indian Affairs, to Brendell Gallegos, Contracting Officer, Termination of Contract for Culturally Appropriate Criterion-Referenced Tests, dated June 27, 2003.

In support of the second option, some committee members argued that it would be better to allow schools to follow the State's standards, assessments, and curriculum, because students in Bureau-funded schools were traditionally more transient and transferred between Bureau-funded schools and public schools.

However, some committee members voiced opposition to the multi-state approach in option two.

Tribal representatives on the Committee expressed serious objections to adopting State AYP definitions as the Bureau's definition instead of establishing a Bureau-specific definition, which some tribes and school boards might prefer. There was concern that requiring use of a State's definition would imply that Bureau-funded schools were subject to State jurisdiction, would signal abandonment of the Federal Government's trust responsibility for Indian education, and could diminish tribal sovereignty.<sup>13</sup>

In tribal consultations with tribes, individuals have expressed opposition to the use of state standards, assessments, and curriculum. Issues raised include cultural bias of state assessments and the federal government relinquishing federal control based on treaty rights to states.<sup>14</sup>

In light of the opposition, a compromise was reached whereby the committee developed language for the proposed rule that expressly states that nothing in the rule diminishes the Secretary's trust responsibility for Indian education or any statutory rights, affects in any way the sovereign rights of an Indian tribe, or subjects Bureau-funded schools to State jurisdiction. That language was codified in 25 CFR § 30.100.

The NCLB rulemaking process resulted in a final rule codified at "25 CFR 30 - ADEQUATE YEARLY PROGRESS," which is still in effect (with the exception of AYP) until replaced with new regulations.<sup>15</sup> The resulting final rule memorialized in regulation the Secretary's definition of accountability, known as Adequate Yearly Progress (AYP) under NCLB.

§ 30.104 - What is the Secretary's definition of AYP?

The Secretary defines AYP as follows. The definition meets the requirements in 20 U.S.C. 6311(b).

(a) Effective in the 2005-2006 school year, the academic content and student achievement standards, assessments, and the definition of AYP are those of the State where the school is located, unless an alternative definition of AYP is proposed by the tribal governing body or school board and approved by the Secretary.<sup>16</sup>

Under the provisions of 25 CFR 30, the BIE was required, in effect, to create a 23-part accountability system. That is, BIE-funded schools were required to adhere to the state standards, assessment, and accountability systems of the respective states in which they reside.

As in NCLB, ESSA allows tribal governing bodies or school boards to waive the Secretary's definition of standards, assessments, and accountability system and propose an alternative that is approved by the

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<sup>13</sup> Ibid.

<sup>14</sup> During a tribal consultation in South Dakota views of opposition to state accountability systems were expressed. See *Tribal Consultations for the American Indian Study Group*, Loneman Day School, Oglala, South Dakota, April 28, 2014. Accessed at: <https://www.bie.edu/cs/groups/xbie/documents/document/idc1-031497.pdf>.

<sup>15</sup> With passage of ESSA, AYP was suspended for all states and the BIE as an accountability measure. The Department of Education issued guidance to states regard AYP. See *Transitioning to the Every Student Succeeds Act (ESSA): Frequently Asked Questions*, February 26, 2016, p. 4.

<sup>16</sup> "Adequately Yearly Progress," Title 25 *Code of Federal Regulations*, Pt. 30.104 (70 FR 22200, Apr. 28, 2005).

Secretaries of the Interior and Education. Under NCLB, two tribes have been granted waivers under this authority. They are the Miccosukee Indian Tribe of Florida and the Navajo Nation.<sup>17</sup>

The Miccosukee Indian Tribe pursued a waiver focusing on two modifications: 1) use of Smarter Balanced assessments in English/language arts and math, rather than the State of Florida's assessments; and 2) substituting science test proficiency scores for attendance as the other academic indicator for grades 3-8. The substance of the Navajo Nation accountability waiver request was to adopt common standards and assessments for all Navajo Nation schools, which are located in three states (i.e., Arizona, New Mexico, and Utah). The difficulty for Navajo educators was that proficiency scores of assessments used in Navajo Nation schools were not comparable across the three states. The Navajo Nation viewed the lack of comparable data as a hindrance to academic progress in Navajo schools.<sup>18</sup> The lack of comparable proficiency data in the context of Navajo schools, in fact, is a microcosm of a larger problem confronting the BIE with a 23-part accountability system. In addition to securing improvements of tribes' own choosing, another positive outcome of the tribes' approved accountability workbooks is the furtherance of tribal sovereignty through greater control over education. Finally, the two waivers demonstrated proof of concept of a key provision for tribes in NCLB that up to that point had not been proven.

### Other State Accountability Systems<sup>19</sup>

As mentioned, BIE lacks a consistent accountability system that applies to all schools and students in the BIE school system. In contrast, all states implement uniform accountability systems, encompassing standards, assessments, and accountability indicators applicable to *all public schools and public school students*. ESEA requires that the same standards and assessments apply to all public schools and public school students in the State. ESEA, as amended by ESSA, states:

“(b) CHALLENGING ACADEMIC STANDARDS AND ACADEMIC ASSESSMENTS.—

“(1) CHALLENGING STATE ACADEMIC STANDARDS.—

“(B) SAME STANDARDS.—Except as provided in subparagraph (E), the standards required by subparagraph (A) shall—

“(i) **apply to all public schools and public school students in the State**; and

“(ii) with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.”<sup>20</sup> (*Emphasis added*)

The BIE is the only school system in the United States with an accountability system comprised of multiple, dissimilar components.

Aside from the Bureau of Indian Education, there is one other federal school system in the United States. That is the Department of Defense Education Agency (DoDEA). DoDEA operates 166 accredited schools in 8 districts located in 11 foreign countries, 7 states, Guam, and Puerto Rico. ESEA requirements do not apply to the Department of Defense school system.<sup>21</sup> In other words, the ESEA

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<sup>17</sup> The Miccosukee Accountability Workbook was approved May 27, 2015, and the Navajo Accountability Workbook was approved September 20, 2016.

<sup>18</sup> The BIE manages the contract that provides PARCC assessments for Navajo schools and the contract that provided Smarter Balanced assessments for Miccosukee. In addition the BIE also manages contracts for English proficiency and alternate assessments for a select number of schools.

<sup>19</sup> For purposes of the BIE-ED agreement, BIE assumes the responsibility of an SEA with respect to BIE funded schools.

<sup>20</sup> ESEA section 1111(b)(1)(B), 20 U.S.C. 6311(b)(1)(B).

<sup>21</sup> See <https://www.dodea.edu/aboutDoDEA/index.cfm>.

requirement that standards and assessments apply to all schools and all students does not apply to DoDEA. However, DoDEA has adopted consistent academic content standards across its school system. Like states, DoDEA is able to benefit from the comparability of student proficiency data across schools, grades, and students. As mentioned previously, the Navajo Nation sought and was granted a waiver to the Secretary's 23-part accountability system, because the BIE's varied accountability system failed to provide comparable assessment data across all Navajo schools to inform instruction and support school improvement. Both DoDEA and the Navajo Nation applied the same principle of comparability to their accountability systems, consistent with the principle of comparability utilized by states.

### **Challenges of a Multipart Accountability System**

The 23-part accountability system adopted by the BIE under NCLB has been problematic for the BIE and BIE-funded schools. Based on its unique accountability system, the BIE has encountered significant challenges not encountered by States. The various obstacles have impeded the development of the BIE as a cohesive school system. Key challenges are summarized below.

- Collection of test results – Collection of assessment results for the different required assessments, including English/language arts, math, science, alternate assessment, and English proficiency, is extremely difficult for the BIE under a 23 part accountability system based on use of states' assessments. Typically, a state will administer assessments through a vendor or vendors or administer the assessments itself. Obtaining the test results is a relatively simple matter for states, since all the data is centralized and the state owns and controls the data. In contrast, the BIE must collect the varied assessment data in multiple ways, including individual schools, state vendors, and the state itself. The data collected varies in format, ranging from differing state data electronic file formats and standards, Portable Document Format (PDF) files, and faxed paper copies. The BIE must then convert data from these varied formats into a useable format for BIE use. The process of data collection takes several months, and in some cases years, causing the BIE to be out of compliance with multiple reporting requirements. Assessment data collection is sporadic at best, with some data never collected.
- Accountability determinations (AYP under NCLB) – Because of challenges created by a 23-part accountability system, the BIE cannot make timely accountability determinations of schools. The generally-accepted standard for states is to deliver the determinations to schools before the start of the following school year, typically September. BIE's determinations are significantly delayed, and the process for BIE unavoidably takes several months, compared to weeks for states. Without a timely accountability status, schools cannot adequately plan education services for students in need of assistance.
- EDFacts reporting – EDFacts is comprised of about 290 data files (i.e., varies by year), but the source of many data files is assessment data which is labor-intensive and time-consuming to collect. Due to the difficulty in collecting assessment data, the BIE is behind several years in reporting assessment data to EDFacts, which is a statutory requirement. BIE EDFacts reporting is typically delayed and incomplete. In addition to the requirement to report the assessment proficiency data directly, other EDFacts elements depend upon the assessment data. Most difficult to collect are data from the science, English proficiency, and alternate assessments. Without essential data, the BIE is unable to submit timely and complete reports to EDFacts.
- State Report Cards – The BIE is several years behind in publishing a state (BIE) report card, also a statutory requirement, due to the challenges in collecting varied data. Under NCLB and ESSA, SEAs are required to publish annual report cards, encompassing, SEA, district, and school report cards. Data included on report cards includes graduation rates and student achievement data for each subject area and grade-level tested by the all student groups and subgroups. Specifically, under NCLB, states must report components of AYP, including performance against Annual Measurable Objectives (AMO), proficiency rates, participation rates, and performance on the

other academic indicators, which are attendance for grades 3-8 and graduation rate for high school. Additionally, states must report information on teacher qualifications.

- Lowest performing schools – The BIE does not have a statistically reliable methodology to rank schools, because of the non-comparability of state assessment scores across states. Both ESSA and NCLB require states to rank schools for the purpose of identifying the schools most in need of assistance. To identify the lowest performing schools, states use statistically reliable methodologies based on required accountability elements, including, but not limited to, test scores and graduation rate data. States use comparable data for all schools and students, thereby ensuring validity of their rankings. The BIE, on the other hand, does not have comparable assessment data and therefore does not have a statistically reliable methodology to rank its lowest performing schools to inform decision-making about the allocation of resources to schools. The BIE, therefore, is forced to employ a method not statistically reliable to rank schools. While imperfect, it does result in a ranking of schools to address the statutory requirement.<sup>22</sup>
- Lack of assessment data for instruction and school improvement – For BIE, teachers and school administrators are at a distinct disadvantage without ready access to student test data. States provide test proficiency data to teachers and school administrators to inform instruction and for school improvement. Additionally, states' student information systems have the capability to house student assessment scores. For states, such a task is clear-cut and achievable. For the BIE, with varied and incomparable data and no centralized data capability, the task of organizing test data for multiple uses and audiences is complex and currently unfeasible. Teachers and administrators therefore lack necessary assessment information that can be used in planning for continuous school improvement to benefit students.

On a daily basis, the BIE as a school system faces obstacles not encountered by states. The myriad and significant problems pervasive to the BIE accountability system have impeded the progress of the BIE as a school system for over a decade and adversely affected students. The focus should be on student learning rather than on the irresolvable task of managing, collecting, and reporting a myriad of disparate data across the 23-part accountability system.

### **Opportunity under the Every Student Succeeds Act**

The ESSA requirement for negotiated rulemaking presents an opportunity to create an effective standards, assessments, and accountability system that supports school improvement across the entire BIE school system, consistent with ESEA section 1111. The current system, consisting of multiple and dissimilar sets of standards, assessments and accountability, is a one-of-a-kind among states school systems and is an obstacle to meeting ESEA statutory obligations. A single, uniform accountability system, rather than a 23-part system, would benefit tribes, schools, and students in the following manner:

- All schools and students would be held to the same expectations regarding academic content standards.
- All students would be administered the same assessments, based upon aligned standards, which would yield comparable test results system-wide.
- With aligned standards and assessments, curricula could be aligned to enhance instruction.
- All schools will be accountable for academic performance using the same, single set of indicators and measures.
- Rankings of schools would be based on consistent data, thus allowing a statistically sound, system-wide ranking, thus allowing for valid inferences by educators and policymakers.

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<sup>22</sup> The BIE has devised a methodology to rank schools, but it does not meet the standard of being statistically reliable. Under the current multi-state system, it is an imperfect solution.

- With a statistically-sound ranking methodology, allocation of resources to schools generally and those most in need (i.e., lowest performing) would be consistent and transparent.
- Uniform test data would better inform a coherent approach to state supports and interventions based on performance and need.
- Individual student test scores would be readily available to teachers for instructional purposes and school administrators for broader school improvement planning.
- Teacher professional development and technical assistance activities could be organized more effectively across the BIE.
- Annual accountability determinations to schools would be made on a timely basis.
- State report cards (i.e., SEA, LEA/school) could be published promptly following the end of the school year.
- Timely reporting of required statutory data (i.e., EDFacts) would be facilitated.

The above listing of beneficial outcomes is not meant to be exhaustive.

The negotiated rulemaking committee will create regulations that allow the Secretary to construct an accountability system for implementation that is informed by current practices by states and adheres to current law. Finally, it is important to note that the establishment of the Secretary's standards, assessments, and accountability system still allows governing tribes and school boards the opportunity to request a waiver of the Secretary's system should they decide to do so.