



Native Education Collaborative

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Tribal Sovereignty and Consultation

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Tribal Sovereignty and Consultation

The National Comprehensive Center

The National Comprehensive Center (NCC) is one of 20 technical assistance centers supported under the U.S. Department of Education’s Comprehensive Centers program from 2019 to 2024. The NCC focuses on helping the 19 Regional Comprehensive Centers and state, regional, and local education agencies throughout the country to meet the daunting challenge of improving student performance with equitable resources.

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Introduction

The National Center assembled a panel of experts in the field of American Indian and Alaska Native education from a broad constituency base to help determine current needs and interests in the field. Interviews conducted with the panel produced the following primary thematic categories:



Native culture and language



College and career readiness and access



Tribal consultation and sovereignty



Physical and behavioral health



Teachers and leaders



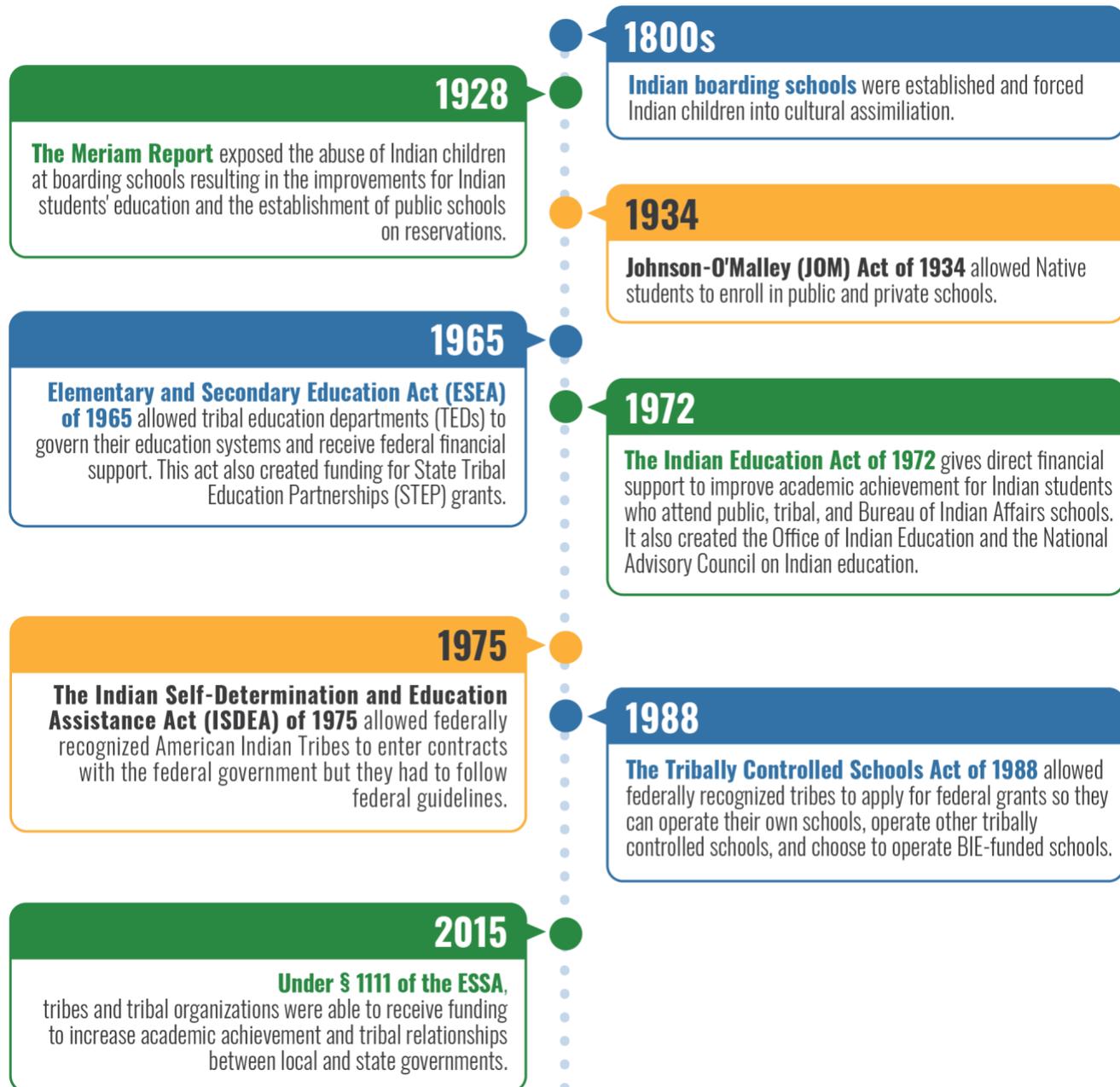
Promising programs and practices

The National Center's American Indian and Alaska Native Education Project developed the following briefs for each category to positively impact the learning lives of Native children and youth. These briefs are meant to enhance the effectiveness of state education agencies' work on Native education. Though tribal communities are very diverse, for the purposes of these briefs, the terms *American Indian and Alaska Native*, *Native*, *indigenous*, and *tribal* are used to refer to Native communities.

Tribal Sovereignty and Consultation

For educators to more fully comprehend the issues surrounding the current state of affairs regarding tribal consultation and sovereignty in American Indian and Alaska Native (AI/AN) education, it is necessary to provide a socio-historical context. The evolution of Native education, from its precolonial roots to present day, has included a shift in control away from tribal governments to the federal government and state governments and, most recently, toward a tri-lateral responsibility model.

Timeline of Major Events Regarding Indian Education

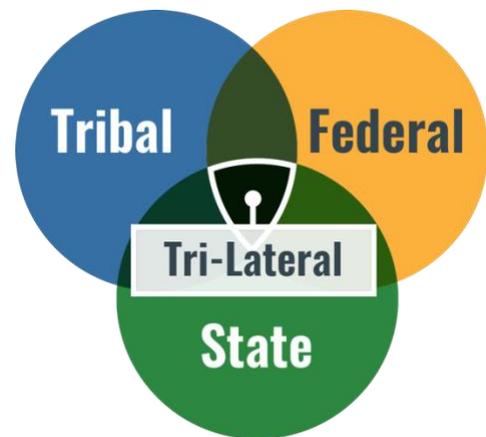


Tri-Lateral Responsibility

The responsibility for Native education in the United States is now shared between three sovereign government systems—tribal, federal, and state. As such, Native education is known as a tri-lateral responsibility (Reinhardt and Maday, 2006), as illustrated in Figure 1. According to the National Congress of American Indians (2020), roughly 90% of Native students now attend public schools under state jurisdiction. The remainder (about 8%) attend federally funded Bureau of Indian Education (BIE) schools or private schools and other educational institutions. Notably, the majority of BIE schools are now tribally operated.

Brayboy, Faircloth, Lee, Maaka, and Richardson (2015) note the major challenges that present-day Native education efforts are working to address, such that “the education of Indigenous peoples is intricately intertwined with the legal/political relationship between Indigenous peoples and the U.S. government, as well as myriad [of] racist policies and practices that have devastated Indian children and communities” (p. 1). According to Brayboy, et. al (2015), Native education has been:

Figure 1. Native education tri-lateral governance responsibility



- “a battle for the hearts and minds of Indigenous nations,
- “a colonial call for assimilation, and
- “a responsibility of the federal government arising from a series of agreements between Indian nations and the United States meant to open up land bases to a burgeoning immigrant population.” (p. 1)

Tribal Sovereignty and Government-to-Government Relations

The original sovereignty, or power to govern, over Native education rests with tribes. Tribes inherit this aspect of their sovereignty from their ancestors (Canby, 2015). Ancient knowledge, as created by the ancestors of Native communities, contains the very essence of tribal sovereignty (Brayboy et al., 2015, p. 3). Jampolsky (2016) points out that scholars have defined tribal sovereignty in a number of ways, such as:

- as “a protective shell around tribal life and culture” (Sarah Krakoff, 2006) and
- as “the right of a people to self-government, self-determination, and self-education. Sovereignty includes the right to linguistic and cultural expression according to local languages and norms” (Lomawaima and McCarty (2002, p. 284).

Lomawaima and McCarty (2002) suggest that “the Native struggle for sovereignty and self-education is a powerful model for all U.S. citizens because public education in the United States was founded on the principle of local control” (p. 280).

As of 2020, there are 574 federally recognized tribes in the United States (National Congress of American Indians, 2020). “The notion of federal recognition is a relatively new concept in Indian affairs, appearing as a codified legal concept in 1978 with the Department of Interior’s promulgation of rules for the administrative recognition of Indian tribes. Prior to 1978, ‘Indian tribe’ was defined, for most purposes, in the Indian Reorganization Act of 1934” (Fletcher, 2012, p.7). According to Fletcher (2012), “Congress and the Department of Interior generally treat each and every federally recognized tribe the same. But cracks are developing in this clear in-out dichotomy for two reasons. The first is the Supreme Court’s decision in *Carcieri v. Salazar*” (p. 4). The second is the varying legal criteria used by tribes to define tribal citizenship.

- **In *Carcieri v. Salazar* case**, Fletcher (2012) explains, “the Supreme Court upended the definitional regime for Indian tribes by eliminating the Narragansett Indian Tribe of Rhode Island from inclusion in the Indian Reorganization Act” (p. 8). The author explains further that, similar to “more than a hundred now federally recognized tribes, the Department of Interior did not list the Narragansetts as an Indian tribe in 1934. *Carcieri* held that the Department of Interior therefore could not take land into trust for the benefit of the tribe under section five of the Act” (p. 8). This decision created a situation where “tribes not listed by the Department in 1934 tend to be landless, as well as the most economically and politically vulnerable” (p. 8).
- **Determining the criteria for tribal citizenship** is wholly a function of tribal governments and varies greatly from tribe to tribe, regardless of how the federal government treats each tribe. Tribes generally use one of two methods to determine their citizenship: blood quantum and lineal descendancy. Blood quantum “must be at least partly derived from Indian ancestors who were members of the relevant tribe,” although some tribes allow for the quantum to come from other tribal groups (Fletcher, 2012, p. 4). Descendancy criteria allow for descendants of tribal citizens to be eligible regardless of blood quantum.

Brayboy et al. (2015) explained that “enrolled members of such tribes have the benefit of multiple citizenships (e.g., to tribal/indigenous nation, nationstate, state, and in some cases, clan societies) wherein they do not lose civil rights because of their status as tribal citizens, and individual tribal citizens are not denied tribal rights because of their U.S. citizenship” (p. 2). A tribal citizen may see their participation in an education system as an exercise of their Native rights, treaty rights, and civil rights at the same time.

State recognized tribes are tribes and heritage groups that are recognized by individual states for their various internal state government purposes. State recognition does not confer benefits under federal law unless federal law authorizes such benefits, as is the case for state recognized tribes under the Administration for Native American’s (ANA) Native American Programs Act (NAPA). According to the 2013 listing of the National Conference of State Legislatures (NCSL), there are sixteen states that have recognized Indian tribes. Both federally- and state-recognized tribes frequently cooperate and collaborate through compacts or other agreements on matters of mutual concern.

Pre-Colonial Native Governance

In a pre-colonial context, Native peoples were in complete control of their education systems. It was a unilateral tribal responsibility. Traditional systems of governance varied from tribe to tribe, but all tribes held some aspects in common. Commonalities included the use of Native languages and cultural customs in the educational governance process. These customs included the incorporation of traditional values, stories, kinship, food, etc. against a backdrop of their cultural environment (Cajete, 1993).

Educational decision-making was informed by relations with the surrounding world and took into consideration other tribes, plants, animals, Mother Earth, the cosmos, their ancestors, future generations, and the spiritual world (Cajete, 1993).

Native educational governance is rooted in an oral tradition. As such, much of the evidence for how it existed in a pre-colonial context can be found in the Native languages and teachings that many contemporary Native people carry with them today, physical artifacts, and early written accounts by Native and non-Native people. Early written accounts by non-Native people about Native perspectives on educational governance must be examined cautiously as they have an inherent bias toward non-Native concepts and ideologies. Current efforts to place Native education decision-making back into the hands of the tribes can help reverse the effects of colonial nations that undermined Native nations to secure tribal lands and resources.

The Shift to Federal Native Education

After it declared independence from Great Britain in 1776, the United States began its bi-lateral educational relationship with each tribe and began creating laws related to the education of Native people. One of the first laws passed by the U.S. Congress to include Native education was the Northwest Ordinance of July 13, 1787, which covered governance of all U.S. territories north of the Ohio River. Article 3 of the ordinance reads as follows.

Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them. (U.S. Library of Congress, 2020)

Federal Treaty Obligations

Shortly after the passage of the Northwest Ordinance, the federal government began to include education as a component of the treaty-making process with Native tribes. The United States entered into 378 treaties or treaty supplements between 1778 and 1871 with American Indian tribes (Kappler,

1972). A total of 147 of these treaties or treaty supplements contain provisions for education (Reinhardt, 2017). The first treaty to include education was the Treaty with the Oneida, etc., 1794, and the last was the Treaty with the Nez Perce, 1868 (Reinhardt, 2017).

Treaties contain a range of guaranteed provisions, including education in general, annuity payments, one-time cash payments, land, schools, teachers, books written in Native languages, Native preference, and Native control (Reinhardt and Tippeconnic, 2010). On March 3, 1871, the U.S. Congress included a rider within the Indian Appropriations Act prohibiting further treaty making. “These treaties represented formal recognition of the government-to-government relationship between the federal government and Indian tribes that serve as the foundation for tribal sovereignty and self-determination found in contemporary federal Indian law” (Mackey, 2017, p. 787).

Although the United States has never fully lived up to its Native treaty obligations, the federal government remains constitutionally obligated to fulfill these treaty provisions today. The Supremacy Clause of the U.S. Constitution states:

This Constitution, and Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding. (U.S. Constitution, Article VI, Clause 2)

The Canons of Treaty Construction

According to Pevar (1992), “The Supreme Court has developed a set of rules that govern the interpretation of Indian treaties. These rules are known as the canons of treaty construction” (p. 40). As such, when a conflict arises in Native education between tribal, federal, and state law and policy, it is incumbent upon the courts to consider how these laws and policies align with treaty rights.

The Supreme Court’s canons of treaty construction:

- “Ambiguities in treaties must be resolved in favor of the Indians,
- “Indian treaties must be interpreted as the Indians would have understood them, and
- “Indian treaties must be construed liberally in favor of the Indians.” (Pevar, 1992, p. 40)

The Marshall Trilogy

In the 1820s and 1830s, Chief Justice John Marshall authored three landmark U.S. Supreme Court opinions, known as the Marshall Trilogy, that established several foundational principles of federal Indian law. “The key to understanding Marshall’s opinions is that they manage to preserve important tribal rights, including tribes’ limited sovereignty and right to self-governance, while legitimizing what had already taken place—the expropriation of Indian lands” (Strommer, 2015, p. 8).

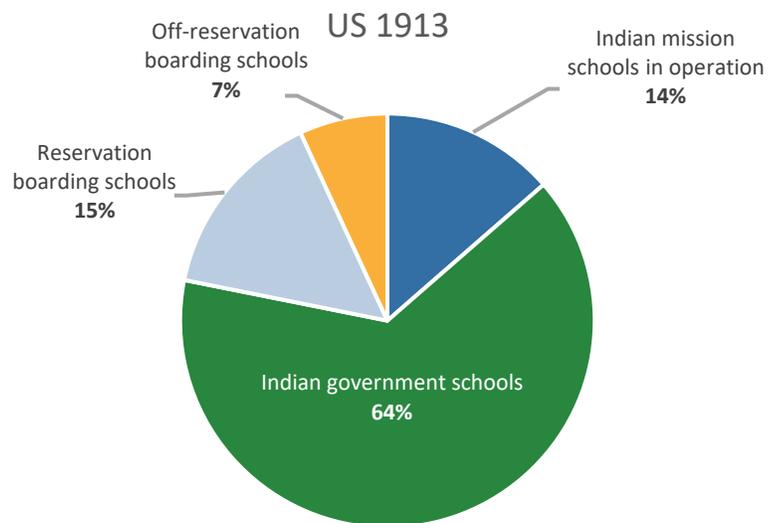
The Marshall Trilogy – Three landmark U.S. Supreme Court opinions by Chief Justice John Marshall that established foundational principles of federal Indian law:

- **Johnson v. M'Intosh, 1823** – The Supreme Court affirmed the doctrine of discovery, which gave European nations an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.
- **Cherokee Nation v. Georgia, 1831** – The Supreme Court ruled that tribes were not foreign nations but domestic, dependent nations in a state of pupilage to their civilized tutors, like that of a ward to a guardian.
- **Worcester v. Georgia, 1832** – The Supreme Court ruled that states lack jurisdiction in Indian territories located within their boundaries.

Native Boarding Schools

The federal government decided to establish its own schools through the Bureau of Indian Affairs during a time of tribal assimilation. “The educational philosophy of the time was that American Indian children should be removed from their families and educated in boarding schools where they would be civilized and assimilated into the dominant culture, then returned home to influence further tribal assimilation” (Mackey, 2017, p. 788). There were two types of Native boarding schools—missionary and federal—and both followed the philosophy of assimilation, and did not incorporate traditional Native education systems.

“In the US, by 1913, there were 69 Indian mission schools in operation, and 328 Indian government schools which included 217 day schools, 76 reservation boarding schools, and 35 off-reservation boarding schools” (Reinhardt, 1998, p. 72).



While missionary schools focused on conversion of Native people into Christianity, federal schools were more focused on creating a subservient underclass (Reinhardt and Maday, 2006). The use of boarding schools by the federal government to forcibly assimilate Native people into European American society was, arguably, the most severe policy of the United States leveled against tribes (Reinhardt and Maday, 2006). Littlefield (1989) explains that the perspective of “politicians and Indian Affairs ‘experts’ during the late 1880s was that Indians should be ‘civilized’ and assimilated into the Euro-American way of life as rapidly as possible, taking on the customs and economic activities of the settlers” (p. 431). She goes on to say, “The off-reservation boarding schools were a key component of this scheme: by separating

children from their families and communities, their way of life could be changed more rapidly and thoroughly” (p. 431).

Lomawaima (1994) suggests that the federal Indian boarding school initiative was “an educational crusade—vast in scope, military in organization, fervent in zeal, and violent in method—to transform young Indian people” (p. xi). Reyhner and Eder (2004) suggest, “The ethnocentric approach of the Indian Bureau can be criticized from the viewpoint of cultural relativism at the end of the twentieth century, but it is hard to imagine how any more enlightened policy could have been followed in the twentieth century. Even the mission schools sought total assimilation” (p. 166). The U.S. Secretary of the Interior’s investigation of Indian Affairs resulted in the Meriam Report, which criticized the schools’ approach to the care and education of Native children and recommended allowing tribes more freedom to handle their affairs.

The Meriam Report, 1926 – Findings of the U.S. Secretary of the Interior’s investigation of Indian Affairs (Reyhner and Eder, 2004):

- Indians should be allowed more freedom to manage their own affairs.
- There is a lack of correlation between the curriculum of Indian schools and the reality of reservation life.
- the care of Indian children in boarding schools was shockingly inadequate.

The Shift to State Public Education

According to Reinhardt (2004), “In 1929, the U.S. passed an act which authorized ‘agents and employees of any state to enter upon Indian tribal lands, reservations, or allotments therein...to enforce compulsory school attendance of Indian pupils, as provided by the law of the State, under such rules, regulations, and conditions as the Secretary of the Interior may prescribe’ (25 U.S.C. § 231)” (p. 30). Although the act was later amended “to require that a tribal government adopt a resolution of consent prior to any state official being able to enter tribal lands to enforce state compulsory attendance laws,” it signaled another major shift in the control of Native education—this time, away from the federal government to the state governments.

Federal Legislation

According to Mackey (2017), “Congress reversed its policy of assimilation and began pushing to assimilate American Indian students into public education with the Indian Reorganization Act of 1934 (IRA or Wheeler-Howard Act, P.L. 73-383).” The author suggests “the IRA brought about educational restructuring that would begin the process of complicating the relationships between the federal, state, and tribal governments” (p. 788). Although the federal government still plays a major role in Native education and remains obligated to protecting tribal sovereignty and honoring treaty rights, since the 1930s, the education of Native people has primarily shifted to the states as a result of the federal legislation listed in Table 1.

Table 1. Federal legislation shifting Native education to the states

Legislation	Description
Johnson-O'Malley (JOM) Act of 1934	A local program that is approved by BIE that allows Native students to enroll in public schools and previously private schools. This local program is operated under an educational plan, approved by the BIE. On December 31, 2018, the JOM Act was updated to include the Supplemental Indian Education Program Modernization Act (JOM Modernization Act), which became Public Law 115-404.
Every Student Succeeds Act (ESSA), P.L. 114-95, Title VII	Previously the Impact Aid law of 1950, ESSA Title VII was signed in 2015 to assist local school districts that have lost property tax revenue or experienced increased expenditures due to the enrollment of federally connected children and those living on reservations.
ESSA Title VI (Indian Education Act of 1972)	<p>ESSA Title VI was signed in 2015 to meet the unique cultural, language, and educational academic needs of Native students and ensure they meet challenging state academic standards. Applicants must develop an annual plan in collaboration with a local parent committee comprised primarily of family members of Native children.</p> <ul style="list-style-type: none"> • Subpart 1 covers formula grants to local educational agencies (LEAs) and tribes and state education agency (SEA) review. • Subpart 2 pertains to special programs and projects to improve educational opportunities for Native children, including professional development for teachers and education professionals. • Subpart 3 is focused on national activities, including grants to tribes for education administrative planning, development, and coordination, and Native language immersion schools and programs. • Subpart 4 authorizes a National Advisory Council on Indian Education and provides preference for Native applicants.

State Legislation

Mackey (2018) notes that “several states that serve high populations of American Indian students:

- “house American Indian Education divisions within their state-level departments of education,
- “developed legislation addressing these students’ needs as well as a culturally appropriate state-wide curriculum,
- “implemented state education standards including understanding and application of contemporary contexts of tribal communities within their state, or
- “some combination of the three.” (p. 267)

She further explains that “despite these longstanding policy efforts, scholars, administrators, educators, and the American public remain largely unaware of their purpose or the context under which they were developed” (p. 267). Additionally, despite ongoing efforts of Native educational leadership to revitalize Native education systems within a contemporary shared educational responsibility context, Mackey (2018) asserts that federal Native education policies still “largely ignore the cultural and economic realities of tribal communities leading to the perpetuation of systemic inequity under the guise of neoliberal ‘education reform.’ This can be attributed, in part, to decades of Congressional apathy towards efforts that would result in genuine improved educational outcomes” (p. 268).

Tribally Controlled Schools

The Indian Self-Determination and Education Assistance Act (ISDEA) of 1975 (P.L. 93-638) authorized the federal government to enter into contracts with, and make grants directly to federally recognized American Indian tribes. Under these contracts, tribes agree to administer federally funded programs, including education, in accordance with federal guidelines. The act rejuvenated tribal governments by admitting, rejecting, and countering previous paternalistic policies. Strommer (2015) reports that “as of September 2013, tribes and tribal organizations directly managed 126 of the 183 schools (69%) in the BIE system” (p. 29).

Under the Tribally Controlled Schools Act of 1988 (25 U.S. Code § 2502), federally recognized tribes can apply for grants from the federal government to:

- operate contract schools under Title XI of the Education Amendments of 1978 [25 U.S.C. 2000 et seq.] and notify the Secretary of their election to operate the schools with assistance under this chapter, rather than continuing the schools as contract schools;
- operate other tribally controlled schools eligible for assistance under this chapter and submit applications (which are approved by their tribal governing bodies) to the Secretary for such grants; or
- elect to assume operation of BIE-funded schools with assistance under this chapter and submit applications (which are approved by their tribal governing bodies) to the Secretary for such grants.

Tribal Education Departments

Although tribes have always governed their own education systems, the advent of tribal education departments (TEDs) (or tribal education agencies) can be traced back to the Elementary and Secondary Education Act (ESEA) of 1965, which provided a provision for federal financial support for TEDs (Reinhardt and Ward, 2018, p. 29). Reinhardt and Ward (2018) explain that TEDs are responsible for educating their tribal members, youth and adults, as dictated by their tribal governments and based on tribal needs and resources. Tribes create TEDs as acts of sovereignty of their right to educate their youth and to educate others about their tribe (Reinhardt and Ward, 2018, p. 28)

TEDs often interact with tribal, federal, state, and local governments and other organizations and individuals. According to Mackety and Roman Nose (2013), over 200 TEDs are in operation within 32 states, as shown in the map in Figure 2 (p. 5). Mackety and Roman Nose (2013) explain that TEDs operate in various ways. Some operate as tribal education committees, some operate as tribal education offices, and others operate as resource centers (p. 3).

Figure 2. A map of TEDs in operation in the United States



TEDs are funded by multiple sources, including “tribal grants, contracts, self-governance compacts, federal program funding, right to work fee[s]...and foundations and endowments” (Mackety and Roman Nose, 2013, p. 4). In recent years, the federal government provided funding through Indian Education Act for State Tribal Education Partnership (STEP) grants¹. Only tribes without established TEDs could apply in the most recent grant competition.

STEP grants:

- “Promote tribal self-determination in education,”
- “Improve the academic achievement of Indian children and youth,” and
- Promote coordination and collaboration between TEDs and state and local educational agencies “to meet the unique educational and culturally related academic needs of Indian students.” (United States, 2019, p. 1)

A 2011 TED report summarizes the programs and services of seven TEDs: Cherokee Nation, Hoopa Valley Tribe, Chickasaw Nation, Eastern Band of Cherokee Indians, Pueblo of Jemez, Seminole Tribe of Florida, and Oglala Sioux Tribe. Bowers (2011) found that while TEDs often share common characteristics, like local community challenges and tribal interests in revitalizing Native languages and cultures, “all the TEDs expressed a need for available data on tribal students.

Tribal Consultation in State Planning

According to Mackey (2017), the ESSA “includes provisions for Indian education that far exceed previous federal legislative attempts to support tribal self-determination in education, yet shifts considerable oversight and decision-making authority to state legislators whose support is yet undetermined” (p.

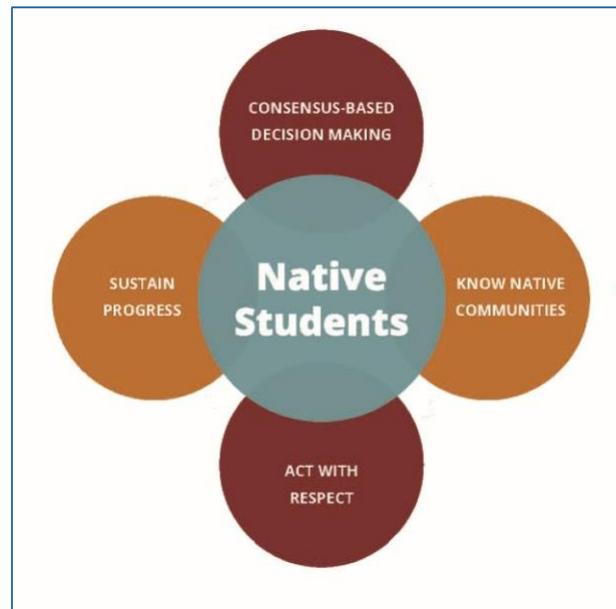
¹ For more information on STEP grants, visit <https://oese.ed.gov/offices/office-of-formula-grants/state-tribal-education-partnership-step/>

783). The author contends that “federal Indian education law and policy must be interpreted through its effect on tribal self-determination rather than its policy goals” (p. 784).

§ 1111 of the ESSA of 2015 has been widely praised in Indian Country for: “opening revenue streams to tribes and tribal organizations through grant opportunities; establishing funding for Native language immersion programs; mandating tribal consultation; incentivizing cooperative agreements between local, state, and tribal education entities; better identifying low performing schools; and limiting the overidentification of American Indian students in special education. (Mackey, 2017, pp. 789–790)

The author further explains, “The central theme throughout ESSA is the increased limits on federal control over education, placing the bulk of power back in the hands of state policymakers” (p. 790). Under § 1111 of the ESSA, states must meaningfully consult with tribes within the state prior to receiving a grant, however, the consultation cannot interfere with the timely submission of the required education plan. Further, capacity-building activities between state and tribal education leaders provide opportunities for both parties to share insights into the inner workings of their government’s educational responsibilities and organizational structures while they review the state education plan together.

Figure 3. NIEA’s essential elements of consultation



Tribes have the right to determine who will represent them during consultation with states. Tribes may choose to send a tribal education director, a paid educational consultant, or an elected tribal official to represent them. Tribal education leaders may be particularly adept at dealing with specific and general Native educational concerns. Tribes retain rights of sovereignty over the education of their citizens and non-tribal citizens about their tribes. As discussed in a previous section, tribes may also have treaty rights to education that supersede other federal, state, and local laws and policies. Some tribes also have their own tribal laws for education of tribal youth. Tribal education leaders are also generally more aware of jurisdictional issues regarding tribal lands and the rights of tribal citizens.

The Northwest Comprehensive Center (2018) developed the *ESSA Tribal Consultation Pre-Planning Tool for Tribes*. It provides an overview of the tribal consultation requirements for state and local education agencies, as well as suggestions, checklists, and program overviews for tribes to consider when

preparing for the consultation process. Although this tool is intended for use by tribes, state education agencies may also benefit from its information on how to best engage with tribal representatives.

The National Indian Education Association (NIEA, 2017b) describes four essential elements of consultation: (1) consensus-based decision making, (2) act with respect, (3) know Native communities, and (4) sustain progress, as shown in Figure 3 (pp. 4–5). NIEA reminds the reader that the consultation process is cyclical, and it needs flexibility to provide for the best possible outcomes. The authors also include practical steps for review of state and local plans, and to ensure ongoing accountability and oversight of ESSA plans.

Policy Recommendations

The National Caucus of Native American State Legislators (NCNASL, 2008) provides the following policy recommendations to strengthen state-tribal relationships in the area of education.

Informing programs

- Include AI/AN and Native Hawaiian representation on education boards, departments, and committees at the state and federal levels.
- Encourage state agencies to seek the advice of local tribes to develop the state education plan required under Title I to ensure the SEA has engaged in timely and meaningful consultation with representatives of tribes to meet the unique cultural, linguistic, and educational needs of Native students.
- Help state and local boards of education use innovative pilot programs to increase parental/guardian involvement among AI/AN and Native Hawaiian families.

Teaching with cultural competence

- Promote tribal certification for teaching Native language, culture, and oral traditions.
- In consultation with tribes and tribal education departments, direct state and local education agencies to develop culturally based curricula—including Native language, culture, and history curricula and culturally appropriate standards—in alignment with state standards, and ensure effective implementation through ongoing, adequate, and sustainable state, federal, and tribal funding.

Tracking and reporting data

- Request that reports on the achievement of AI/AN and Native Hawaiian students be submitted to state leadership.
- Require the state public school system to maintain a database on AI/AN and Native Hawaiian students to provide accurate information on student achievement and to assess progress.
- Request that annual reports on Native student achievement be conducted by the K-12 state education department and delivered to the legislature, governor, tribal councils, and other state leadership organizations—including assessments administered in compliance with the Elementary and Secondary Education Act, graduation and completion rates, special education

enrollment rates, data from the Office of Civil Rights on suspensions and expulsions, and other data routinely collected by SEAs on their K-12 school districts.

In 2020, Dr. Martin Reinhardt and his students at Northern Michigan University conducted a review of online, statewide Indian education reports currently available to the public. The review revealed that very few states have produced such a report over multiple, consecutive years. A comparison of California, Utah, Arizona, Montana, and Wisconsin Native education reports also showed little consistency in the data being collected and presented. Dr. Reinhardt and his students concluded that there should be a national, tri-lateral effort between tribal, federal, and state governments to gather consistent Native education data across all states annually to assist all levels of government in Native education decision-making processes. To ensure accuracy of data, Tribes can work with agencies to provide guidance and advice on methodological issues relating to inaccurate reporting of AI/AN data and statistics.

State Support and Monitoring of Tribal Consultation with LEAs

§ 1111 of the ESSA requires that “an affected local educational agency shall consult with appropriate officials from Indian tribes or tribal organizations approved by the tribes located in the area served by the local educational agency prior to the affected local educational agency’s submission of a required plan or application for a covered program under this Act or for a program under title VI of this Act.” Similar to the requirement for consultation at the state level, the “consultation shall be done in a manner and in such time that provides the opportunity for such appropriate officials from Indian tribes or tribal organizations to meaningfully and substantively contribute to such plan.” Also similar to state-level consultation, tribes have the right to determine who will represent their tribes for the purposes of consultation.

ESSA’s definition of *affected local educational agency (LEA)*:

- an LEA “with an enrollment of American Indian or Alaska Native students that is not less than 50 percent of the total enrollment of the local educational agency”;
- an LEA that “for fiscal year 2017 [or any year following], received [an Indian education grant] in the previous year...that exceeded \$40,000”; or
- an LEA that, “for any fiscal year following fiscal year 2017, received a grant in the previous fiscal year under subpart 1 of part A of title VI that exceeded \$40,000.”

The ESSA also requires that LEAs “maintain in the agency’s records and provide to the State educational agency a written affirmation signed by the appropriate officials of the participating tribes or tribal organizations approved by the tribes that the consultation required by this section has occurred.” If the tribal representatives do not “provide such affirmation within a reasonable period of time,” the LEA is required by the ESSA to submit documentation that the consultation has occurred, nonetheless.

While the ESSA is vague about the definition of “meaningful consultation,” all of the constituents involved should consider data-driven decision making for the consultation process. Data-driven decision making is based on recommendations from a Mathematica Policy Research report submitted to the Bill & Melinda Gates Foundation in 2014. Gill, Borden, & Hallgren (2014), authors of the report, provide the following insights on meaningful data:

- “Meaningful use of data begins with who will access, analyze, or review the data and for what purpose... It is important to recognize that data often flow across levels and that decisions based on data can affect multiple levels” (p. 4).
- “Reliable data are measures that do not have large random variation when they are measured repeatedly” (p. 7).
- “Unreliable data lack stability: they involve so much random variation (or statistical ‘noise’) that they are essentially uninterpretable” (p. 7).
- “Data that are improperly analyzed or interpreted can lead to invalid inferences that are biased, that is, that cause decision makers to draw exactly the wrong conclusions” (p. 8).

Guiding documents to assist TEDs, SEAs, and LEAs with tribal consultation:

- Striving to Achieve: Helping Native American Students Succeed
- ESSA Tribal Consultation Pre-Planning Tool for Tribes

In 2017 the Midwest Comprehensive Center and Bowman Performance Consulting produced the document, *Tribal Consultation Under the Elementary and Secondary Education Act* (Reinhardt and Bowman, 2017). The document lists programs included in the ESSA tribal consultation requirements, key considerations, and guiding questions. The program list includes the following:

- **Title I, Part A** (Improving Basic Programs Operated by SEAs and LEAs),
- **Title I, Part C** (Education of Migratory Children),
- **Title I Part D** (Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At-Risk),
- **Title II, Part A** (Supporting Effective Instruction),
- **Title III, Part A** (English Language Acquisition, Language Enhancement, and Academic Achievement Act),
- **Title IV, Part A** (Student Support and Academic Enrichment Grants),
- **Title IV Part B** (21st Century Community Learning Centers),
- **Title V, Part B, Subpart 2** (Rural and Low-Income School Program), and
- **Title VI, Part A, Subpart 1** (Indian Education Formula Grants to LEAs).

Reinhardt and Bowman (2017) recommend that districts inform tribes about “dates for upcoming meetings,” and “deadlines for plan development and submission” (p. 3) and provide tribes with copies of education plans, contact information for key district and school personnel, evidence on which the plans are based, and any previous reports or plans (p. 3). Lastly the authors state, “Most affected

districts will need to consult regularly with local tribal nations to meet the ESEA requirements given the number of covered programs in the law” (p. 3).

Based on the requirements of the ESSA for tribal consultation at the LEA level, and recommendations of the NCNASL (2008), the NIEA (2017a), the Midwest Comprehensive Center (2017), and the Northwest Comprehensive Center (2018), it is recommended that:

- SEAs encourage LEAs and TEDs to incorporate data-driven decision making into the consultation process;
- the documentation account for how data, inclusive of tribal concerns, were used in the process to account for LEA education plans for a minimum of all programs included in the ESSA tribal consultation requirements;
- SEAs work with the U.S. Department of Education, Office of Indian Education to determine how to best meet the technical assistance needs of affected LEAs, the tribes in their district, and associated programs under the ESSA regarding data-driven decision making; and
- an annual, statewide Native education report include an analysis of the documentation produced from the LEA tribal consultation processes within each state, and that this analysis be used to inform subsequent consultation activities.

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