

THE NATIVE AMERICAN RIGHTS FUND

INDIAN EDUCATION LEGAL SUPPORT PROJECT

“Tribalizing Indian Education”

**The Evolution of Tribal Sovereignty over Education
in Federal Law since 1965**

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INTRODUCTION

These materials are a review of major federal laws, policies, and reports regarding Indian education since 1965. The review was undertaken with the goal of understanding specifically *what* federal laws, policies, and reports have provided, stated, or recommended about tribal sovereignty over education; that is, tribal *governance* over the formal education of tribal students.

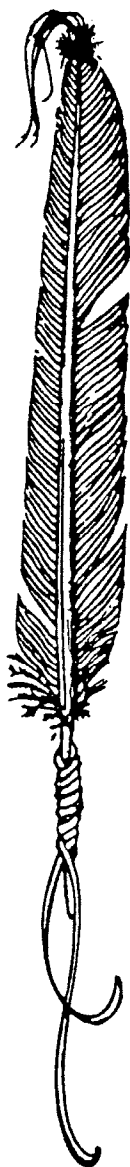
The materials begin with a general definition of tribal sovereignty as that term is used in federal Indian law. Brief summaries of early federal Indian education laws and policies also are provided to enhance the understanding of and set the context for the modern federal policy of Indian self-determination.

Under this current policy tribal sovereignty over education is returning. Its extraordinary evolution is steady, though seemingly slow and somewhat sporadic. In many instances the intent and goals of federal law regarding tribal sovereignty over education are yet unrealized. Also, tribal sovereignty over education as it is recognized in federal law is only part of the story. There are many other manifestations of tribal sovereignty over education that are found in international, state, and tribal law. Moreover, “the law” never has been and never will be the totality of all that tribal sovereignty encompasses.

These materials are intended to be a general resource for tribal, state, and federal officials, educators, schools, and other interested persons. For further information and reference about Indian education law and policy and the rights and roles of tribal governments in education, please see the first nine sets of materials under this project dated October 1993, October 1994, October 1997, October 1998, October 1999, October 2000, September 2003, November 2003, and June 2004. None of these materials is intended to be legal advice for any particular tribe. Tribes should consult their legal counsel for specific advice about the existence and scope of their sovereign authority in education.

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**NATIVE AMERICAN RIGHTS FUND
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EXECUTIVE SUMMARY**

The Native American Rights Fund

The Native American Rights Fund (NARF) is the national legal defense fund for American Indian and Alaska Native tribes. Founded in 1970, NARF concentrates on bringing cases and reforming laws that are of major importance to a great many Native people. NARF consistently has been at the forefront of issues and developments in Indian law in areas such as Indian treaty rights to land and water, Native religious freedom rights, and the rights of tribes as sovereign governments including tribal rights in education.

The NARF Indian Education Legal Support Project - Tribalizing Indian Education

NARF historically has represented Indian clients on a variety of education issues. Since 1987, NARF has represented the Rosebud Sioux Tribe of South Dakota in establishing a precedent-setting tribal education code and implementing that code through a tribal education department. As a result of its success with the Rosebud Sioux Tribe, NARF started a new project that has been funded primarily by the Carnegie Corporation of New York and the W.K. Kellogg Foundation. The project advances Native American education by emphasizing the legal rights of tribes to govern the formal education of tribal members in all types of schools – federal, state, and tribal.

NARF seeks to "tribalize" formal education through developing tribal education laws and reforming state and national Indian education legislation. Tribal education laws are essential to effective tribal governance of education, yet few tribes have such laws. Tribal laws are essential to defining each tribe's education rights and goals. Tribal laws are essential to delineating the forum and process for establishing tribal and non-tribal government-to-government relationships and working agreements on common education issues and goals.

The Need is Evident but Affirmative Steps Must Be Taken

Indian tribes are sovereign governments just as their state and federal counterparts. Many federal reports and some federal and state laws have focused on Indian education problems. Some reports and laws have pointed out the need to increase the role of tribal governments to address the problems. But instead of requiring active tribal government involvement, most federal and state education programs and processes circumvent tribal governments and maintain non-Indian federal and state governance over the intent, goals, approaches, funding, staffing, and curriculum for Indian education. And there are no effective programs to establish tribal education codes or operate tribal education departments.

The three sovereign governments in this country have a major stake in Indian education. Common sense dictates that tribal governments have the most at stake because it involves their children who are their most precious resource and their future. Some progress has been made because of Indian education programs, Indian parent committees, Indian school boards, and tribally-controlled colleges. Some progress has been made through a measured amount of tribal control and input under laws that include the Indian Education Act of 1988, the Indian Self-Determination and Education Assistance Act of 1975, the Elementary and Secondary Education Act of 1965, and the Impact Aid Laws of 1950.

Conclusion

More direct tribal governance of Indian education is needed, and more direct governance is the next logical step for many tribes. Federal reports and recommendations call for partnerships between tribes and state schools, tribal approval of state education plans, and tribal education codes, plans, and standards. Tribal governance of education is a fact of life in a small number of tribes and more tribal communities want to assume this role. But tribes have been denied this opportunity and responsibility and have been left "out of the loop" in terms of decision-making and accountability. For Indian education to succeed, federal and state governments must allow tribes the opportunity to regain governance of the education of tribal students, thereby shaping their children's future and their own future as tribes. NARF intends to ensure that tribes gain the legal governance over education that they deserve as sovereigns and that they must have for Indian education success.

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The Evolution of Tribal Sovereignty over Education In Federal Law since 1965

GOALS OF THE PROJECT - TRIBALIZING INDIAN EDUCATION

1. To promote sovereign tribal rights and responsibilities in education, including the government-to-government interactions of tribal governments with the federal and state governments;
2. To increase the number of tribal governments that assess their education situation, develop education goals, and exercise sovereign rights through developing and implementing tribal education laws, tribal education standards, and tribal education plans;
3. To increase the number of tribal governments that assume more governance of education, including governmental responsibility and accountability;
4. To assist the federal and state governments in increasing their government-to-government education work with tribal governments and in monitoring that increase within their federal and state agencies and federal and state funded education programs; and,
5. To assist tribes in reforming federal and state Indian education laws and policies and in passing new laws and adopting new policies which enable tribal governance, ensure access to resources, and enhance other improvements in Indian education.

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**The Evolution of Tribal Sovereignty over Education
in Federal Law since 1965**

A. What is Tribal Sovereignty?

Federal law generally recognizes that Indian tribes are sovereign nations, separate from the federal government and from the states. *See, e.g., United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, 1639 (2004). Anglo-American law generally defines “sovereign” as: “An independent and supreme political body with all the rights and powers necessary to govern.” *See, e.g., Black’s Law Dictionary* (8th ed. 2004).

Federal law recognizes that tribal sovereignty is inherent; it is not something that another government has “given” to tribes. *See United States v. Lara*, 124 S.Ct. at 1632-1633. And, federal law recognizes that as sovereigns, tribes generally may govern their members and their territory. *Id.* at 1636. But in federal law, tribal sovereignty is not “independent and supreme.” Tribal sovereignty in federal law may be limited by the United States Congress, particularly where in Congress’ view it is inconsistent with national or state interests. *Id.* at 1635-1636. In short, federal law recognizes tribes as *dependent and limited sovereigns*. This status is very unique; there are virtually no comparables.

Modern federal laws recognize many instances of tribal sovereignty over education. These include tribal administration of federal Indian education programs, Indian school boards, and tribal contract and grant schools. They include tribes or tribal educational authorities having status equal to that of local education agencies (also known as public school districts, which are political entities of their states). Tribal colleges and universities are an extraordinary example of tribal sovereignty. Tribal Education Departments, an emerging manifestation of tribal sovereignty, are viewed by Congress as being capable of exercising broad governance over many aspects of education.

There is reason to commend these laws. On behalf of their students, families, and communities, tribal leaders and Indian educators consistently and persistently have demanded tribal sovereignty over education. In some cases, Congress and federal agencies have responded favorably. The current level of tribal sovereignty over education recognized by federal law is all the more remarkable considering the extreme degree to which earlier federal laws and policies destroyed or ignored that sovereignty.

Tribal sovereignty over education is far from absolute. It is a particularly difficult area to understand given the history and complexities of federal Indian law and policy. Moreover, tribal sovereignty over education implicates not just federal law and policy but also state powers and interests, cultural and philosophical issues, and – above all – tribal students who are the very future of tribal sovereignty.

B. Brief Overview of Early Federal Indian Policies with Respect to Education

1. The Treaty Era (1776 - 1871)

When the United States of America was founded as a country, it entered into treaties with Indian tribes. It did so pursuant to the U.S. Constitution. It did so pursuant to the federal policy of recognizing Indian tribes as separate sovereign nations. And, it did so as a means of acquiring Indian land.

Many Indian treaties had provisions regarding education. In exchange for the vast amounts of land that treaties transferred from tribes to the federal government, the government promised to provide, among other things, education to the Indians. One way to view this is that the federal government was “offering” to “civilize” Indians as an inducement to get their land. Another way to view it is that tribes as sovereigns were insisting on education as part of the price to be paid by the other sovereign – the federal government – for Indian land.

The U.S. Congress began to make appropriations for Indian education in 1802. Some treaty provisions on education were fulfilled by the federal government funding or contracting with religious denominations (churches and missions) to provide schools and instruction (which was typically technical, vocational, and Christian). Other treaty provisions on education were not fulfilled as promised, and, like so many other Indian treaty provisions, they have been very difficult to enforce.

By 1820 Congress was enacting laws that provided for Indian education to tribes generally, regardless of whether they had specific treaty provisions on education. These laws were part of the general federal Indian policy at the time that sought to civilize (or pacify; or, assimilate) Indians. These laws and some specific education treaty provisions continued as the U.S. began to remove tribes westward and assign them to reservations in the 1830s, 1840s, and 1850s. In general implementation of the education laws and treaty provisions was minimal, but there was some schooling of various types provided by federal agents, religious denominations, and even tribes.

In 1871 Congress passed a law that ended treaty making with Indian tribes. The law provided however, that existing treaties were not to be invalidated or impaired. Thus, in general, federal law continues to recognize that the original treaty stipulations on education serve as a basis for a federal obligation to provide for Indian education. The early federal laws providing for Indian education generally are also part of that basis.

2. The Allotment and Assimilation Era (1871 - 1934)

After the American Civil War, federal Indian policy was far less inclined to recognize tribes as separate sovereigns, and it was far less inclined to “offer” civilization to Indians. Instead, Indians were viewed as heathen wards who *required* assimilation into the ever-growing mainstream American society and economy. This view was used to justify transferring massive amounts of remaining Indian land into private property owned by non-Indians; subjecting Indians to state laws rather than to their own tribal laws; and, suppressing tribal cultures. The federal policies of Indian land allotment and assimilation were very unilateral; they were forced on tribes by an increasingly powerful federal government.

Formal education became one of the primary means used by the federal government to destroy tribes and assimilate Indians. The government still contracted with religious denominations for Indian schools but it began to operate directly many Indian schools itself. The off-reservation federal Indian boarding schools began in 1879. In the 1880s vacant federal military facilities (often the very same ones that had been used in U.S. wars against tribes) were turned into Indian boarding schools. By 1900 there were also hundreds of on-reservation day schools, including some schools which had been established by tribes but were taken over by the federal government. By 1915 a system-wide curriculum had been adopted, deviation from which was not allowed. Even more so than the mission schools, the federal Indian schools emphasized technical and vocational training according to strict regimentation and routine. Tribal languages and cultures were prohibited. There was no recognition of tribal sovereignty over education or over anything else.

3. The Indian “New Deal” (the 1920s and 1930s)

Before 1900, the federal government would reimburse the few state public school districts that accepted Indians for the cost of educating them. By 1912 there were already more tribal children in public schools than in federal Indian schools. By 1917 federal policy was moving more and more toward the view that Indians should go to state public schools. This movement was mostly driven by the increasingly high costs of the federal Indian schools. It was also driven by the notion that Indians would assimilate “better” if they went to public schools.

In 1924 Congress made all Indians citizens of the United States in part to clarify that states must allow Indians into their public schools. In 1926 the federal government estimated that of the approximately 70,000 elementary and secondary tribal students nationwide, slightly more than one-third were in the federal Indian schools; already well over half were in the public schools. Once again, there was little or no attention to tribal sovereignty in this arrangement.

a. The Meriam Report

In 1928 the results of a two-year study of federal Indian policy commissioned by the federal government were published. Known as "*The Meriam Report*," the study was highly critical of the allotment and assimilation policies. It concluded that while these policies had effectively destroyed many aspects of tribalism, they nevertheless were ineffective because nothing meaningful had been substituted for what was destroyed and they were heavily based on false expectations of cultural change.

In a very in-depth discussion with many specific recommendations, *The Meriam Report* was particularly critical of the state of Indian education. It condemned the deplorable policy of removing Indian children from their homes, and found the physical and psychological conditions at Indian boarding schools "grossly inadequate."

The Meriam Report's major recommendation for Indian education was literally a "Change in Point of View." It emphasized the need to have formal education of Indians occur in the natural setting of "local Indian life," including families, communities, and tribes. Remarkably, it also emphasized the need to adopt curriculum and teaching to meet the special needs of Indian students, and suggested that meaningful curriculum and teaching for Indians would be based on tribal histories, geographies, and arts. It even recognized that there are differences among tribes and among individual Indians, and cautioned against a "standard" Indian curriculum.

Unfortunately, *The Meriam Report* viewed the options for sovereignty over Indian education as being limited to either the federal government or the states. As between the federal Indian schools and the state public schools, it clearly favored the latter. While it recognized that many Indians in the public schools would need special curricula and services, it did this with the ultimate vision that Indians would understand and fit better into American society and that Indian education would cease to be a federal obligation. As forward-thinking as it was, *The Meriam Report* simply did not take into account the notion of tribal sovereignty over education.

b. The Indian Reorganization Act and the Johnson O'Malley Act

The Meriam Report set the stage for major reform in federal Indian law and policy. In 1934 the Indian Reorganization Act (IRA) was passed. The IRA was intended to halt the allotment of Indian land, reduce forced assimilation, and provide some recognition of tribal governments, economies, and cultures. The comprehensive law dealt with land and natural resources, financial credit, employment, and economic development, self-government, and education. The option of coming under the IRA's limited tribal self-government provisions was "offered" to tribes. They would not apply to tribes that did not want them, although over time this distinction has had little legal impact on tribal sovereignty.

The Johnson O'Malley (JOM) Act of 1934 was the health, education, and welfare component of the Indian New Deal. The JOM Act allowed the federal government to contract with states, private entities, and Indian tribes for services formerly provided by the government to Indians. The federal government continued to provide funds, facilities, and standards for the services. With respect to education, under the JOM Act the government contracted out education programs specifically to assist Indians. Despite tribes expressly being among those with whom the government could contract, until the 1970s most of the JOM education contracts went to states and public school districts. Thus, even when federal law once again recognized tribal sovereignty over education, in practice it was ignored.

In addition to the JOM Act, many recommendations of *The Meriam Report* regarding Indian education were implemented in the 1930s. The remaining federal Indian schools reduced their uniformity and regimentation; more federal Indian day schools replaced boarding schools; and, more Indians began to attend local public schools.

4. The Termination Era (the 1940s and 1950s)

The IRA, which had been controversial from the beginning, was increasingly attacked in the 1940s and 1950s by the ever-present assimilationists, anti-Indian business interests, and policy-makers. What followed was a series of laws that ended or transferred important federal obligations to Indians and eroded tribal sovereignty.

Congressional appropriations for the federal Indian agency (that is, the Bureau of Indian Affairs (BIA)) declined. In 1946 the two full standing congressional Committees on Indian Affairs were abolished. The Indian Health Service was transferred from the BIA to the U.S. Department of Health, Education, and Welfare. Laws such as "Public Law 280" in 1953 transferred jurisdiction over many civil and criminal matters on Indian land to the states. Other laws transferred control over rights-of-way across Indian land, Indian natural

resources, and other Indian property to the states. Large populations of reservation and rural Indians were "relocated" to major cities in the Midwest and West with promises of economic and employment assistance.

"Termination" became the official federal Indian policy from 1953 - 1958. The harshest form of this policy was reserved for over one hundred specific tribes whose government-to-government relationship with the U.S. was ended and their lands were sold. "Successful" tribes that, in the view of the government, could manage well without federal supervision, were targeted. The individual Indians of these tribes and their property were placed under state jurisdiction. Without a federal-tribal relationship and without land bases, their sovereignty was in effect extinguished.

As in earlier eras, education was an important means of coerced assimilation during the Termination Era. Most of the remaining federal Indian schools were closed and many were transferred to the states and public school districts. Federal Indian schools remained primarily where there were no public schools, such as on the Navajo Reservation. In exchange for assuming the primary responsibility of schooling Indians, the states demanded remuneration from the federal government. Some of this was handled through JOM contracts with the states.

A major federal education subsidy program, Impact Aid, began in the 1950s. The Impact Aid laws authorize funds through what is now the U.S. Department of Education to compensate the public schools for large amounts of non-taxable federal land, including Indian land, within their districts. Although Impact Aid funds are based expressly on the number of children residing on federal land, Impact Aid funds are to be used by the schools for basic support, including general operating expenses, not special Indian education programs.

In contrast JOM funds to states and public school districts are supposed to be used for special Indian education programs, but this has been disobeyed. In fact, for a two-year period during the Termination Era, 1957-1959, JOM regulations expressly allowed the funds to be used for basic support / general operating expenses. Although the regulations were amended to restrict JOM funds to special program uses, in practice the states and public schools continued to use the funds for basic support / general operating expenses without enforcement or recourse by the federal government.

C. Summary of Historical Federal Policies

In the first two hundred years of its history, United States law and policy had moved from entering into treaties with tribes to assimilating them to reorganizing them and then to terminating them. Not only were these policy swings volatile; the policies themselves were haphazard. The overall result was layers of promises unfulfilled and problems unresolved at all levels of sovereignty – federal, state, and tribal. But especially in the area of education, tribal sovereignty had suffered two centuries of depletion. True to the pattern, federal policy would soon step in to change that course.

NOTES

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**The Evolution of Tribal Sovereignty over Education
in Federal Law since 1965**

A. The 1960s and 1970s

The current federal policy of Indian self-determination was both fueled by and became a part of the larger civil rights, anti-war, and other political, social, and economic reform movements that emerged in American society in the 1960s. Tribal leaders and Indian groups increasingly asserted their legal rights and called for change. With some groundwork laid by the Kennedy Administration, Indians were included in much of President Johnson's "Great Society" social and economic program legislation. New federal programs aimed at reducing poverty and increasing community development specifically included Indian tribes as among the local government units eligible for grants. The success of these programs helped spur the BIA to begin to use its authority to contract its programs to tribes, and eventually would effect wholesale changes in federal Indian policy generally.

**1. The Elementary and Secondary Education Act's Early Indian Amendments
(late 1960s)**

Education once again was a fundamental part of changing national policy. The landmark 1965 Elementary and Secondary Education Act (ESEA) established the Title I and what would become the Title III education programs for economically disadvantaged children. Title I authorizes funding to states and their public school districts for compensatory education programs for economically and educationally disadvantaged children to improve their learning performances. Title III of the ESEA authorizes funding for Limited English Proficiency (formerly known as Bilingual) education programs. The important federal Vocational Education Act and Adult Education Act were passed in 1963 and 1966 respectively. The Head Start program began in 1965.

Early Indian amendments to the ESEA involved the federal Indian (now called BIA or BIA-funded) schools. In 1966 the BIA schools were granted an express "set aside" amount of the Title I program grants. This set aside is intended to be used for the special educational needs of Indian children, and is not to be mixed in with other federal program funds. This is important because Title I also provides for parent advisory boards with respect to the planning and evaluation of Title I programs. In 1969 the BIA schools received a status equal to the public school districts (also known as local education agencies or LEAs) in terms of eligibility for Title III program grants. Eventually, virtually all federal Indian education programs would come under various Titles of the ESEA.

2. The Kennedy Report (1969)

In 1969 the results of a two-year study by a Special Senate Subcommittee on Indian Education were released. Entitled "*Indian Education: A National Tragedy – A National Challenge*," the report became known as "*The Kennedy Report*" because of the leadership on the Subcommittee by both Senator Robert Kennedy and Senator Edward Kennedy. *The Kennedy Report's* characterization of Indian education referred both to its failures (the tragedy) and its potential (the challenge).

The Kennedy Report noted that of the approximately 160,000 elementary and secondary tribal students nationwide, one third were in the BIA schools; two thirds were in public schools. *The Kennedy Report* expressed grave concern over the low quality of virtually every aspect of Indian education in both the BIA schools and the state public schools: inadequate facilities, irrelevant curricula and teaching materials; and indifferent or hostile attitudes of teachers and administrators. With respect to the public schools, *The Kennedy Report* denounced them for preventing Indians from getting on their local school boards and from participating in their JOM programs. With respect to the BIA schools, the Report noted a lack of Indian participation in and community control over them; only a few even had elected school boards.

The Kennedy Report made sixty specific suggestions for improving Indian education. Many were quite similar to those made in *The Meriam Report*, which in itself suggested the failure of the federal government and the states to improve Indian education. Indeed, the primary recommendation of *The Kennedy Report* was "increased Indian participation and control over their own education programs." Other suggestions included Indian school boards for BIA schools; increased Indian involvement in JOM programs and basic education programs; culturally relevant curriculum; better training for teachers of Indians; and, more Indian teachers.

The Kennedy Report viewed quite favorably the relatively new Rough Rock Demonstration School on the Navajo Reservation as “the only example of a successful school under tribal control.” It encouraged other such autonomous tribal schools, including those contracted to tribes from the BIA. ***Significantly, The Kennedy Report also recommended increased JOM contracting by the BIA with tribes to develop tribal education plans, projects, and programs.***

3. The Indian Education Act (1972)

Congress responded to *The Kennedy Report* in 1972 by enacting the Indian Education Act (IEA). The IEA authorized federal funding for three new special supplemental programs to assist Indian students: 1) the formula grant program for the special educational needs of Indians; 2) the discretionary grant program for a broad range of educational improvement opportunities; and, 3) special Indian adult education and literacy grants. In its original form, the IEA formula grants were available only to state public school districts; the discretionary grants and adult education grants were available to states, school districts, BIA schools, tribes, Indian organizations, and higher education institutions.

The major feature of the IEA is the formula grant program. This program requires open consultation by the public school districts with Indian parents and the establishment of Indian parent committees. Of equal if not more significance is that ***the IEA established for its own implementation an Office of Indian Education, then within the U.S. Department of Health, Education, and Welfare. The IEA is not and never has been administered by the BIA within the U.S. Department of the Interior.*** The IEA also created the National Advisory Council on Indian Education (NACIE) to advise the Office of Indian Education on coordination of all programs affecting Indian education within the Department of (then HEW; now Education), and make annual recommendations to Congress.

Of course, notably lacking in the IEA, and particularly in the original formula grant program, is any recognition of or provisions regarding tribal sovereignty over education.

4. 1974 Changes

In 1974 in part in response to *The Kennedy Report* and at the insistence of several Indian organizations the BIA adopted new regulations for the JOM program. To curb abuses by states and public school districts regarding JOM funds the new regulations sharply restricted the use of JOM funds by states and public school districts for basic support / general operating expenses. They also increased Indian parent control over JOM programs. Finally, the new regulations instituted a more equitable system for allocating JOM funds among school districts nationwide.

Also in 1974, amendments to the IEA authorized grants for special Indian teacher training programs and graduate school education fellowships for Indians.

5. The Indian Self-Determination and Education Assistance Act (1975)

Although it had been mentioned during the Johnson Administration, President Nixon's Special Message to Congress in 1970 formally enunciated the federal policy of Indian Self-Determination. *This policy is based on the premise that sovereignty over tribal Indians is vested first and foremost in their tribal governments, and that the federal government has an obligation to affirmatively support and strengthen tribal governments.* Many of President Nixon's specific recommendations were subsequently adopted into the Indian Self-Determination and Education Assistance (ISDEA) Act passed by Congress in 1975.

The ISDEA begins with a bold general policy statement about Indian control and participation in education and other services. The policy declaration reads in full:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress 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.

Title I of the ISDEA directs the Secretary of the Interior, upon tribal request, to contract with tribes for the administration of programs and services formerly administered by the Secretary or the Indian Health Service. Title I also authorizes grants to tribes for planning, training, evaluation and other activities designed to support the contracts. *Title I is the authority for tribes to contract and administer BIA schools.*

Title II of the ISDEA is specific to education, and significantly reformed the JOM Act. The ISDEA reinforced that the Secretary could contract with, in addition to states and public school districts, *federally recognized tribes* to administer JOM programs. The ISDEA also amended the JOM Act to provide that states and public school districts must submit plans that show how they will meet the special educational needs of Indians with JOM program funds. Where public school boards are not majority Indian, elected Indian parent committees are required. Indian parent committees should fully participate in the development of JOM programs and have authority to approve or disapprove JOM programs. Where state education agencies are receiving JOM contracts, they must establish an Indian advisory council on education.

By any standard, the ISDEA was and remains a quantum leap forward in federal recognition of tribal sovereignty over education.

6. The American Indian Policy Review Commission (1977)

The same year (1975) that Congress passed the ISDEA it created the American Indian Policy Review Commission (AIPRC) to conduct a comprehensive review of historical federal Indian policies in an effort to help shape future Indian policies and programs. Congress noted a lack of such review since *The Meriam Report* in 1928. The AIPRC submitted its Final Report to Congress in 1977. It praised the ISDEA's recognition of tribal sovereignty and the federal obligation to support and enhance such sovereignty. It contained over 200 recommendations for increased federal financial support for and increased tribal sovereignty over virtually every aspect of Indian affairs.

With respect to education, the AIPRC estimated that among the 337,000 elementary and secondary tribal students nationwide, over eighty per cent (80%) were in public schools and about fifteen per cent (15%) were in BIA-funded schools. About three per cent (3%) of Indian reservation children were not in school at all, although the AIPRC noted that this figure had only recently been reduced dramatically.

Interestingly, notwithstanding the recent IEA, the AIPRC was of the view that little had changed in Indian education since *The Meriam Report* in terms of the types of schools serving tribal students and the federal agencies administering Indian education programs. The AIPRC was of the view that the federal government had primary responsibility for Indian education, and it urged Congress to stop its historic piecemeal approach to addressing Indian education and to directly support and fully fund "Indian community control of all aspects of Indian education." To the extent that federal administration of Indian education was to remain, due to their ineffectiveness, the AIPRC recommended generally removing all Indian education programs from both the BIA and the Office of Indian Education, and consolidating them in a new independent Department of Indian Affairs.

With respect to specific Indian education programs, the AIPRC recommended that: 1) *Impact Aid funds go directly to tribes*; 2) tribes be allowed to contract or develop and administer their own higher education institutions; 3) *JOM and other contract education programs go directly to tribes*; 4) *tribes be allowed to contract for the operation of public schools* as well as former BIA schools; 5) tribes be allowed to sue in federal court states and public school districts that are not in compliance with contracts or agreements for Indian education programs; and, 6) *tribes receive federal funding to establish standards in and accreditation capabilities for their contract schools; for teacher training; to operate their own education systems; to develop their own curriculum*; and, for scholarships for vocational and higher education. Obviously, of this rather radical wish list which clearly advocated for tribal sovereignty over many aspects of education, to date very few of the recommendations have been adopted.

7. The 1978 ESEA Reauthorization

As with most federal programs, the ESEA programs periodically must be “reauthorized” by Congress. Reauthorization typically occurs every five, six, or seven years.

Regrettably, in ESEA reauthorizations or otherwise, a critical recommendation of the AIPRC to which little attention has been paid is the call to halt the federal government’s “piecemeal” approach to addressing Indian education. The IEA and the ISDEA both have grounded and launched heretofore unprecedented federal recognition of and support for tribal sovereignty over education. Despite these two pillars of enlightenment, fragmentation of Indian education programs and the federal agencies that administer them have multiplied. Indeed, in many respects, laudable federal policy statements and goals and even increases in tribal sovereignty have been confounded or stymied by increased (or entrenched) agency and program compartmentalization and diffusion.

a. Impact Aid law amendments

Significant revisions to the Impact Aid laws occurred in the 1978 reauthorization of the ESEA. Public school districts receiving Impact Aid funds would be required to ensure increased participation of Indian parents *and Indian tribes* in the planning and operation of education programs that they offered according to new policies and procedures (“Indian policies and procedures” or “IPP”). An administrative complaint procedure was established by which eligible parents *or Indian tribes* could attempt to enforce the IPP provisions.

The IPP provisions generally require: equal participation of Indian students in all school programs; consultation with Indian parents and tribes in the planning, development, and operation of the programs; opportunities for Indian parents and tribes to make recommendations regarding the needs of tribal students and the methods used to meet the needs; and, adequate and timely dissemination to Indian parents and tribes of the program plans and evaluations.

The administrative complaint (or grievance) procedure applies in instances where the elected boards of public school districts are not a majority Indian. *It gives tribes or their designees the right to file complaints with the U.S. (then Commissioner; now Secretary) of Education against public school districts if they feel that a district is not in compliance with the IPPs.* Complaints are reviewed by an examiner appointed by but outside of the U.S. Department of Education who must hold a public hearing on the record and make findings of fact and recommendations. The Commissioner / Secretary must make final determinations based on the examiner's work and must set a date by which the district will comply. Where districts refuse to comply or refuse to comply by the prescribed date, *tribes may chose to remove their children from the district and either contract with the BIA to operate a school under the ISDEA or request the BIA to provide the schooling.*

Significantly, the historic 1978 Amendments to the Impact Aid laws are expressly based on the "special relationship between the United States and Indian nations." One can applaud the reintroduction of the term "Indian nations," and the contemplated role of tribes in the Impact Aid amendments is remarkable. To date, however, the complaint procedure has not often been used.

b. IEA amendments

The IEA formula grant program was broadened in 1978 to allow funding not only for the special educational needs of Indian students, but for their *culturally related academic needs* as well. Parent Advisory Committees of the formula grant program were given additional input into (but not ultimate authority over) the hiring and firing of program personnel. Tribally-contracted BIA schools were made eligible for the formula grant program and received a ten per cent (10 %) set aside of the program funding.

Also in 1978, authorization for a new IEA competitive grant program was established which would provide for demonstration project grants to public school districts (as opposed to tribes, which were already eligible for demonstration projects under an original IEA program), with the projects focused on the special needs of Indian students.

c. BIA-funded schools amendments

Major amendments also were made to the BIA-funded school laws in 1978. They included a directive to the Secretary of the Interior to develop basic education standards for BIA-funded schools *in consultation with tribes* and Indian organizations. Tribes and / or Indian school boards were authorized to waive and revise inappropriate or ill conceived standards set by the Secretary. The revised standards would govern unless specifically rejected in writing by the Secretary.

Other amendments increased the powers of BIA-operated school boards. The school boards were permitted to waive the Indian preference laws otherwise applicable to the hiring, retention, and firing of school personnel, and to waive the otherwise applicable requirements for the certification of teachers of tribal languages and cultures. It was clarified that school board selections themselves are subject to tribal law.

With regard to tribal contracting of BIA-operated schools, due to the BIA's resistance in this area notwithstanding the ISDEA, the 1978 amendments contained an "Express Policy for Indian Control of Education." In addition, the 1978 amendments gave tribally-contracted schools LEA status for purposes of Title I funding (a status which the BIA-operated schools already had).

8. Other Late 1970s' Laws

a. The Tribally Controlled Community College Act

1978 also saw the passage of the Tribally Controlled Community College Act (TCCCA). This premier law deserves far more attention than is given in this publication. In general, the TCCCA authorizes the Secretary of the Interior to make grants for the establishment, operation, and improvement of tribal colleges. The TCCCA is based on the trust obligation of the United States to Indian tribes to provide Indian education.

b. The Establishment of the U.S. Department of Education

In 1979, the U.S. Department of Education was established. Part of this new cabinet reorganization included transferring the Office of Indian Education created by the IEA in 1972 from the former Department of Health, Education, and Welfare to the new Department of Education.

B. The 1980s

1. The 1984 ESEA Reauthorization

With the 1984 reauthorization of the ESEA came several Indian education law amendments primarily affecting BIA-funded schools and programs. At that time, the BIA-funded schools served about 40,000 tribal students nationwide.

Among the 1984 amendments was a reemphasis that tribal waivers of the Secretary of the Interior's standards for BIA-operated schools must be accompanied by alternative tribal standards. Also among the amendments was a provision establishing that contract schools must meet either BIA or state basic education standards. *Interestingly, the option of contract schools meeting tribal standards was rejected on the grounds that at that time Congress was of the view that there were insufficient Tribal Education Departments (TEDs) and insufficient Tribal Education Codes to develop and support such standards.*

In part to address this view, the ISDEA was amended to clarify expressly *that ISDEA grants can be used for TEDs and tribal education code development and administration.* To date, however, few tribes have taken advantage of this opportunity.

2. The 1988 ESEA Reauthorization

Many of the Indian education law amendments in the 1988 ESEA reauthorization also affected BIA-funded schools. Among the amendments was a provision establishing that *tribes* must approve or make formal request for actions at BIA-funded schools such as transfers of operations or facilities. Without proper tribal request or approval, the BIA cannot take such action on its own. Another amendment strengthened the statutory consultation process by requiring that all actions taken by the BIA regarding BIA-funded schools and education programs must be preceded by notice and active consultation with *tribes*.

The 1988 amendments added a new authorization for coordinated programs between BIA-operated schools and state public schools. Agreements would be negotiated by tribes or the Indian school boards and implemented by the BIA

One of the most important new authorizations in the 1988 amendments was for grants from the BIA for TEDs. Congress contemplated that with such grants the TEDs would coordinate all education programs (federal grant and other) and develop education codes, standards, and policies. To date, however, no appropriations have been made by Congress for this authorization.

Another important amendment in 1988 authorized Tribal Grant Schools. Under this authorization, tribes that seek to operate schools formerly operated by the BIA can receive funding in a one-year lump sum (as opposed to quarterly payments under the ISDEA contract school authorization) and they are permitted to invest the funding and earn interest on it in accordance with the applicable federal law. With respect to education standards applicable to grant schools, tribal standards were permitted if they were approved by a state or federally recognized regional accreditation agency.

Finally, the 1988 amendments authorized a White House Conference on Indian Education to be called by the President between September 1, 1989 and September 30, 1991. Among other things, the Conference was to make recommendations for making more relevant and otherwise improving Indian education programs.

C. The 1990s

1. The Native American Languages Acts

Although it is not often viewed as an “Indian education law” the Native American Languages Act was passed in 1990 (NALA 1990). It is a prominent statement of federal policy regarding tribal languages. It is intended to help prevent the extinction of tribal languages and to help tribes develop language and culture programs. NALA 1990 is widely heralded as a long-overdue recognition of the right of Native Americans to use their own languages and to have that right respected by other governments.

With respect to education, NALA 1990 stated that Congress had found convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for and support of the first language of the child or student, and that it is clearly in the interests of the United States, individual states, and territories to encourage full academic and human potential achievements of all students and citizens and to take steps to realize these ends.

NALA 1990 also stated that it is the policy of the United States to

- (1) preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages;
- (2) allow exceptions to teacher certification requirements for Federal programs, and programs funded in whole or in part by the Federal Government, for instruction in Native American languages when such teacher certification requirements hinder the employment of qualified teachers who teach in Native American languages, and to encourage State and territorial governments to make similar exceptions;
- (3) encourage and support the use of Native American languages as a medium of instruction in order to encourage and support—
 - (A) Native American language survival,
 - (B) educational opportunity,
 - (C) increased student success and performance,
 - (D) increased student awareness and knowledge of their culture and history, and
 - (E) increased student and community pride;

- (4) encourage State and local education programs to work with Native American parents, educators, Indian tribes, and other Native American governing bodies in the implementation of programs to put this policy into effect;
- (5) recognize the right of Indian tribes and other Native American governing bodies to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior;
- (6) fully recognize the inherent right of Indian tribes and other Native American governing bodies, States, territories, and possessions of the United States to take action on, and give official status to, their Native American languages for the purpose of conducting their own business;
- (7) support the granting of comparable proficiency achieved through course work in a Native American language the same academic credit as comparable proficiency achieved through course work in a foreign language, with recognition of such Native American language proficiency by institutions of higher education as fulfilling foreign language entrance or degree requirements; and
- (8) encourage all institutions of elementary, secondary and higher education, where appropriate, to include Native American languages in the curriculum in the same manner as foreign languages and to grant proficiency in Native American languages the same full academic credit as proficiency in foreign languages.

Finally, NALA 1990 contains the bold statement that "The right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs."

A second Native American Languages Act was passed in 1992 (NALA 1992). NALA 1992 is the means of implementing the policy and goals of NALA 1990. Through the Administration for Native Americans within the U.S. Department of Health and Human Services *NALA 1992 authorizes grants to tribes and Indian organizations to help ensure the survival and continuing vitality of tribal languages, including programs for teaching tribal languages. It expressly encourages tribes and other grantees to collaborate with schools and higher education institutions in seeking such grants.*

2. The Indian Nations at Risk Report (1991)

After being chartered in 1990, in 1991 the Indian Nations at Risk Task Force submitted to the U.S. Secretary of Education its final report, entitled "*Indian Nations at Risk: An Educational Strategy for Action.*" Notwithstanding all of the new federal Indian education laws and policies of the 1970s and 1980s, the Report revealed the startlingly low achievement and high drop out rates of tribal students in both the BIA-funded and public schools. The Report was intended to lead to significant improvement in the academic performance of tribal students if its recommendations were fully implemented.

The Task Force noted that of the approximately 400,000 tribal elementary and secondary students, almost ninety per cent (90 %) were in state public schools. The then-one-hundred-sixty-six (166) BIA-funded schools had most of the remaining tribal students. The Task Force identified several main reasons for Indian nations being at risk, including that schools had failed to educate large numbers of Indians and that schools had contributed to the erosion of tribal languages and cultures by discouraging the use of tribal languages in the classroom.

The Report recommended a broad-based initiative to improve the quality of Indian education. Basic to the initiative was the need for partnerships among parents, schools, tribes, and other policymakers. The Task Force was of the view that positive political relationships between tribes and state and federal governments are important to tribal students' self-image and success in school.

Among the Report's specific recommendations were: for states to "develop comprehensive education plans with school districts *and tribal governments* to meet the educational needs and to improve the academic achievement of tribal students;" for the federal government to "*require tribal approval of state and public school district education plans;*" and, for tribes to "*establish tribal education plans* that define the purposes of education and outline the goals and strategies necessary to carry out those purposes." Unfortunately, to date there has been no comprehensive adoption and implementation of these or other recommendations of the Indian Nations at Risk Report.

3. The White House Conference on Indian Education Final Report (1992)

As provided in the 1988 ESEA reauthorization, in January 1992 the White House Conference on Indian Education was held. In May 1992 the Conference submitted its Final Report to the President.

The Conference Report took a positive view of the many recent increases in tribal control of education. It generally praised federal policy for helping to ensure that increase since the release of *The Kennedy Report*. Nevertheless, the Conference Report was of the view that significant additional changes could and should be made. "The changes must be action oriented, innovative, community and tribally based, with those in control and responsible held accountable for providing quality education. The critical items to achieve this overall belief are responsibility and accountability, change and quality improvement and commitment and involvement."

The Conference Report recommendations included "*a heavy emphasis on tribal involvement, control, and leadership at all levels of education planning and administration. Tribes . . . [could have] their capabilities strengthened through the development and application of appropriate tribal codes*" Other major recommendations included stronger federal Indian education policies and increased financial support; more inter-governmental and non-governmental partnerships in education; and, more culturally relevant and accurate curricula, education standards, and teaching methods on tribal issues.

4. The 1994 ESEA Reauthorization

The 1994 Reauthorization of the ESEA was also known as Goals 2000: Educate America Act and the Improving America's Schools Act. These Act's emphases on improvement, reform, and voluntary national standards would set the stage for the subsequent ESEA reauthorization in 2001.

The most important new authorization in the 1994 amendments was for grants from the U.S. Department of Education for the development and operation of TEDs. Congress contemplated that with such grants the TEDs would conduct administrative planning and development to coordinate all education programs operated by the tribe and within the tribe's territorial jurisdiction; develop tribal education codes; and, provide support services and technical assistance to schools. In the view of the Senate Committee on Indian Affairs, this new authorization would

“enable tribal governments to give leadership to the achievement of school reform and pursuit of the National Education Goals. . . . Such grants would assist tribal governments in providing the kind of leadership to school reform and improvement such as the governors of states are to provide.”

Unfortunately, to date, this authorization, like its counterpart on the BIA side, has never been funded by Congress.

Another important new provision in the 1994 amendments pertained to the IEA formula grants. It provides that where public school districts do not establish elected parent committees and a tribe represents more than fifty per cent (50 %) of the eligible Indian children, *tribes* may apply for the grants. Also in 1994, Tribal Grant Schools were accorded the same LEA status as Contract and BIA- operated schools for purposes of ESEA Titles I and III funding.

5. Executive Order No. 13096 (1998)

Two years into his first term as U.S. President, President Clinton invited tribal leaders to meet with him at the White House. This historic event did not go unnoticed by Indian educators and Indian education organizations, who were dismayed to find out at the last minute that education was not on the tribal leaders' agenda for discussion with the President. Indian educators succeeded in getting the tribal leaders to devote three minutes of their meeting to education, and a promise from tribal leaders and the White House that more in-depth discussions of Indian education would be forthcoming.

Following a series of meetings among tribal leaders, Indian educators, and federal officials, the National Indian Education Association (NIEA) and the National Congress of American Indians (NCAI) sought to devise a “*Comprehensive Federal Indian Education Policy Statement*” (CFIEPS) that the Administration would adopt and implement. The goals of the CFIEPS were primarily to improve inter-federal agency planning for and administration of all of the various Indian education programs and programs that affect Indian education, and to improve the federal-tribal relationship in planning for and administering Indian education.

After several years of drafting and review in Indian country, in March 1997 NIEA and NCAI presented a proposed CFIEPS to the White House. The White House responded with the offer to issue an Executive Order on Indian Education. Over the next year, NIEA and NCAI negotiated with federal officials many of the concepts and terms of a proposed Executive Order. In August 1998, Executive Order No. 13096, entitled "*American Indian and Alaska Native Education*" was signed by President Clinton.

Executive Order No. 10396 was expressly premised on the "*unique political and legal relationship of the Federal Government with tribal governments . . .*" One of the express strategies of the Executive Order was to develop a Comprehensive Federal Indian Education Policy that would, among other things, "*assist tribal governments in meeting the unique educational needs of their children, including the need to preserve, revitalize, and use native languages and cultural traditions.*" In January 2001 the U.S. Department of Education's Office of Indian Education released its Comprehensive Federal Indian Education Policy Statement which, among other things, called on federal agencies to work cooperatively with tribal governments to incorporate the long term educational development of tribal members as a fundamental component of local community social and economic development, and to work cooperatively with tribal governments and Indian communities to develop community based education strategies to meet long term social and economic development goals and objectives.

Federal agencies participating in Executive Order No. 13096 were required to consult with *tribal governments* on their education-related needs and priorities, and on how the agencies could better accomplish the Order's goals. Tribal governments were also included in the Regional Partnership Forums called for by the Executive Order. In July 2002 the U.S. Departments of Education and the Interior released the "*Regional Partnership Forum Report*" for Executive Order No. 13096. Among the summary of recommendations from nine Regional Partnership Forums conducted under Executive order No. 13096, was the recommendation for increased inter-governmental collaboration among tribal, state, and federal governments. In keeping with this recommendation, "*A promising approach cited was the development of Tribal Education Departments (TEDs) and tribal education codes. Tribal education codes can guide and detail the relationships and responsibilities of tribes and state and local education agencies.*" The Report also mentioned *tribal standards for tribal curricula in language, culture, geography, history, and economics.*

Executive Order No. 13096 has been superseded by Executive Order No. 13336, discussed below in Part D(2).

D. The Twenty-First Century

1. The 2001 ESEA Reauthorization

The reauthorization of the ESEA in 2001 is also known as the No Child Left Behind (NCLB) Act. NCLB significantly reforms the ESEA by requiring greater accountability of schools for teacher quality and results of testing and other assessments; increasing local control of schools and their flexibility in using federal funding; providing new information to and options for parents; and, emphasizing scientifically based research instruction and other methods in schooling.

NCLB has many provisions regarding tribal governance in education. Many of the strongest provisions are in Title III, the Limited English Proficient (LEP) programs. Tribes are eligible for direct grants in English Language Acquisition and Language Enhancement Programs; Improving Language Instruction Educational Programs; and, certain Program Development and Enhancement Programs. Public school districts are encouraged to collaborate with tribes in English Language Acquisition and Language Enhancement Grant Programs, and Program Development and Enhancement Grant Programs.

Under NCLB, the IEA programs are in Title VII; the Impact Aid programs are in Title VIII, and the BIA schools and education programs are in Title X. NCLB added new “trust relationship” language to the policy statements for both Titles VII and X. The policy statements now provide that *“it is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the American Indian people for the education of Indian children”* The Title VII statement provides further that *“the Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of assuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children.”* The Title X statement is similar, and expressly mentions “financial support” for the BIA funded schools as being part of the government’s trust relationship and responsibility in education.

Significantly, NCLB retains both authorizations for TED funding (through the Department of Education in Title VII and through the BIA in Title X). The authorization for TED funding through the BIA was amended slightly to add as a new priority to be considered by the Secretary of the Interior that the funding applicants serve “3 or more” separate BIA funded schools. The authorization for TED funding through the Department of Education was moved, along with the authorizations for certain other discretionary programs, to a new “national activities” section where, unfortunately, separate appropriations authorizations were deleted.

With respect to tribal sovereignty over education, some of the strongest amendments in NCLB for tribes are in Title X's BIA funded school provisions. With respect to NCLB's benchmark of performance, "Adequate Yearly Progress" (AYP), tribes can waive "inappropriate" definitions of AYP set by the Secretary of the Interior for BIA funded schools. Tribes must then submit a proposed alternative AYP definition to the Secretary within sixty days. With respect to many aspects of facilities and construction for BIA-funded schools, NCLB requires the Secretary of the Interior to establish and follow the process of "negotiated rule making" with tribes and / or local school boards.

NCLB also strengthens several provisions for tribal accreditation of certain BIA funded schools. Under Title I of NCLB, if a BIA funded school is accredited by a tribal accreditation body, the school must use that academic assessment, although the BIA must ensure that the assessment is in compliance with NCLB. New provisions in Title X regarding accreditation of tribal grant schools provide that the Secretary of the Interior cannot revoke a grant school's eligibility determination if the school's required reports have been submitted and if, among other things, the school has been accredited by a tribe whose accreditation is accepted by a recognized regional or state accreditation agency. Another new provision directs the Secretaries of the Interior and Education to consult with tribes and submit to Congress a report on the desirability and feasibility of establishing a tribal accreditation agency that would recognize qualified and credible TEDs as accrediting bodies for tribal schools.

2. Executive Order No. 13336 (2004)

With the change in Administrations and especially in light of the passage of NCLB came the need for a new Executive Order on Indian Education. Accordingly, with the support of NIEA and NCAI in April 2004 President George W. Bush signed Executive Order No. 13336, entitled "*American Indian and Alaska Native Education.*"

Executive Order No. 13336 generally recognizes tribal governments, tribal sovereignty, and Indian self-determination. The Executive Order is intended to assist tribal students in meeting the challenging student academic standards of NCLB *in a manner that is consistent with tribal traditions, languages, and cultures.*

The federal Interagency Working Group established by Executive Order No. 13336 to implement the Order may consult with tribes. The Secretaries of Education and the Interior must consult with, among other entities, tribes and tribal colleges and universities *"to seek ways to develop and enhance the capacity of tribal governments, tribal universities and colleges, and schools and educational programs serving American Indian and Alaska Native students and communities to carry out, disseminate, and implement education research, as well as to develop related partnerships or collaborations with non-tribal universities, colleges, and research organizations."*

At the time of this publication, this and other Sections of Executive Order No. 13336 are being implemented.

NOTES

THE NATIVE AMERICAN RIGHTS FUND
INDIAN EDUCATION LEGAL SUPPORT PROJECT

**The Evolution of Tribal Sovereignty over Education
In Federal Law since 1965**

Recommendations for Increased Tribal Sovereignty over Education

Much progress has been made in the last forty years in terms of federal law and policy's renewed and continued recognition of and support for tribal sovereignty over education. As evidenced by the ESEA reauthorizations, the Executive Orders on Indian Education, and the reports and statistics, however, the federal government is still trying to improve Indian education. And there is no doubt that such efforts are in response to the real concerns of tribes, Indian educators, and tribal students that improvements can and should be made.

Accordingly, set forth below are five specific recommendations to continue the present course of increased tribal sovereignty over education. Although all of the recommendations may not seem to follow directly from the discussion of the review of federal laws, policies, and reports set forth above, these recommendations nevertheless are timely and well-supported by the federal materials. Most importantly, they are worthy of the sovereignty of tribes and of the students who both inherit and represent the future of that sovereignty.

A. TRIBAL EDUCATION DEPARTMENT APPROPRIATIONS.

The Administration needs to request funding for Tribal Education Departments (TEDs) in the President's Annual Budget Request to Congress, and Congress needs to make the appropriations for TEDs.

The request for and appropriation of funds should be under either or both TED appropriations authorizations, the one currently in NCLB Title X that authorizes funds through the Bureau of Indian Affairs (BIA) budget within the U.S. Department of the Interior, or the one currently in NCLB Title VII that authorizes funds through the U.S. Department of Education's budget.

The programs authorizing TED appropriations are among the most recent (1988 and 1994) and innovative efforts of federal law and policy to provide for and support "Indian education." The best reason to make appropriations for these programs is stated aptly in the authorizations themselves. In the authorizations, Congress envisions TEDs as facilitating tribal control over education; coordinating education programs; developing and enforcing tribal education codes, policies, and standards; and, providing support services and technical assistance to schools and programs.

As if the authorizations themselves were not sufficient, major Indian education reports of the modern era repeatedly have spoken of "tribes developing education plans.... (The Kennedy Report);" "tribes operating their own education systems with tribal standards and curriculum (The American Indian Policy Review Commission Report);" "tribal governments developing education plans.... (The Indian Nations at Risk Task Force Report);" and, "tribal leadership at all levels of education planning and administration . . . through the development and application of appropriate tribal codes . . . (The White House Conference on Indian Education Final Report)."

For the laws to be implemented and these recommendations to be adopted, TED appropriations must be made. Only then will most TEDs be able to move beyond merely administering contracts, grants, and programs into the core areas contemplated by Congress, tribes, and Indian educators including education research and planning, curriculum and standards development, and assessments and accreditation. In short, TED appropriations must be made so that the true potential of TEDs and the concomitant results in terms of student academic performance can be realized.

B. AMEND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT TO PROVIDE THAT TRIBAL EDUCATION AGENCIES / AUTHORITIES ARE AMONG THE EDUCATION AGENCIES / AUTHORITIES TO WHOM STUDENT RECORDS AND OTHER PERSONALLY IDENTIFIABLE INFORMATION CAN BE RELEASED WITHOUT ADVANCE PARENTAL OR STUDENT CONSENT.

Although it is not among the laws reviewed above, there is a particular federal law that is inadvertently hindering tribal sovereignty over education. It is the Family Educational Rights and Privacy Act (FERPA) of 1974, Public Law No. 93-380, currently codified at 20 U.S.C. §§ 1232 - 1232i.

Section 1232g of FERPA generally allows *federal, state, and local* education agencies and authorities access to student records and other personally identifiable information kept by, among other institutions, the state public schools, without the advance consent of parents or students. These records include attendance records, grades, test scores, *etc.* FERPA protects access to this information based on concerns for the parents' and students' rights of privacy.

It is unclear whether Congress intended *tribal education agencies and authorities* to have the same rights of access. It appears that Congress simply did not take into account the education agencies and authorities of tribes such as Tribal Education Departments on this point when it enacted, and when it has amended FERPA.

Because of this lack of clarity, many public school districts will not allow tribal education agencies and authorities access to the protected records of tribal students unless the requisite parental or student consent is obtained in advance. Very few tribes have the resources to secure timely and regularly the advance consent.

The difficulty of accessing or the inability to access these records and information on tribal students, most of whom attend public schools, has hampered the efforts of tribes to monitor and assess the educational progress and needs of their students and to make research-based decisions about education planning and improvement.

Because it appears that Congress has never considered the issue of whether tribal education agencies and authorities are or should be among the agencies and authorities to whom the records and information can be released without the advance consent the issue is well-suited to be resolved by Congress. And because FERPA provides that access to protected student records and information is not *completely prohibited or restricted* but is simply *contingent* upon the requisite advance consent, there is no reason not to include tribal education agencies and authorities as being among those who can receive the records without advance consent.

In short, adjusting FERPA to authorize tribal education agencies and authorities to have a status equal to that of states and local education agencies on this point is consistent with modern federal policies of Indian self-determination and control over education, and it would greatly assist all education agencies and authorities in terms of achieving the federal goals of closing the school achievement gaps for tribal students.

**C. AUTHORIZE TRIBES TO BE ELIGIBLE AND / OR PRIORITY GRANTEEES
FOR THE U.S. DEPARTMENT OF EDUCATION TITLE VII FORMULA GRANT
AND TITLE VIII IMPACT AID GRANT PROGRAMS.**

Nationwide, funding for federal supplemental education programs such as those under Title VII or Title X generally amounts to a very small portion of the budgets for state public school districts. For some public school districts in this country, Impact Aid funding constitutes a large portion of their annual budgets and for other districts it is a much smaller portion.

In any event, it is time for the Administration and Congress to seriously consider a mechanism whereby funding for at least these two very important federal subsidy / grant programs -- the Title VII Indian Education Act Formula Grants and the Title VIII Impact Aid grants -- can go directly to eligible *tribes* who would then administer directly the funds and / or programs, or who would enter into cooperative agreements with states or public school districts to administer them, or who would subcontract their administration to the states and / or state public school districts.

Regarding the IEA Formula Grants, at least where there are tribes with a functioning TED or a suitable equivalent tribal education authority (TEA), there is little reason to continue to by-pass or avoid the TEDs or TEAs in favor of the states or LEAs. NCLB has most recently affirmed that the Formula Grants are intended to benefit the unique educational and culturally related academic needs of tribal students, and as between the tribes and the states or their public school districts, common sense dictates that tribes are in the better position to identify, understand, and address these needs.

Regarding Impact Aid grants, as the American Indian Policy Review Commission recommended almost thirty years ago, these should also go first and foremost to eligible tribes with functioning TEDs or TEAs. With such funds, 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 Indian Policies and Procedures provisions (that is, equal participation by tribal students in, consultation with Indian parents and tribes regarding, and opportunities of Indian parents and tribes to make recommendations about basic education programs).

In short, the Administration should seek and Congress should grant eligible tribes the authority to co-manage the basic education programs of public school districts whose boundaries include large areas of Indian land and therefore who serve a great number of tribal students. Such an arrangement would be far more aligned with the underlying basis for the Impact Aid subsidy program -- that the federal government allowed public schools to locate on or within Indian land. It would also bring that over fifty-year-old program in line with the modern federal policy of Indian self-determination and control over education.

D. FUND ALL BIA-FUNDED SCHOOLS AT LEAST AT THE LEVEL THAT THE U.S. DEPARTMENT OF DEFENSE ELEMENTARY AND SECONDARY SCHOOLS ARE FUNDED.

The U.S. Commission on Civil Rights stated recently that

Perhaps the clearest example of unmet needs among Native Americans is the disparity between the amounts spent per student at BIA schools compared with public schools. In 2004, BIA schools will spend about \$3,000 per student, less than half the amount that public schools nationally will spend.

The U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 23 (July 2003) (footnote omitted).

That the federal government fails to match the public schools is in and of itself disgraceful. Even more disgraceful is the disparity between the amounts spent by the government on the two school systems that it maintains – the BIA schools and the U.S. Department of Defense (DOD) schools. The U.S. General Accounting Office recently reported that in 1997-98, the estimated annual per pupil expenditure for the domestic DOD schools was over \$1,000 *higher* than the national average for public school annual per pupil expenditures. U.S. General Accounting Office, *BIA and DOD Schools: Student Achievement and Other Characteristics Often Differ from Public Schools* 45 (Sept. 2001) Hence, the federal government spends *about one-quarter to one-third per year on BIA schools of what it spends on DOD schools.*

To the extent that the federal government is even remotely committed to improving Indian education, this matter seems utterly self-explanatory. The government should fund BIA-funded schools at least at the level that it funds DOD domestic schools.

E. CONGRESS SHOULD CONSIDER AUTHORIZATION AND GUIDELINES FOR TRIBAL-STATE COMPACTS IN EDUCATION GOVERNANCE

Controversies and differences between tribes and states about governance over various matters -- from non-renewable natural resources to taxation and law enforcement -- are a familiar part of American history. In many such instances, tribes and states have successfully resolved governance and other issues through negotiated inter-governmental compacts or agreements.

For example, it is estimated that at this time there are about 250 tribal-state gaming compacts. There are about eighteen state-tribal water rights compacts. There are perhaps tens or hundreds of taxation and law enforcement compacts between tribes and states or tribes and state local units of government.

There are only a handful of tribal-state compacts in education, such as those between the State of New Mexico and various tribes regarding the teaching of tribal languages in the public schools there. The agreements in New Mexico are quite recent and were prompted by the cutting-edge New Mexico Indian Education Act of 2001.

If the Administration and Congress are serious about improving Indian education, let alone achieving the goals of Indian self-determination and tribal sovereignty, it is time for them to consider authorizations and guidelines for State - Tribal Compacts in Education Governance. Good possible pilot projects in this area would include fashioning authorizations and guidelines for such agreements between tribes and the state public schools that receive large amounts of Impact Aid as discussed above under Recommendation Three, or in the area of teaching native languages and the certification of native languages perhaps under NALA 1990 and NALA 1992.

The federal government need not wait for states such as New Mexico to take the lead on this. Rather, as reports including *The Indian Nations at Risk Task Force Report* and *The White House Conference on Indian Education Final Report* have recommended, the national government should play a leadership role in encouraging and providing for such intergovernmental partnerships. Surely tribal students are no less an important resource to this country than are economic revenues and natural resources.

APPENDIX

THE NATIVE AMERICAN RIGHTS FUND
INDIAN EDUCATION LEGAL SUPPORT PROJECT

**The Evolution of Tribal Sovereignty over Education
In Federal Law since 1965**

APPENDIX

**Chronological List of Major Federal Indian Education Laws and Reports in the
Modern Era**

1. The Impact Aid laws of 1950, Public Law No. 81-874, 64 Stat. 1100 (1950) and Public Law No. 81-815, 64 Stat. 967 (1950), as amended by, among other laws, Public Law No. 83-246, 67 Stat. 522 (1953), currently codified at 20 U.S.C. §§ 7701 - 7713a
2. The Elementary and Secondary Education Act (ESEA) of 1965, Public Law No. 89-10, 79 Stat.27 (1965)
3. Special Subcomm. on Indian Education of the Comm. on Labor and Public Welfare, *Indian Education: A National Tragedy – A National Challenge*, S. Rep. No. 91-501 (1st Sess. 1969)
4. The Indian Education Act of 1972, Public Law No. 92-318, 86 Stat. 235 (1972), as amended, currently codified at 20 U.S.C. §§ 7401 - 7546
5. The Family Educational Rights and Privacy Act of 1974, Public Law No. 93-380, 88 Stat. 571 (1974), as amended, currently codified at 20 U.S.C. §§ 1232 - 1232i
6. The Indian Self-Determination and Education Assistance Act of 1975, Public Law No. 93-638, 88 Stat. 2203 (1975), as amended, currently codified at 25 U.S.C. §§ 450 - 450n
7. Task Force Five: Indian Education, American Indian Policy Review Commission, *Final Report on Indian Education* (1976)
8. The Reauthorization of the ESEA of 1978, Public Law No. 95-561, 92 Stat. 2143 (1978)

9. The Tribally Controlled Community College Assistance Act of 1978, Public Law No. 95-471, 92 Stat. 1325 (1978), as amended, currently codified at 25 U.S.C. §§ 1801 -1815
10. The U.S. Department of Education Organization Act of 1979, Public Law No. 96-88, 93 Stat. 668 (1979), currently codified at 20 U.S.C. §§ 3401 - 3404
11. The ESEA Reauthorization of 1984, Public Law No. 98-511, 99 Stat. 2366 (1984)
12. The ESEA Reauthorization of 1988, Public Law No. 100-297, 102 Stat. 130 (1988)
13. The Native American Languages Act of 1990, Public Law No. 101-477, 104 Stat. 1153 (1990), currently codified at 25 U.S.C. §§ 2901 - 2906
14. The Native American Languages Act of 1992, Public Law No. 102-524, 106 Stat. 3434 (1992), currently codified at 42 U.S.C. §§ 2991 - 2992d
15. Indian Nations at Risk Task Force, U.S. Department of Education, *Indian Nations at Risk: An Educational Strategy for Action* (1991)
16. White House Conference on Indian Education, *Final Report Executive Summary* (1992)
17. The ESEA Reauthorization of 1994 (Goals 2000: Educate America Act and the Improving America's Schools Act), Public Law No. 103-227, 108 Stat. 125 (1994) and Public Law No. 103-382, 108 Stat. 3518 (1994)
18. Executive Order No. 13096, *American Indian and Alaska Native Education*, 63 Fed. Reg. 42683 (Aug. 6, 1998)
19. The ESEA Reauthorization of 2001 (the No Child Left Behind Act), Public Law No. 107-110, 115 Stat.1425 (2001)
20. The U.S. Commission on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (2003)
21. Executive Order No. 13336, *American Indian and Alaska Native Education*, 69 Fed. Reg. 25295 (Apr. 30, 2004)

INDIAN EDUCATION LAW MATERIALS

Under its Indian Education Legal Support Project, "*Tribalizing Indian Education*," the Native American Rights Fund (NARF) has developed the following sets of materials:

1. *Presentation/Workshop Materials (October 1993, updated October 1995)*, also known as "The Yellow Book." A focus on tribal rights under selected federal Indian education laws.
2. *Draft Materials for Tribal Governance in Education (October 1994)*, also known as "The Red Book." Suggesting draft tribal education laws and education plans.
3. *Compilation of State Indian Education Laws (October 1997)*, also known as "The Blue Book." A compilation of the education laws of 34 states, organized by subject areas such as curricula, scholarships, and staffing. (Index to Blue Book available in hard copy only).
4. *Cooperative Agreements in Indian Education (October 1998)*, also known as "The Green Book." Samples of cooperative agreements among federal, public, and tribal schools.
5. *Federal and State Laws regarding Tribal Education Departments, 1984 - 1999 (October 1999)*, also known as "The Orange Book." The federal and state statutory provisions on tribal education departments, and their legislative history.
6. *Legal and Political Aspects of Indian Education (October 2000)*, also known as "The Purple Book." An overview of the main principles of federal Indian law and how those principles have shaped federal Indian education law and policy.
7. *An Historical Analysis of Requests for Direct Federal Funding for Tribal Education Departments for Fiscal Years 1989 - 2004 (September 2003)*, also known as "The Maroon Book." Details the repeated but as-yet-unsuccessful requests to Congress by tribes and national Indian organizations for appropriations for Tribal Education Departments through both the Bureau of Indian Affairs and the U.S. Department of Education.
8. *A Compilation of Federal and State Education Laws on Native Languages in Curriculum and Certification of Teachers of Native Languages (November 2003)*, also known as "The Pink Book." Contains the language and history of the Native American Languages Acts of 1990 and 1992; the laws of sixteen states, and the sections of No Child Left Behind on Native languages curricula and teachers.
9. *Major Federal Programs for American Indian, Alaska Native, and Native Hawaiian Education: What Are They and How do they Involve Tribes? Part II: Titles VII (Indian Education Act), VIII (Impact Aid), and X (Bureau of Indian Affairs) (June 2004)*, also known as "The Turquoise Book, Part II."
- ****New **** 10. *The Evolution of Tribal Sovereignty over Education in Federal Law since 1965 (January 2005)*, also known as "The Gold Book." Summarizes the monumental restoration of tribal governance of education over the last forty years.

Indian Education Law Materials are available in two ways:

- I. On NARF's web site, www.narf.org, select "National Indian Law Library" (NILL), then "NARF Publications," and scroll down to "*Tribalizing Indian Education*."
- II. Purchase hard copies through NILL. Order information is as follows:

INDIAN EDUCATION LAW MATERIALS

Order Form - Send purchase requests, along with pre-payment, to:
(Allow three to four weeks for shipping)

NATIVE AMERICAN RIGHTS FUND

The National Indian Law Library
1522 Broadway
Boulder, CO 80302

1. ____ Yellow Book(s) (federal Indian education laws)
 ____ Hard Copy (\$5.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Yellow Book order \$ _____
2. ____ Red Book(s) (draft tribal education laws)
 ____ Hard Copy (\$5.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Red Book order \$ _____
3. ____ Blue Book(s) (state Indian education laws)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Blue Book order \$ _____
4. ____ Green Book(s) (cooperative agreements)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Green Book order \$ _____
5. ____ Orange Book(s) (tribal education department laws)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Orange Book order \$ _____
6. ____ Purple Book(s) (legal and political history)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Purple Book order \$ _____
7. ____ Maroon Book(s) (requests for TED funding)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Maroon Book order \$ _____
8. ____ Pink Book(s) (federal and state laws on Native languages and their teachers)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Pink Book order \$ _____
9. ____ Turquoise Book(s) Part II (major federal programs under NCLB Titles VII, VIII, and X)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Turquoise Book, Part II order \$ _____
10. ____ Gold Book(s) (evolution of tribal sovereignty over education since 1965)
 ____ Hard Copy (\$10.00) ____ 3 1/2" Diskette (\$3.00) (check one) ☐ Word ☐ Word Perfect
 Total cost for Gold Book order \$ _____

Total of Order \$ _____
 Colorado Residents add .07% sales tax \$ _____
 TOTAL AMOUNT ENCLOSED OR CHARGED (Prices include shipping) \$ _____

Name: _____

Address: _____

Payment Method:

____ Check Enclosed ____ MasterCard or ____ Visa and Account No. _____ Exp. Date _____

Signature _____