



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

February 8, 2021

Dear School Leaders,

The COVID-19 national emergency continues to profoundly affect how schools throughout the country deliver instruction to students. Indian Affairs and the Bureau of Indian Education (BIE) are dedicated to upholding their trust responsibility to Indian tribes by continuing to provide mission-critical services, such as education delivery, during the COVID-19 emergency. Indian Affairs' continuity-of-operations plan is outlined specifically in its May 11, 2020 Pandemic Plan and provides necessary flexibilities to ensure safety to the extent practicable. To support continuity of operations and diminish potential harm to its schools, the Department of the Interior (Department) established a process to waive regulations otherwise applicable to BIE-funded schools¹ in response to the pandemic, as outlined in a letter to you on June 25, 2020 (June Letter). Specifically, schools seeking a waiver for any regulatory requirements applicable to school year 2020-21 were required to submit a waiver application including (1) a distance learning plan; (2) assurance of compliance with Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Individuals with Disabilities Education Act (IDEA); and (3) an assurance to offer mental health support services to all students.

The waiver-request process outlined in the June Letter reflected the Department's hope and expectation that, to the greatest extent possible, BIE students would attend school in-person for the 2020-21 school year and that regulatory waivers would only be sparingly necessary. While in-person instruction remains our goal, the ongoing COVID-19 pandemic has necessitated ongoing school-site closures of more than ninety-five percent of BIE school sites into 2020-21 in order to protect the safety of BIE students and their parents, as well as BIE faculty and staff. These site closures will result in significant decreases in Indian School Equalization Program (ISEP) and transportation funding levels for nearly all BIE schools pursuant to the BIE funding mechanisms established in Title 25 part 39 of the Code of Federal Regulations. These mechanisms base funding for the 2021-22 school year on factors including instructional hours, student nights in residence, and school and commercial bus mileage during the current school year, all of which are severely impacted by the site closures. The resulting funding decreases would significantly affect the quality and availability of educational opportunities that BIE schools can offer to our students during the 2021-22 school year and potentially beyond.

As discussed in the June Letter, as a matter of law and policy, there remains a strong presumption that the Secretary of the Interior's (Secretary) regulations are appropriate to their purpose and require Departmental compliance, including those applicable to BIE schools. To provide the Secretary with sufficient latitude to respond to extraordinary circumstances,

¹ For purposes of this letter, the terms "BIE schools" and "BIE-funded schools" include BIE operated schools and dormitories, schools and dormitories operated pursuant to a grant under the Tribally Controlled Schools Act of 1988 (25 U.S.C. § 2501 *et seq.*), and schools and dormitories operated pursuant to a contract under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 5301 *et seq.*).

however, 25 C.F.R. §1.2 provides that the Secretary has the authority to waive or make exceptions to certain regulations in Title 25 of the Code of Federal Regulations, including those applicable to BIE schools, in any case where permitted by law so long as such waiver or exception is in the best interests of the Indians. This authority has been delegated to the Assistant Secretary – Indian Affairs via 209 DM 8.

The circumstances of the COVID-19 national emergency, and the potential consequences for BIE-funded schools and the students served at such schools in light of the ongoing school-site closures extending into the 2020-21 school year, have required the Department to reconsider the efficacy of the waiver request process established in the June Letter. It is particularly evident that we need a new approach given that COVID-related school closures are so widespread that more than ninety-five percent remain closed. To ensure adequate ISEP and transportation funding for these schools in the 2021-22 school year, I am therefore issuing a blanket waiver of the following regulatory requirements applicable to school year 2020-2021 for all BIE schools: 25 C.F.R. §§ 39.710-.711(bus transportation), 39.702-.704 (commercial transportation), 39.216-.221(residential), 39.214 (instructional hours).

I note that this waiver is applicable only to the above-cited regulatory requirements. To the extent that a BIE school has already submitted a waiver request pursuant to the June Letter and has not yet heard from the Department, this letter constitutes an approval of all such waiver requests to the extent the regulations requested to be waived fall within the scope of this letter. To the extent a previously submitted waiver application includes a request to waive regulations outside of those covered by this blanket waiver, we will continue to review those requests, but will limit the review only to those provisions not covered by this blanket waiver. Schools that have submitted such a waiver that includes requests outside of this blanket waiver need not re-submit an additional request. In addition, until schools can safely reopen, BIE will continue its outreach and to offer technical assistance on the delivery of distance learning instructional services.

I find that this waiver is permitted by law. In addition, through my work with the BIE Director, I am reassured this waiver is in the best interests of schools funded by the BIE and our Tribal communities and is consistent with the Secretary's obligations to provide for a quality education for students at BIE-funded schools and to ensure the safety of the students and staff at BIE schools. Finally, the Department will revisit the necessity, scope, and duration of this waiver as warranted by ongoing progress in the response to the COVID-19 national emergency.

Sincerely,

A handwritten signature in black ink that reads "Darryl LaCounte". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Darryl LaCounte, Director, Bureau of Indian Affairs

Exercising the delegated authority of the Assistant Secretary - Indian Affairs