

Dated August 16, 2000

Ms. Julie Goings
Education Specialist
Bureau of Indian Affairs Education
P.O. Box 333
Pine Ridge, South Dakota 57770

Dear Ms. Goings:

This is in response to your letter dated July 20, 1999 containing nine questions about services provided to children with disabilities aged 0 through 5 who are members of the Oglala Sioux Tribe and the Oglala Sioux Tribe's responsibilities for assisting in providing those services. We apologize for the delay in responding but your questions cover broad and complex areas.

The Office of Special Education Programs (OSEP) administers the Individuals with Disabilities Education Act (IDEA), which has two major components: Part C and Part B. Part C of IDEA requires States that accept Part C funds to provide early intervention services for children with disabilities under the age of three. *See*, 20 U.S.C. §§1431 through 1445 and 34 C.F.R. Part 303. Part B of IDEA requires that States provide a free appropriate public education (FAPE) for 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. In many of your questions, you ask about IDEA services for children aged 0 through 5 and thus our responses to those inquiries include separate answers for the Part C and Part B requirements. However, where your inquiry only addresses Part C, we have only responded regarding Part C.

Question:

1. Who is considered the Lead Agency for 0-5 programs for the BIA referred to in the regulations ?

Response:

While the term lead agency applies only to Part C and the term State Educational Agency (SEA) applies to Part B, in South Dakota, the agency responsible for implementing both Part C and Part B is the same; it is the South Dakota Department of Education and Cultural Affairs (DECA). However, DECA's responsibilities under Part C differ from those under Part B.

Under Part C, DECA is responsible for ensuring that "early intervention services are available to all infants and toddlers with disabilities in the State and their families, including Indian infants and toddlers with disabilities and their families residing on a reservation geographically located in the State." 20 U.S.C. §1434 and 1435(a)(2); 34 C.F.R. §303.140(b). Under Part B of IDEA, the SEA is responsible for providing FAPE to children with disabilities in the State's mandated age range, which in South Dakota includes children with disabilities aged 3 through 5. 20 U.S.C. §1412.

Your question also asks about the role of the Bureau of Indian Affairs within the U.S. Department of Interior (“BIA”). Under Part B of IDEA, the Secretary reserves 1.226% 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 these funds are used by the BIA to ensure that FAPE is provided to all 5 through 21 year old children with disabilities enrolled in elementary and secondary schools for Indian children operated or funded by the Department of the Interior. 20 U.S.C. §1411(i)(1)(A). The SEA is responsible for making FAPE available to all other children with disabilities aged 3 through 21 on reservations with a few exceptions where certain preschool-aged children remain the responsibility of the BIA. 20 U.S.C. §1411(i)(1)(C). For preschool-aged children, the BIA remains responsible for those 3 through 5 year old Native American children with disabilities 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).

Twenty percent of these Part B funds are provided to the BIA to distribute to tribes and tribal organizations or consortia of these entities (“tribal entities”) 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 Interior. 20 U.S.C. § 1411(i)(3)(A). The BIA must distribute these funds to the tribal entities and may not use these funds for administrative purposes, including child count and the provision of technical assistance. 20 U.S.C. §1411(i)(3)(F). These funds are to be used by tribal entities “to assist in child find, screening, and other procedures for the early identification of children aged 3 through 5, parent training, and the provision of direct services.” 20 U.S.C. §1411(i)(3)(D). Given the limited funds available to tribal entities and the fact that other entities may exist to provide such services, OSEP has previously discouraged the use of these funds for the provision of direct services by tribal entities. *See*, January 12, 1993 OSEP Memorandum; a copy of this Memo is attached for your easy reference. For Fiscal Year July 1, 1999 through June 30, 2000, according to the BIA, the Oglala Sioux Tribe received 5.1559% of BIA’s Part B funds for children aged 3 through 5, which was approximately \$545,000.

A portion (1.25%) of Part C funds under the Early Intervention Program for Infants and Toddlers with Disabilities is provided to the BIA to distribute to tribes and tribal organizations or consortia of these entities (“tribal entities”) for the coordination of assistance in the provision of early intervention services by the States to infants and toddlers with disabilities and their families on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of Interior. 20 U.S.C. §1443(b)(1). The BIA must distribute these Part C funds to the tribal entities and may not use these funds for administrative purposes, including child count and the provision of technical assistance. 20 U.S.C. 1443(b)(6). These Part C funds are to be used by the tribal entities “to assist the States in child find, screening, and other procedures for the early identification of Indian children under 3 years of age and for parent training.” 20 U.S.C. §1443(b)(4). These funds also may be used by the tribal entities to provide early intervention services. .” 20 U.S.C. §1443(b)(4). Given the limited funds available to tribal entities and the fact that other entities may exist to provide such services, OSEP has previously discouraged the use of funds for the provision of direct Part C services by tribal entities. *See*, January 12, 1993 OSEP Memorandum. For Fiscal Year July 1, 1999 through June 30, 2000,

according to the BIA, the Oglala Sioux Tribe received 8.8310% of BIA's Part C funds or approximately \$403,400.

Question:

2. Who is the Service Coordinator for the Oglala Sioux Tribe (OST)? Is this the same as the Single Point of Contact?

Response:

The State, here DECA, has the responsibility for supervising the provision of service coordinators under Part C and is best able to identify the service coordinator(s) for the Oglala Sioux Tribe. The DECA contact information is listed below in response to question 7. We cannot confirm whether in all cases the Single Point of Contact you identify in your inquiry is the same individual as the Service Coordinator for the Oglala Sioux Tribe but we note the following Federal Part C requirements regarding service coordination.

The term "Service Coordinator" is a term under Part C of IDEA. 20 U.S.C. §1432(4)(E)(vii); 34 C.F.R. §303.23. The regulations under Part C mandate that States provide each Part C eligible child and the child's family one service coordinator. The role of the service coordinator, among other duties, is to serve as a "single point of contact in helping parents to obtain the services and assistance they need." 34 C.F.R. §303.23(a)(2)(ii). The selection of the Service Coordinator in each State is to be made consistent with Part C. 34 C.F.R. §303.23(c). The qualifications for a Service Coordinator are set forth at 34 C.F.R. §303.23 (d).

Question:

3. Can the Direct Services in 303.3(b) be provided by OST [Oglala Sioux Tribe]?

Response:

The regulation, 34 C.F.R. §303.3(b), applies to services only under Part C, not Part B. Under Part C, tribal entities, such as the Oglala Sioux Tribe may provide direct services to children under three through Federal IDEA funds by:

- (1) Using funds provided to tribal entities under IDEA §643(b)(4) [note that OSEP has discouraged tribal entities from using its limited resources for direct services to avoid duplication]; and/or
- (2) Serving as a service provider/contractor for DECA, the lead agency under Part C.

Question:

4. In writing the Statement of Work for use of Federal funds for 0-5 year olds that flow directly to tribes, should one follow §303.145 (Description of Use of Funds)?

Response:

The IDEA does not include the term “Statement of Work” and we assume it is a term of art under the BIA’s administration of IDEA funds. The IDEA regulation you cite, 34 C.F.R. §303.145, applies to State Applications under Part C. Since the Oglala Sioux Tribe is not a State, OSEP does not require the Oglala Sioux Tribe to provide the information in this regulation to OSEP. IDEA §§643(b)(1) & (4) describe the activities that the Oglala Sioux Tribe may support with its BIA Part C funds. IDEA, Part C only requires the Oglala Sioux Tribe to meet the information and reporting requirements for the funds it receives from the BIA; the requirements are set forth at IDEA §§643(b)(3) and 643(b)(5). These Part C reporting requirements are applicable to the BIA. Since BIA is responsible for monitoring the use of the funds it distributes, there may be additional information required by the BIA/Secretary of Interior. We direct your inquiry to the BIA contact, who is:

Dr. Angelita Felix
Bureau of Indian Affairs
Division of School Program Support and Improvement
500 Gold Ave. SW, Rm. 7202
Albuquerque, New Mexico 87103-1088

As for Part B funds, there are similar reporting requirements to the BIA for the Part B funds the Oglala Sioux Tribe receives from the BIA. See 20 U.S.C. §§1411(i)(3)(C) and (E). The BIA may have additional requirements to implement its monitoring responsibilities.

Question:

5. In the Statewide System of early intervention services should the OST [Oglala Sioux Tribe] adhere to South Dakota (SD) State's system of Early Intervention?

Response:

We assume your inquiry is limited to the Part C program because you reference only early intervention services in this question. If the Oglala Sioux Tribe is receiving Part C funds (as a contractor), whether through the BIA or through the State, it must comply with Federal Part C requirements. See the response to the prior question (4) regarding the Oglala Sioux Tribe’s informational and reporting requirements for BIA pass-through funds. If the Oglala Sioux Tribe receives funds through the BIA, there may be additional informational and reporting requirements imposed by the BIA.

DECA in South Dakota is responsible for administering Part C and providing Part C services to all infants and toddlers in the State. If the Oglala Sioux tribe is serving as a contractor for the State in providing services, then it must comply with State contract provisions and early intervention policies. The DECA contact information is in response 7 below.

Question:

6. Is the SD INTERAGENCY COORDINATING COUNCIL the same as YAMNI?

Response:

The short response is no.

A State receiving Part C funds is required to establish a State Interagency Coordinating Council (SICC). The SICC's responsibilities are set forth in IDEA §641 and 34 C.F.R. §§303.650 through 303.654. The Governor appoints the SICC members, which may include a member from the BIA, the Indian Health Service or a tribal entity. The SICC's role is to assist the lead agency (DECA) in identifying sources of funding and developing a coordinated early intervention program of services for infants and toddlers with disabilities in the State and their transition to preschools. This includes children who live on reservations geographically located within the State. The SICC prepares and submits an annual report to the Governor and the Secretary of Education under §641(e)(1)(D) of IDEA. This SICC annual report may be combined with the State's required annual Performance Report under 34 C.F.R. §80.40 to serve as one annual report.

It is our understanding that YAMNI is one of the 22 local networks of service providers in South Dakota responsible for the implementation of services for infants and toddlers with disabilities. YAMNI's area of service includes the Pine Ridge reservation where the Oglala Sioux Tribe resides. For specific information about YAMNI and the State's agreement with YAMNI or South Dakota's SICC, contact DECA.

Question:

7. Where can the following documents be found: SD Annual Report, State Application, State Plan, Central Directory of Information, and Statement of Assurances?

Response:

South Dakota must submit to OSEP a State Application for Part C funds and Policies and Procedures for Part B funds. Both include a Statement of Assurances. There is no separate document entitled State Plan. The Part C Application was last updated by DECA in 1998 after IDEA Amendments were adopted in 1997. DECA has submitted comprehensive new Part B Policies and Procedures in April, 2000, which are undergoing review by OSEP.

As for annual reporting, DECA's Performance Report required under 34 C.F.R. §80.40 is often combined for Part C with the SICC Annual Report required under IDEA §641. In addition, DECA is required to submit an annual child count, which is a separate annual report. The most current Annual Report available for South Dakota is the 1999 report.

Due to the length of State applications, the volume of requests, and agency costs, requests for copies such documents must be made under the Freedom of Information Act (FOIA). The request for the Application (either C or B) or for the Annual Report (either the SICC Report,

State's Performance Report or Child Count) should be in writing and should specify the year and type needed. The request should be submitted to:

Ms. Melzetta Friday
FOIA Coordinator for OSERS
MES, Switzer, Room 3123
300 C Street, S.W.
Washington, D.C. 20202

You may also request these documents from the State agency for South Dakota, DECA. The DECA contact information is:

Deborah Barnett, Director of Special Education
South Dakota Department of Education & Cultural Affairs
700 Governors Drive
Pierre, South Dakota 57501-2291
Tel.: (605) 773-3678.

As for the Central Directory, §635(a)(7) of IDEA Part C and 34 C.F.R. §303.301 require the State to maintain a central directory of information on early intervention services, resources, and experts as well as research and demonstration projects. However, the State is not required to provide an updated directory to OSEP and the central directory may be in some States a repository of information and not a single document. However, this information is to be made available to the public. You may contact DECA to request how to access the Central Directory as well as to request a copy of the State Application and Annual Report.

Question:

8. Who has the Financial Accountability for the funds that come to the Oglala Sioux Tribe for children 0-5 under IDEA: South Dakota or the Oglala Sioux Tribe Early Intervention Program?
How is the STATE (SD) & OST [Oglala Sioux Tribe] Early Intervention Program separated as far as funding, compliance, services provided, etc?

Response:

As noted earlier, under both Part C and Part B, the BIA has the responsibility for ensuring that the funds that it distributes to tribes are used consistently with the IDEA and the regulations applicable to these IDEA programs. 20 U.S.C. §§1411(i) and 1443(b).

In order to be eligible for a grant under Part B §611(i)(3) and Part C §643(b), a tribe, tribal organization or consortium must make a biennial report to the Secretary of Interior of activities undertaken with these funds. 20 U.S.C. §§1411(i)(3)(E) and 1443(b)(5). These activities include "the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the 2 years following the year in which the report is made. . . . The Secretary of

Education may require any additional information from the Secretary of the Interior." 20 U.S.C. §§1411(i)(3)(E) and 1443(b)(5).

Under Part C, the State has the responsibility to assure that all components of the Part C early intervention system (including child find, evaluations, service coordination, early interventions services, etc.) are provided to all eligible Part C children in the State including those on the reservation. Under Part B, the SEA must make FAPE available to all 3 through 5-year-old Native American children with disabilities residing on reservations, with the exceptions discussed in question 1. The State, however, has no financial accountability or control over the Part C and Part B funds that the Oglala Sioux Tribe receives from the BIA. The State's obligation is to coordinate with the Oglala Sioux Tribe to minimize duplication of services and to assure that all Part C and Part B eligible children receive the services and rights to which they are entitled. If a tribe receives Part C or Part B funds from the State, it is accountable to the State for those funds.

In addition, the Education Department General Administrative Regulations (EDGAR) at 34 C.F.R. Part 80 (Uniform Administrative Requirements for State, Local, and Tribal Governments) apply to the Oglala Sioux Tribe for the funds it receives from the BIA under IDEA §§611(i)(3) and 643(b). 34 C.F.R. §80.1. Section 80.22 of EDGAR incorporates, with respect to accounting procedures, Office of Management and Budget (OMB) Circular A-87, "Cost Principles for State, Local and Indian Tribal Governments". In §C.1. of "Basic Guidelines" which is Attachment A to the OMB Circular, the general criteria for allowable costs are listed. This list includes the following relevant criteria: the cost must be necessary and reasonable for proper and efficient performance and administration of Federal funds. These would include funds received by the Oglala Sioux Tribe under IDEA §§611(i)(3) and 643(b). Sections C.2. and C.3. respectively address the definitions of reasonable costs and allocable costs. A copy of OMB Circular A-87 and 34 C.F.R. Part 80 is enclosed for your reference as well as the 1999 IDEA regulations implementing the IDEA Amendments of 1997.

Question:

9. Can the Statement of Work plan for the OST [Oglala Sioux Tribe] Early Intervention include both PART C & PART B requirements and can they be included in one document?

Response:

Under Part C, if the Oglala Sioux Tribe receives funds from the BIA under §643, it must comply with the informational and reporting requirements at IDEA §§643(b)(3) and (b)(5). Under Part B, if Oglala Sioux Tribe receives funds from the BIA under §611, it must comply with the informational requirements at IDEA §611(i)(3)(C) and (E). BIA must determine whether these requirements may be combined with any other requirements it may have, including the Statement of Work you reference. Your BIA contact is noted above.

If your inquiry relates to the information required by the Oglala Sioux Tribe for contracting purposes under Part C funds provided to the State, we suggest you contact the State (DECA) as the State is the responsible contracting party and lead agency under Part C.

We hope that this information provides helpful clarification on these issues. As the information you requested affects the administration of other programs, we are providing a copy of this response to the DECA, BIA and Oglala Sioux Tribe Early Intervention Program contacts listed below. If you have further questions regarding OSEP's implementation of IDEA as it relates to the tribal entities, please contact JoLeta Reynolds at (202) 205-5507 or Terese Lilly, OSEP Part C contact for South Dakota, at (202) 205-0151.

Sincerely,

Signed Kenneth R. Warlick/pg

Kenneth R. Warlick
Director
Office of Special Education Programs

Enclosures: (1) OMB Circular A-87
(2) 34 C.F.R. Part 80
(3) 1999 IDEA regulations
(4) January 12, 1993 OSEP Memorandum

cc: Ms. Deborah Barnett, Director of Special Education
South Dakota Department of Education & Cultural Affairs DECA
Dr. Angelita Felix, Bureau of Indian Affairs
Mr. David Plume, Director,
Oglala Sioux Tribe Early Intervention and Special Education Program