

Sovereignty in Action: Tribal Control of Education

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This chapter provides an overview of the history of American Indian education with a focus on how tribal governments are increasingly exercising their sovereignty and demanding a say in how their children are educated. It describes federal programs supporting the education of Indian students and the rights of parents and tribes to determine how those funds are spent. Then it discusses the development of Tribal Education Departments and various State initiatives and partnerships recognizing the rights of Indian tribes to be consulted with in regard to what educational programs can best serve their children.

American Indian and Alaska Native Nations in the United States historically have been and presently are recognized generally as separate sovereigns. “Sovereign” is a term used widely to mean a political community with central governmental authority that the members of the community obey. Before Europeans invaded and conquered North America, Native Nations, through their own sovereign systems and spiritual tenets, typically exercised complete control—or governance—over all aspects of their members, or citizens. Despite centuries of subjugation and genocide by outside governments, including the United States and its States, Native Nations in the United States today, primarily under the current domestic and international policies espousing Indigenous Peoples’ self-determination, again govern many facets of their citizens’ and non-citizens’ lives, such as land and natural resources, economic undertakings, health care and family relations.

For Native Nations in the United States, however, no area of their once-intact sovereignty has been as decimated or ignored by non-Native governments, religious institutions and the general public as much as that over formal education. This affects the 574 federally-recognized Native Nations and hundreds of thousands of PreK-12 Native students, many of whom struggle by objective academic achievement and educational attainment standards. According to the U.S. Department of Education, in 2016, only about 75% of Native students completed high school, less than any other racial or ethnic group in the United States (Institute, 2019a). Owing to the concerted and dedicated efforts of Native and non-Natives, Native Nations have begun to regain their sovereignty over formal education, but the recovery is far from complete or conclusive.

Brief Overview of Historical Federal Native Education Policies

The U.S. Constitution, which generally allocates governmental powers between the federal government and the States, does not expressly mention education. This silence implicitly leaves authority over education to the States, not the federal government. Consequently, the Constitutions of all 50 States

Cite as from J. Reyhner, J. Martin, L. Lockard & W. S. Gilbert. (Eds.). (2020). *Honoring Our Students* (pp. 77-86). Flagstaff, AZ: Northern Arizona University.

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provide for public education systems. To some extent, Native education is an exception to this general rule, since the federal government early on began to assume authority over Native education.

The United States originally entered into treaties with Native Nations, clearly recognizing them as separate sovereigns, albeit for purposes of preventing war and acquiring their land. Many treaties had education provisions. In exchange for the vast amounts of land that treaties transferred from Native Nations to the federal government, the government agreed to provide Natives with, among other things, education. Typically the federal government contracted with Christian churches and missions to deliver religious and vocational instruction. Federal appropriations for Native education began in 1802. Although the United States stopped making treaties with Native Nations in 1871, federal law provides generally that existing treaty provisions, including education provisions, remain in force unless expressly abrogated by the U.S. Congress.

After the American Civil War, some treaty provisions were abrogated unilaterally by Congress, and federal policies generally turned very anti-Native. Large amounts of remaining communal Native land were allotted to individual Natives and even more was transferred into non-Native private ownership. Native governments were repressed and Natives were subjected to federal and sometimes state jurisdiction. Formal education was used to forcibly assimilate and culturally annihilate Natives. Federal boarding and day schools often operated strict, military-like regimens and prohibited Native languages, religions, and cultures. The conditions were often physically and emotionally harsh and unrelenting, causing death, illness, and trauma.

As States came into the Union, some declined to admit Natives into their public schools. In 1924 Congress made all Natives citizens of the United States in part to clarify that States must allow Natives in public schools. By 1926 more Natives attended public schools than federal schools. By the 1950s many federal schools were closed or transferred to States. While the public school environments were not as punitive as those of the federal schools, assimilation was emphasized and discrimination was rampant. Throughout the Nineteenth and Twentieth Centuries, reports, including those generated by the federal government, criticized both the federal and state governments for their failures to educate Natives. Yet, until recently, reports, experts, and officials have rarely suggested a role for Native governments in the formal education of Native students. Nevertheless, along the way seeds were planted for change and the resurrection of depleted tribal sovereignty over education.

Three Major Federal Programs for Native PreK-12 Education: Johnson O'Malley; Impact Aid; and Indian Education Act Formula Grants

Currently, over 90% of PreK-12 Native students in the United States attend state public schools. The three major federal programs for these schools – Johnson O'Malley; Impact Aid; and, Indian Education Act Formula Grants – originated in various decades in the Twentieth Century and are still quite active today. They feature specific roles for Native parents, and also offer some opportunities for Native Nations.

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An independent study by the Brookings Institute at John Hopkins University of the federal government's Native policies resulted in a publication known as the Meriam Report after its lead investigator in 1928. It was highly critical of the allotment and assimilation policies generally and federal schools in particular. Its major recommendation for Native education was literally a "Change in Point of View." Formal education of Natives should occur in their natural, local settings of families, communities, and tribes. Curriculum and teaching should include Native histories, geographies, and arts. Still, based on the assumption that Natives needed to understand and fit into American society at large, it envisioned state public schools (as opposed to the federal government) as the primary provider of Native education, and did not take into account the notion of Native Nation sovereignty over formal education.

The Meriam Report radically reformed federal law and policy. The Indian Reorganization Act of 1934 halted further allotment of Native land, reduced forced assimilation, and provided some recognition of Native governments, economies, and cultures. In the same year the Johnson O'Malley (JOM) Act provided new federal funding for Natives in state public schools. States, public schools, and Native Nations were eligible for JOM contracts, but until the 1970s most JOM contracts went to States and public schools, not Native Nations. A 1971 report entitled *An Even Chance* by the National Association for the Advancement of Colored People's legal defense and education fund documented how some public school districts were using JOM funds to educate non-Indian students. In 1975 Congress clarified that Native Nations should be the priority recipient of JOM contracts. In 2014, over 350 Native Nations had JOM contracts; States and public school districts had about 170.

Also since 1975, public schools claiming JOM funds that do not have a majority of Natives on their school boards must have an elected Native parent committee that participates fully in the development of JOM programs and has authority to approve or disapprove the programs. In 1985 Congress clarified that public schools cannot use JOM funds for general education and operating expenses; they must use them only for supplemental educational services to meet the unique educational needs of Natives. In late 2018, Congress finally directed an updated count of Native students eligible for JOM funding, which had been frozen since 1995, in an effort to increase the annual national JOM funding levels which have been as low as \$15 million.

In 1950, federal financial assistance, known as Impact Aid, began to state public schools that serve children who reside on federal lands not taxable by states or their counties, such as military installations and Native lands. Importantly, Impact Aid funds are not for education programs just for Natives; public schools must use them for general education and operating expenses. Since 1978, however, Congress has required public schools claiming Impact Aid funds to ensure that Native children participate equally in the schools' general programs and activities, the planning and development for which Native parents must be consulted and involved. Native Nations can enforce these requirements through an administrative procedure with the U.S. Department of Education. In 2018 over

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1,200 public school districts claimed a total of \$1.3 billion Impact Aid funds, but the vast majority of these districts only serve children residing on military land; only a fraction serve children residing on Native land.

In 1969, a U.S. Senate Subcommittee Report, entitled *Indian Education: A National Tragedy – A National Challenge* (also known as The Kennedy Report because of the leadership of then Senators Robert and Edward Kennedy) expressed grave concerns with low quality Native education in both state public and federal schools. Its first recommendation was for maximum participation and control by Indians in establishing Indian education programs” (Special, 1969, p. 106). While The Kennedy Report recommended increasing JOM contracts to Native Nations to enable them to develop tribal education plans, projects, and programs, Congress instead responded with a new Indian Education Act (IEA) in 1972, to be administered by a new Office of Indian Education (OIE). The OIE, originally within the U.S. Department of Health, Education, and Welfare, is now located within the U.S. Department of Education, which was established in 1979. The OIE has never been part of the Bureau of Indian Affairs (BIA) or the Bureau of Indian Education (BIE), which are located within the U.S. Department of the Interior.

The IEA’s primary feature is the Formula Grant program for the unique cultural, language, and educational needs of Natives. Originally, Formula Grants were available only to state public schools, and schools claiming Formula Grants are required to consult with required Native parent committees, which must have a full opportunity to understand and offer recommendations on IEA programs. The original IEA lacked any recognition of Native Nation sovereignty over education.

In 1978 the IEA Formula Grants were broadened to allow funding for Native educational needs and their culturally related academic needs. IEA Native parent committees were given additional input into (but not ultimate authority over) the hiring and firing of Formula Grant personnel. Since 1994, where a school does not establish an IEA Native parent committee, a Native Nation with 50% or more of the eligible children for a Formula Grant is eligible to apply for the Formula Grant. The 2015 Every Student Succeeds Act (ESSA) requires public school districts to consult with Native Nations of the students served by Formula Grants. In recent years, about 1,300 Formula Grants have been awarded annually from a national appropriation of about \$100,000,000.

Federally Funded BIE Operated Schools, Tribal Contract Schools, and Tribal Grant Schools

According to the Kennedy Report, in 1968 the BIA was operating 214 schools. In 1966 the Navajo Nation had started a private, non-profit institution, the Rough Rock Demonstration School. The Kennedy Report praised Rough Rock as “a symbol of Indian participation and control and educational innovation” and deemed it “extraordinarily influential in shaping a ‘new policy’” in Indian education (Special, 1969, p. 177).

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This new policy became law in 1975 with the Indian Self-Determination and Education Assistance Act (ISDEAA). The ISDEAA authorizes Native Nations to contract the administration of programs and services formerly administered by the federal government, including federal schools. It boldly declares that “a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children and adults to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic welfare.”

Owing largely to bureaucratic resistance, Native Nations contracting of federal schools got off to a slow start. In 1978 and again in 1984, Congress tried to improve the situation, and also directed the BIA to develop basic education standards for the schools in consultation with Native Nations. Federal standards can be waived if there are alternative approved Native Nation standards, or the schools can choose to meet state basic education standards. In 1988 Congress required Native Nation consultation and approval for most BIA-funded school actions and programs and authorized BIA-funded schools to coordinate with state public schools. Also in 1988, Congress authorized Native Nation grant schools, by which Native Nations receive funding on at least an annual basis, as opposed to the quarterly payments per year for contract schools, and with less paperwork. Most BIA-funded schools are accredited by regional or state accreditation agencies, but in 2001, Congress strengthened the provisions for Native Nation accreditation of certain BIA-funded schools, particularly the grant schools.

In 2006, the former Office of Indian Education Programs within the BIA was renamed the Bureau of Indian Education (BIE). In 2019 there were 183 BIE-funded schools, 53 of them operated by the BIE. The other 130 schools are operated by Native Nations as contract or grant schools. BIE-funded schools are located in 23 States, and serve about 41,000 children. All BIE-funded school boards have considerable power under federal and tribal law over the requirements for and hiring, retention and firing of school personnel. The current level of annual funding for all BIE-schools is about \$650,000,000.

Tribal Education Departments and Agencies

It is commonplace that States, like the federal government, have Education Departments or Agencies. In part to address the growing issues surrounding standards for then-BIA-funded schools, amendments to the ISDEAA in 1984 clarified that ISDEAA funds can be used for Native Nations' Tribal Education Departments (TEDs, also known as Tribal Education Agencies or TEAs) and tribal education code development and administration. In 1988 Congress authorized direct appropriations to Native Nation TEDs. The 1988 authorization was through appropriations for the U.S. Interior Department, and it requires Native Nations applying for TED funding to be served by at least three BIA-(now BIE) funded schools. The TED funds are to be used for TEDs to coordinate all education programs serving the Tribe, and to develop tribal education codes, standards, and policies. For over 25 years, Congress made no appropriations under this authorization until finally in Fiscal Year 2015 the first appropriations

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were made. The appropriations are very modest (to date no more than \$2.5 million per year), such that only a handful of Native Nations have been able to secure TED funding.

In 1994 Congress added a second authorization for direct federal funding for TEDs. This authorization is through appropriations for the U.S. Education Department, and it is not tied to BIE-funded schools, but no appropriations have ever been made under this authorization. The funding is for the development and operation of TEDs, and for TEDs to conduct administrative planning and development to coordinate education programs, develop tribal education codes, and provide support services and technical assistance to schools. The U.S. Senate reported that this new authorization would enable tribal governments to be education leaders like the fifty States. Due primarily to the advocacy efforts of national Native organizations and individual Native Nations, the 2015 ESSA retains both TED direct funding authorizations. Accurate data is lacking, but it is estimated that between 150 and 200 Native Nations today have a TED or TEA.

State Laws Recognizing Roles for Native Nations as Sovereigns in PreK-12 Public Schools

The previous sections have discussed the intent and goals of various federal laws and programs regarding Native Nation sovereignty over formal education. Other manifestations of this sovereignty are found in state law. One of the first States to recognize a role for Native Nations as sovereigns was Wisconsin, which in 1995 recognized TEDs in its American Indian Language and Culture Education Program. In 1999, Montana recognized TEDs in its Indian Education for All American Indian Studies Instruction provisions, including as providers of in-service training for instructors. In 2003, New Mexico recognized TEDs in its Indian Education Act, stating that one purpose of the Act is to ensure that TEDs are among those working to find ways to improve education for Native students. In 2010, Oklahoma's new Advisory Council on Indian Education included representatives of TEDs. Five years later, Oklahoma became the first State to authorize Native Nations to directly charter state public schools. In 2017, Wyoming provided for State-Tribal cooperation in reviewing and evaluating state social studies content and performance standards, to ensure that Native Nations' histories and cultures are accurately depicted.

In addition to these laws, at least fourteen States have formalized roles for Native Nations in their education or administrative codes in connection with state laws allowing the teaching of Native languages in schools and the certification or licensing of teachers for the languages: Arizona, California, Idaho, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Washington, Wisconsin, and Wyoming. All of the state laws recognizing a role for Native Nations in public schools are notable as there is no federal law that requires the state laws; rather, they have stemmed from a genuine desire to improve Native education and the realization that Native Nations have something to offer in attaining that aspiration.

State-Tribal Consultations and Partnerships

The landmark 1965 Elementary and Secondary Education Act (today known as ESSA) provided significant federal funding to States for public school education of economically disadvantaged children. All 50 States today, along with the District of Columbia and the remaining federal schools, both BIE and military, receive this funding, which nationwide in 2018 was over \$16 billion. Title I has always provided for parent advisory boards with respect to the planning and evaluation of its programs. In ESSA, Congress, at the behest of national Native organizations, uniquely required States to consult timely and meaningfully with Native Nations within their State in applying for Title I funding. This is remarkable because many federal laws already required Native Nation consultation by federal agencies. Some federal laws have optional, voluntary state-tribal partnership arrangements, like the Indian Gaming Regulatory Act, which allows State-Tribal Gaming Compacts. But no federal law other than ESSA requires States to consult with Native Nations as a condition of applying for federal funding.

Because of ESSA, many States now have Tribal Education Consultation policies for Title I funding consultations.¹ Independent of ESSA's requirements, in 2018, California became the first State to legislate consultation with Native Nations regarding the State's Native studies curriculum [Cal. Educ. Code § 51226.9(a)(1)]. Some Native Nations are now developing their own counterpart formal consultation policies and procedures.

Certain State laws that have confirmed roles for Native Nations in their public schools were mentioned above, but one particular State law deserves special attention. In 1991, the U.S. Education Department's Indian Nations at Risk Report first recommended state-tribal governmental partnerships in public school education. In 2013, Washington became the first State to authorize State-Tribal Compacts in K-12 public school education. To date it has entered into Compacts with seven Native Nations: Suquamish; Puyallup; Lummi; Muckleshoot; Quileute; Nisqually; and Yakama.² Washington State-Tribal Compact Schools are exempt from general state education laws but must establish their own standards and policies for teachers, staff, curriculum, admissions, funding, and reporting requirements on student enrollment. As will be discussed next, Washington was ahead of its time at least with respect to federal law on this point.

The 2015 ESSA also made permanent the State-Tribal Education Partnership (STEP) Grants Program. The STEP Grants Program began as a demonstration program in Fiscal Year 2012 under the Administration of U.S. President Obama. It is overseen by the U.S. Education Department. It allows States and their public school districts to coordinate and collaborate with TEAs in specific areas to meet the unique and culturally related academic needs of Native students. It also helps build the capacities of TEAs to conduct certain ESSA administrative functions in place of States, including policy-making, technical assistance, reporting, evaluation, and compliance monitoring, or in place of public schools, including supervision and direction of educational services to students, grant implementation, data submissions, and curriculum and professional development. By 2019 six States had partnered with seven Native Nations under the STEP Grants Pro-

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gram: Oklahoma and the Chickasaw Nation and the Cheyenne-Arapaho Tribes; New Mexico and the Navajo Nation; Idaho and the Nez Perce Tribe; Oregon and the Confederated Tribes of the Umatilla Indian Reservation; Oklahoma and the Muscogee Creek Nation; and Idaho and the Coeur d'Alene Tribe.

Improved Native Education Laws Have Not Solved Everything

Undoubtedly, federal and state Native education laws have improved since the Nineteenth Century, but there are still serious problems. An on-going federal court case against the BIE-operated Havasupai Elementary School in Arizona, *Stephen C. v. Bureau of Indian Education*, alleges that the school has failed to provide the required basic instruction and has provided only part of the required Native language instruction.³ The school library and extracurricular activities do not comply with BIE law and regulations. In particular, disabled students at the school are ignored or mistreated.

The Havasupai case may be an isolated instance, but there is no denying that significant historical and institutional deficiencies continue to plague the federal government's administration of Native education. The U.S. Government Accountability Office (GAO) routinely designates the BIE as a "high risk" agency due to systemic management, fiscal, and staffing irregularities and improprieties for which there is little, if any, accountability.⁴ Perhaps the most serious issues directly affecting Native students involve the BIE-funded school buildings themselves, which often are horribly unsafe.⁵

Native education in many state public schools also continues to be lacking. Despite numerous reports stating that Native students do better in school when their Native languages are included or offered, in 2015 the U.S. Education Department reported that 50% of Native students are not exposed to their Native languages in schools (Institute, 2019b). More recently it has been reported that public schools generally provide limited choices for Native students as reported by the GAO in *Public School Choice: Limited Options Available for Many AI/AN Students* in January 2019.

In January 2019, the U.S. Education Department agreed to investigate claims of alleged discrimination against Native students at the Wolf Point School District in Montana, which serves the Fort Peck Indian Reservation.⁷ The claims allege that unequal treatment, push outs, disciplinary actions, harassment, retaliation and deprivation of basic due process rights contributed, in one year, to six Native students committing suicide and to suicide attempts by another 20 Native students. In February 2019, a New Mexico state court held that the State was in violation of the State Constitution for the failure of its public school districts to provide an adequate education for Native students in *Yazzie v. State of New Mexico*.⁷ The graduation rate for Native students between 2008 and 2014 ranged between 45-65%, well below the national rate for Natives and the State's rate for non-Native students. The Yazzie court has ordered New Mexico to provide additional funding to the schools and required the State to hold the schools more accountable for how they spend their funds. The Montana and New Mexico cases may be extreme examples, but they are real cases, and given the time, opportuni-

ties, and reasons that States and public schools have had to improve education and eliminate discrimination, it is deeply troubling that these cases exist.

Conclusion

As a U.S. district court aptly concluded in 1995, in *Meyers v. Board of Education of San Juan School District*, the three sovereign governments in this country—the United States, the States, and Native Nations—each have a duty to educate Native children, even in State public schools.⁸ The opportunities for Native Nations surely are increasing, but the regaining of their sovereignty over formal education is complicated by centuries of exclusion or neglect of that sovereignty by non-Native governments as well as considerable direct damage done by non-Natives. Whether TEDs and TEAs, along with State-Tribal co-governance of PreK-12 education, all of which are really still in their infancies, can truly make a difference is yet to be seen, but the prospects are welcome.

Notes

¹Arizona's Tribal Education Consultation Policy can be found at http://www.azed.gov/oie/files/2016/10/tribalconsultationpolicy_final_021417.pdf. North Dakota's policy can be found at <https://www.nd.gov/dpi/sites/www/files/documents/Indian%20Education/FinalNDESSATribalConsultationGuidance.pdf>.

²See State-Tribal Education Compact Schools (STECs) at <https://www.k12.wa.us/student-success/access-opportunity-education/native-education/state-tribal-education-compact-schools-steps>

³See Major Court Victory in Landmark Lawsuit Asserting the Educational Rights of Native American Students at <http://unitefornativestudents.org/major-court-victory/>

⁴See US Government Accounting Office, *Further Actions on GAO Recommendations Needed to Address Systemic Management Challenges with Indian Education* (April 2015) and U.S. GAO Bureau of Indian Education needs to Improve Oversight of School Spending (November 2014) at <https://www.gao.gov/assets/670/666890.pdf>

⁵See US Government Accounting Office, *Further Actions Needed to Improve Oversight and Accountability for [BIE] School Safety Inspections* (May 2017) at <https://www.gao.gov/products/GAO-17-421>

⁶See Jackson, et al v. Wolf Point School District at <https://www.aclumontana.org/en/cases/jackson-et-al-v-wolf-point-school-district>

⁷See Court issues final ruling in landmark education lawsuit at <http://nmpoverty-law.org/2019/02/court-issues-final-ruling-in-landmark-education-lawsuit/>

⁸See *Meyers v. Bd. of Educ. of San Juan*, 905 F. Supp. 1544 (D. Utah 1995) at <https://law.justia.com/cases/federal/district-courts/FSupp/905/1544/1741037/>

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