

The Elementary and Secondary Education Act Reauthorization Recommendations for Tribal Education Departments/Agencies

INTRODUCTION

The Elementary and Secondary Education Act (ESEA) is currently up for reauthorization and it is the most important federal law that applies to American Indian and Alaska Native tribal students. The ESEA currently has 10 Titles with multiple programs. Some are general programs, like the Title I Improving Basic Programs, and some are specific to Native Americans, like the Title VII Indian Education Act programs. Tribal students, whether they attend Bureau of Indian Education (BIE) funded schools or state public schools, are served by all of the ESEA programs. Unfortunately, ESEA programs are not working for tribal students and the statistics prove it:

- **The high school dropout rate of tribal students is 50%; nearly double that of their Caucasian peers.**
- **Tribal students have the highest rates of absenteeism, suspension, and expulsion.**
- **Tribal 8th grade students are 18% more likely to read or perform in mathematics at a "below basic" level than their Caucasian peers.**

All of the ESEA programs could do more to help tribal students by recognizing a role, or by enhancing the role or roles, including in public school education, of tribal governments as sovereign nations. Tribal governments are a major untapped resource in education that can help improve tribal student performance, and this ESEA reauthorization needs to change that.

Over 200 of the over 560 federally-recognized tribal governments have education agencies located in 32 states. Known as "Tribal Education Departments" (TEDs) or "Tribal Education Agencies" (TEAs), these tribal governmental agencies can help the non-tribal federal and state governments serve tribal students. TEDs / TEAs can assist with the most fundamental education improvement and accountability functions like data collection, reporting, and analysis. TEDs / TEAs can help in other areas as well, including the development of curricula, standards, and assessments; teacher training; research; and, specific local initiatives like truancy intervention, drop out prevention, and tutoring programs.

In particular, *TEDs / TEAs are in a unique position to coordinate data* on tribal students that is generated by various and sometimes multiple sources, including federal education programs, public school systems, states, and BIE-funded schools. For tribal students, this never has happened before; right now we can only imagine accurate and current tribe-wide, statewide, or nationwide data-based reports on tribal students. But if such reports were available, agencies and legislatures of all governments could make data-driven decisions regarding tribal students as they implement the next reauthorization of the ESEA.

For the *data roles of TEDs / TEAs to reach their full potential, the Family Education Rights and Privacy Act (FERPA) needs to be clarified by an amendment that includes TEDs / TEAs as being among the education agencies, authorities, and officials to whom protected student records and information can be released without the advance consent of parents or students.* Such an amendment to FERPA would be consistent with the TED / TEA programs authorized by Congress since the ESEA Reauthorizations of 1988 and 1994 and thus would bring FERPA up to date and in accord with the ESEA.

TEDs and TEAs in the ESEA

Each and every ESEA Title needs to better connect TEDs / TEAs with states, public school districts, BIE-funded schools, and the various federal education programs that serve tribal students. In particular, the roles and responsibilities of TEDs / TEAs with respect to public schools (LEAs) – which nationwide serve 92% of tribal students – are very limited and outdated, especially with respect to LEAs located within tribal geographic territories. This ESEA reauthorization should rectify that situation by generally:

- *Authorizing and / or increasing tribal eligibility for all pertinent ESEA program and formula funding, including state level formula funding.*
- *Authorizing intergovernmental education agreements between tribes and states / LEAs.*

The following are TEDNA's recommendations for each title in the current ESEA, known as the No Child Left Behind Act (NCLB).

Title I: TEDs / TEAs as SEAs; Increased State-Tribal Relations; and, Teaching Tribal Sovereignty

Title I is and always has been the biggest ESEA program (over \$15 billion annually). State Educational Agencies (SEAs) can get Title I funds if they submit proper plans that address academic standards, assessments, and accountability; teaching and learning support; parental involvement; and reporting. In the development of these state education plans, which are a prerequisite for Title I funds; there is no specified role for TEDs / TEAs, which is a serious flaw because it has severely limited or impaired the ability of TEDs / TEAs to work with SEAs. To address this oversight the following three recommendations should be incorporated into Title I:

1) TEDs / TEAs should be Authorized to Perform SEA functions within Tribal Geographic Territories

TEDs / TEAs should be authorized to perform SEA functions within significantly large tribal geographic territories that include a high percentage of tribal students served

by Title I.¹ This could be accomplished by authorizing TEDs / TEAs to be eligible for Title I funds, as well as state-level formula funding in other titles of the ESEA, and authorizing tribal-state compacts to co-administer the programs and services authorized by the ESEA within tribal geographic territories. In short, the model would work as follows:

- TEDs / TEAs would be eligible to receive state-level formula funding in all ESEA titles, including Title I.
- *A TED / TEA would submit a consolidated education plan² to the Department of Education for such funding; the plan would include the same information and assurances as required for SEA consolidated education plans, including evidence of capacity to administer education programs and services.*
- **The Department of Education would approve the TED's / TEA's consolidated education plan** using the same approval standards used for SEA plans and distribute the ESEA formula funds to the TED / TEA.
- *The TED / TEA and SEA would enter into a compact agreement* to determine how the ESEA formula funds would be used by LEAs with high percentages of tribal students within or near large tribal geographic territories. The affected LEAs would participate in the tribal-state compact agreement negotiations.
- *The ESEA formula funding would be sub-granted to the LEAs*, according to the TED / TEA- SEA compact agreement.
- **The compact agreements would specify which entity, the TED / TEA or the SEA, would perform the relevant services**, such as data collection, technical assistance, and reporting. For example, the TED / TEA may provide teacher training, professional development opportunities, and develop curriculum (that would meet state assessments and standards), while the SEA may provide assessments and standards that would be implemented in LEAs with high tribal student percentages within or near tribal geographic territories.

This program would be limited to TEDs/TEAs from federally-recognized Tribes (1) with large tribal geographic territories; (2) with LEAs within such territories with high percentages of tribal students; and, (3) that the Department of Education has determined have the capacity to administer the relevant programs and services. The goal is to provide a statutory mechanism for TEDs / TEAs and SEAs to combine and coordinate federal, state, and tribal resources, and develop partnerships to improve student academic performance and increase accountability. As federal reports including *The Indian Nations at Risk Task Force Report* (1991) and *The White House Conference on Indian Education Final Report* (1992) have recommended, the national government should play a leadership role in encouraging and providing for such intergovernmental partnerships.

¹ There are 20 federally-recognized Indian reservations that are geographically larger than states such as Rhode Island and Delaware.

² See the enclosed proposed requirements for Consolidated Tribal Education Plans.

Presumably, not every TED / TEA would immediately seek SEA status – some TEDs / TEAs are ready and willing to perform SEA functions immediately while others will take several years to develop the necessary capacity and infrastructure. But although the vast majority of TEDs / TEAs are not likely to seek SEA status in the immediate future, they should have support from the federal government to develop the necessary capacity to exercise that option when they are ready.

2) States should be Required to Meet with TEDs / TEAs as a Condition of Receiving Title I funds

In other instances, outside of or away from significantly large tribal geographic territories, where there are TEDs / TEAs located within states, the ESEA should, at a minimum, require the *SEAs of those states to identify the TEDs / TEAs, meet with them on a quarterly basis, develop joint strategies for improving education in schools with tribal students served by Title I, and jointly report on the results of such meetings to the U.S. Education and the Interior Departments as a condition of receiving Title I funds.*

3) Encourage or Mandate the Teaching of Tribal Sovereignty as a Condition of Receiving Title I Funds

Yet another suggestion for the Title I program would be to encourage those states receiving Title I funds that have TEDs / TEAs operating within their borders, if they do not already have one, and there are five states that do – California, Maine, Montana, Oregon, and Wisconsin – to enact state laws that mandate the teaching of tribal sovereignty in their K-12 curriculum on a regular basis. If a state chooses not to enact such a law, TEDs / TEAs with students served by Title I funding must be allowed to develop such a curriculum mandate that the LEAs must follow.

Titles II and III: Native Language Curricula and Teacher Certification

Twelve states – Arizona, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Washington, Wisconsin, and Wyoming -- now have laws that address tribal language curriculum and the certification of teachers for these curricula in their LEAs. All of these laws acknowledge a role of tribes as sovereigns in the development and implementation of these laws. *The Reauthorized ESEA should require the SEAs and the TEDs / TEAs in these states to jointly track the progress made in implementing these laws and their impacts on students, and to jointly report on these matters to the Department of Education and Congress.* Further, the ESEA Reauthorization should authorize, at least on a nationwide pilot project basis, other states and tribes to enter into *compacts or agreements for tribal language curricula development and teacher certification*, and authorize appropriate funding to implement such compacts or agreements.

Titles VII and VIII: TED / TEA Appropriations; Tribal Eligibility or Increased Eligibility as Grantees

In the ESEA Reauthorization, the *funding level amount authorized for TED / TEA appropriations in Title VII should be reinstated and increased to support TED / TEA capacity building*. In addition, for the Title VII Indian Education Act Formula Grant programs, tribal eligibility to receive these funds directly should be increased and the amount authorized for this grant program should be increased. For Title VIII Impact Aid funding, TEDs / TEAs should be authorized to receive directly these funds under defined eligibility criteria and upon the condition of entering into a cooperative agreement with the affected LEA regarding management and administration of the funds. These Title VII and Title VIII recommendations are in recognition of the increased number and capacity of TEDs / TEAs to whom these funds should go directly along with the responsibility of being accountable for the expenditure of the funds and correlative student performance.

1) Reinstatement and Increase and Title VII TED / TEA appropriation amount

Title VII of NCLB, Section 7135, currently codified at 20 U.S.C. Sec. 7455, authorizes appropriations for TEDs / TEAs through the Department of Education.³ In this authorization, Congress envisions TEDs / TEAs as coordinating education programs; developing and enforcing tribal education codes; and, providing support services and technical assistance to schools and programs. NCLB eliminated an amount for the authorization, but the original amount in the authorization in 1994 was \$3 million. **This authorization amount should be reinstated and increased to \$25 million.**

Proposed Statutory Language:

In NCLB Title VII, Part A, Subpart 3, National Activities, Section 7135, add a new Section 7135(e), that reads, "AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section \$25,000,000."

2) Increase the Eligibility of Tribes for Title VII Formula Grants

The Formula Grant Program was the cornerstone of the original Indian Education Act (IEA) in 1972, Pub. L. No. 92-318. Today the IEA Formula Grant Program is in NCLB at Title VII, Sections 7111 -7119, currently codified at 20 U.S.C. Secs. 7401-7546. Eligible applicants for the IEA Formula Grants program are primarily LEAs. BIE-supported schools are eligible under a Formula Grants special set aside allocation. Since 1994, tribes have been eligible to receive Formula Grants directly where they represent at least fifty percent (50 %) of the eligible Indian children served by an LEA and the LEA does not establish an elected parent committee under this program. *See* Section 7112(c) of NCLB, Title VII, codified at 20 U.S.C. Sec. 7422(c).

Tribes should be directly eligible to receive Title VII Formula grants, to provide services in public schools located on or near tribal geographic territories. NCLB most recently has affirmed that the Formula Grants are intended to benefit the

³ The Interior Department authorization for TED appropriations is in NCLB Title X, Section 1140, currently codified at 25 U.S.C. Sec. 2020(a).

unique educational and culturally related academic needs of tribal students, and as between LEAs and tribes, common sense dictates that tribes are in the better position to identify, understand, and address these needs. Hence, there is little reason to continue to by-pass or avoid so many TEDs / TEAs in favor of LEAs.

3) Authorize Tribes to be Eligible for Title VIII Impact Aid Grants

The Impact Aid Basic Support Program for Eligible Federally Connected Children was originally authorized by the Act of September 30, 1950, Pub. L. No. 81-874. Portions of it are in NCLB Title VIII, Sections 801-805, and it is currently codified at 20 U.S.C. Secs. 7701-7714. Today, the annual appropriation level for Impact Aid is over \$1 billion. **This Reauthorization should allow TEDs / TEAs to receive Impact Aid funding at least where they represent at least one-third (1/3) of the claimed children residing on Indian lands.**

Previous ESEA Reauthorizations have maintained that Impact Aid grants are available only to eligible LEAs; not to tribes. Impact Aid grants go directly into the general operating budgets of LEAs and are to be used for basic education programs. Since 1978, however, LEAs who claim children residing on Indian lands under this program must establish "Indian Policies and Procedures (IPPs)." The IPPs must ensure that there is equal participation by tribal students in; consultation with Indian parents and tribes regarding; and, opportunities for Indian parents and tribes to make recommendations about the LEAs' education programs and activities. A statutory administrative complaint process allows tribes a U.S. Department of Education hearing and determination if they feel the LEAs are not in compliance with the IPP provisions.

Over thirty years ago (1977) the American Indian Policy Review Commission recommended that Impact Aid funds go directly to eligible tribes. It is time for the Administration and Congress to act on this recommendation. TEDs / TEAs should be ***authorized to receive Impact Aid funding at least where they represent one third (1/3) of the claimed children residing on Indian lands.*** TEDs / TEAs could administer directly the Impact Aid funds, they could enter into cooperative agreements with LEAs to administer them, or, they could subcontract their administration to LEAs. Consideration also should be given to reasonable indirect cost amounts that would allow TEDs / TEAs to administer Impact Aid funds where LEAs choose not to receive such funds.

Under this arrangement, tribes would have leverage in addition to or beyond the underutilized (and therefore ineffective) Impact Aid administrative complaint provisions to achieve the goals of the law as stated in the IPP provisions. It would also bring this over fifty-year-old program in line with the modern federal policy of Indian self-determination and control over education.

Proposed Statutory Language:

In 20 U.S.C. Section 7704, Policies and Procedures relating to children residing on Indian lands, add a new Section 7704(g), that provides,
"(g) Indian tribes. –

(1) In General. -- an Indian tribe that represents not less than 1/3 of the claimed children residing on Indian lands for the purpose of receiving funds under section 7703 of this Title may apply for such funds.

(2) Special Rule.—The Secretary shall treat each Indian tribe applying for funds under Section 7703 of this Title as if such Indian tribe were a local educational agency for purposes of this Title, except that any such tribe is not subject to Section 7704 of this Title."

Additionally, add a new Section 7704(h), that provides,
"Section 7704(h) Cooperative Agreements.

(1) Where an Indian tribe receives funds under Section 7704(g) of this Title, the Secretary shall, if specifically requested by the tribe, implement any cooperative agreement entered into between the tribe and the LEA which meets the requirements of paragraph (2) and involves education matters for which the funds may be used. The tribe and the LEA shall determine the terms of the agreement.

(2) Each agreement entered into pursuant to the authority provided in paragraph (1) shall confer a benefit upon the parties commensurate with the burden assumed, though this requirement shall not be construed so as to require equal expenditures or an exchange of similar services."

Title IX: Definition; Tribal Consolidated Plans and Reporting; Tribal Waivers

1) Definition

The ESEA at present has several different definitions of TEDs / TEAs which has caused some confusion. For example, in the Title VII Department of Education appropriations authorization, they are referred to as "tribal administrative entities." NCLB Title VII, Section 7135; 20 U.S.C. Sec. 7455. As another example, Title III of NCLB (Language Instruction for Limited English Proficient and Immigrant Students), uses the term "tribally sanctioned educational authority." NCLB Title III, Section 2113; 20 U.S.C. Sec. 6822.

For clarity and uniformity, the term that should be used consistently throughout the ESEA is "Tribal Education Agencies (TEAs)." This would eliminate the unnecessary confusion already engendered by the various titles, and it would bring TEDs / TEAs more in line with their counterparts at the state level, which are defined consistently throughout the ESEA as "State Education Agencies." The following definition of TEDs / TEAs should be included in the next ESEA Reauthorization definitional section and be made applicable to all titles:

() Tribal education agency

The term "Tribal education agency" means the authorized governmental agency of a federally-recognized American Indian and Alaska Native tribe (as defined in 25 U.S.C. §450b) that is primarily responsible for regulating, administering, or supervising the formal education of tribal members. "Tribal education agency" includes tribal

education departments, tribal divisions of education, tribally sanctioned education authorities, tribal education administrative planning and development agencies, tribal education agencies, and tribal administrative education entities.

2) Tribes receiving ESEA funding should, like SEAs, be Eligible to Consolidate Administrative Funds eligible for Consolidation

Currently, Part B of Title IX allows SEAs to consolidate administrative funds available in ESEA programs eligible for consolidation if the SEA can demonstrate that the majority of its resources are from non-Federal sources. TEDs / TEAs receiving ESEA funding should be able to consolidate administrative funds according to the same set of requirements.

Tribal students are served by programs funded from federal, private, tribal, and state sources. Potentially all of these programs contain funds to be used for administrative purposes. The authority of TEDs / TEAs to consolidate administrative funds received will reduce waste and ensure efficient program management at the tribal level.

3) Tribes, like SEAs, should be Eligible for all State-Level Formula Funding and Authorized to Submit ESEA Consolidated Plans and Consolidated Annual Reports

Currently, Title IX Part C allows SEAs to submit ESEA consolidated plans and consolidated annual reports. Consolidated plans include general information about each program and a single set of assurances applicable to each program. Consolidated annual reports replace individual annual reports for each program included in the consolidated annual report. *TEDs / TEAs receiving ESEA funding similarly should be eligible for all state level formula funding and authorized to submit consolidated plans and consolidated annual reports.*

Consolidated tribal education plans should be subject to the process required by the NCLB for submitting and approving state education plans. In addition, the tribal plans would demonstrate capacity to administer and implement programs supported by ESEA funding. **Department of Education would use this information, just as it does for state education agencies, to determine if the TED/TEA has capacity to administer such programs and would work with the TED/TEA to build capacity as necessary to approve the tribal plan.** TEDNA has prepared proposed requirements for consolidated tribal education plans that are attached herein. It includes guidelines to determine if a TED/TEA has capacity to operate ESEA programs.

The purposes of Part C are to “improve teaching and learning, by encouraging greater cross-program coordination, planning and service delivery” and to provide greater flexibility through consolidated plans, applications, and reporting. *See* 20 U.S.C. §7841. For tribal students, the potential need for program coordination is particularly great as they attend federal, tribal, and public schools that do not coordinate records or programs.

Authorizing TEDs / TEAs to submit consolidated plans and consolidated reports is consistent with the express purposes of Part C.

4) Tribes should be Eligible to Request Title IX Waivers for LEAs within Tribal Geographic Territories

Currently, Title IX Part D allows for waivers by the Secretary of Education of ESEA statutory and regulatory requirements. Tribes are among the eligible entities that may request a waiver for tribally operated schools. The ESEA reauthorization should retain this option and extend the option for TEDs / TEAs that are approved by the Education Department to receive Title I funding directly (based on a tribal education plan covering a significantly large tribal geographic territory) to seek waivers of statutory and regulatory requirements for LEAs serving tribal students, and require the TED / TEA to work with the LEAs to implement the waiver.

Such waivers have the potential to allow TEDs / TEAs the flexibility and local control needed to improve the academic performance of tribal students. Specifically, many reports and research show that tribal students generally perform better when taught using tribal language and culture. The Navajo Nation has requested a Title IX waiver to develop its own definition of AYP. Other Tribes could request waivers to develop their own standards, assessments, and curriculum to meet the unique cultural-academic needs and goals of their communities.

Title X: Increase TED / TEA Appropriation Authorization Amount

In 1988 Congress authorized appropriations for TEDs / TEAs within the Interior Department / BIE (Pub. L. No. 100-297, Section 5199). In this authorization, Congress envisions TEDs / TEAs as facilitating tribal control over education; planning and coordinating education programs; and, developing and enforcing tribal education codes, policies, and standards. This authorization is retained in NCLB in Title X, Section 1140, currently codified at 25 U.S.C. Sec. 2020(a). *The authorization amount should be increased to \$25 million to support TED / TEA capacity building to better serve tribal students.*

Proposed Statutory Language:

In NCLB Title X, Part D, Native American Education Improvement, Section 1140, delete "\$2,000,000," and replace with "\$25,000,000."

CONCLUSION

All stakeholders affected by troubling statistics regarding tribal student academic achievement, test scores, and college readiness, stand to gain from enhanced roles of TEDs / TEAs in the ESEA reauthorization. The recommendations in this report will result in crucial structural and programmatic changes to develop TED / TEA capacity to better-serve tribal students.